No. _____

In The

Supreme Court of the United States

DONTARIUS MARQUIS HALL,

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

J. Edward Yeager, Jr.
Counsel of Record
ATTORNEY AT LAW
P. O. Box 1656
Cornelius, NC 28031
(704) 490-1518 – Telephone
(866) 805-6191 – Facsimile
yeager@ncappeals.net

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY DENYING MR. HALL'S MERITORIOUS ARGUMENT THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING MR. HALL'S MOTION FOR A NEW ATTORNEY.

B. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY DENYING MR. HALL'S MERITORIOUS ARGUMENT THAT THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY IMPOSING A SENTENCE BASED ON DRUG WEIGHT WHICH INACCURATELY OVERSTATED MR. HALL'S CRIMINAL INVOLVEMENT.

LIST OF PARTIES

DONTARIUS MARQUIS HALL, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s):

Cases:

Constitutional Provision:

Statutes:

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dontarius Marquis Hall respectfully prays for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The decision of the Fourth Circuit Court of Appeals affirming the judgment entered against Mr. Hall is reported at *United States v. Dontarius Marquis Hall*, 798 Fed. Appx. 781, 2020 U.S. App. LEXIS 9638, No. 19-4119 (4th Cir. 27 March 2020). (App A). Pursuant to Federal Rules of Appellate Procedure 32.1, the decision is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued an unpublished decision on March 27, 2020. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 3553 – Imposition of a Sentence

> (a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of Guidelines in Imposing a Sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of Reasons for Imposing a Sentence.—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, and 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 also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in

camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence Procedure for an Order of Notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(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.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

STATEMENT OF THE CASE

The Defendant-Appellant, Dontarius Marquis Hall, was involved in a conspiracy to traffic crack cocaine in Gaston County, North Carolina beginning sometime in 2010 and continuing through December 2015. During that time law enforcement received information from several cooperating co-conspirators

incriminating Mr. Hall. Using a confidential source law enforcement also executed controlled purchases of crack cocaine. On December 9, 2015, law enforcement executed a search warrant on Mr. Hall's residence recovering firearms, cash, and items containing cocaine residue. Even after the search, law enforcement conducted an additional controlled purchase of drugs.

Mr. Hall was named in a six-count Second Superseding Bill of Indictment filed in the Western District of North Carolina on February 21, 2018. The Indictment charged him with: Conspiracy to Distribute and Possess with Intent to Distribute Cocaine Base (Count One); Distribution of, and Possession with Intent to Distribute, Crack Cocaine and Aiding and Abetting the Same (Counts 2 and 3); Possession of a Firearm in Furtherance of Drug Trafficking (Count 4); Possession of a Firearm by a Convicted Felon (Count 5); and Distribution of, and Possession with Intent to Distribute Crack Cocaine and Aiding and Abetting the Same (Count 6).

On June 1, 2018, the district court, Judge Robert J. Conrad, Jr., Judge Presiding, conducted a hearing on defense counsel's Motion for Inquiry as to Status of Counsel. Mr. Hall made clear to the court that there were problems in the attorney/client relationship. He explained that there were times when he had to explain to his attorney, Daniel McIntyre, points which he felt his attorney should already understand. There were also instances in which Mr. Hall saw his attorney as talking down to him and being treated as if he was not important. Mr. Hall's defense attorney admitted that "[m]y ability to represent him hence forth is going to

be extremely difficult due to his lack of belief or feelings for my abilities or in my caring and in my zealousness of representation of him."

Despite this acknowledgement of significant problems in the attorney client relationship, Judge Conrad found that "[t]here are communication issues, but certainly not a communication breakdown. I've seen the two of you working together during this hearing, and I've heard from you all about communicating. Even though there may be disagreement about the advice being given, there seems to be avenues of communication that are open." Judge Conrad denied Mr. Hall's for a new attorney.

The case was scheduled to go to trial beginning at 9:00 on Monday, June 4, 2018. Instead of a trial, however, when the case was called, Mr. Hall's attorney announced that "he's been wrestling and wrestling with this whole thing. He has decided and just informed me that he would like to enter a plea to the indictment straight up instead of going to trial, Your Honor." As part of the Rule 11 inquiry Mr. Hall answered in the affirmative to the question asking if he was satisfied with counsel's representation. Approximately a month later – on July 6, 2018 – Matthew Pruden filed a notice of appearance as Mr. Hall's new attorney.

On January 24, 2019, the case returned to court for a sentencing hearing at which Mr. Hall was represented by his new attorney Pruden. During the hearing, significant character evidence was presented of Mr. Hall's community involvement and changes that he made beginning in 2016 as he was maintaining legal employment.

The defense requested the court grant a downward variance because although the cumulative quantity of drugs sold was high it was as a result of numerous small transactions. Judge Conrad noted "that there is a legitimate guideline issue to consider someone's role in drug distribution, and that kingpins should – and people with small roles should be treated differently, notwithstanding the quantities involved." Nevertheless, the court rejected the defense request but granted a limited variance based on the period of time in which Mr. Hall was not engaged in criminal activity.

Judge Conrad still imposed a sentence of 264 months on Count One, 60 months on Counts Two, Three, Five, and Six to run concurrent with each other and a consecutive term of 60 months on Count Four for a total sentence of 324 months. Written judgment was entered on February 13, 2019. Mr. Hall entered notice of appeal on February 19, 2019.

Mr. Hall filed a brief and Joint Appendix with the Fourth Circuit Court of Appeals on July 25, 2019. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. Mr. Hall's brief stated two issues for consideration: (1) whether the trial court abused its discretion in denying Mr. Hall's motion for a new attorney; and (2) whether the trial court committed reversible error in failing to properly analyze Mr. Hall's motion for a downward variance. On September 26, 2019 the government filed a Response Brief. The Fourth Circuit issued an unpublished decision on March 27, 2020 affirming the district court's judgment. (App A).

REASONS FOR GRANTING THE WRIT

Petitioner asserts that the Writ should be issued for two reasons. First, the district court committed error in denying Mr. Hall's motion for a new attorney. This error was compounded by the district court's failing to grant Mr. Hall's request for a downward variance.

On the issue of counsel, Mr. Hall was initially represented by a court-appointed attorney named Baker McIntyre. On May 31, 2018, Mr. McIntyre filed a Motion for Inquiry as to Status of Counsel. When the motion came on for a hearing on June 1, 2018, McIntyre stated that

> He [Mr. Hall] feels, number 1, that I am not prepared, that when we meet, I'm too nonchalant about things, that I'm still learning things about his case at this late juncture, which he feels I should have known way before now, which indicates, in his mind, that I'm not prepared, that I have not done a proper job for him.
>
> …
>
> He is adamant with me that I'm not prepared, that I have not done the proper things to get ready for trial, you know.

(Motion Transcript, Docket 18, page 5).

Mr. Hall spoke to the court directly and made clear his concerns with his lawyer.

> Your Honor, there's been times where we're discussing things, and it's like he don't have the defense for it. I have to tell him, and he will be like, "Okay." But it's things that, as a lawyer, you're supposed to already understand and be able to, you know, be able to prepare for this defense.
>
> He's telling me what they're going to say, what they're going to do, what they're going to say, what they're going to do, but he's not telling me what he's going to do.
>
> It's been a few times where he talked to me like I was his ten year old son, like cuss words and all. As a client and my lawyer, as a lawyer, I don't feel like that's the right relationship.

> Again, like I said, it's like he's just very nonchalant about everything. Some things be a joking matter. I mean, we're talking about a bunch of time, and he's making little jokes about certain things which, you know, once again, I just don't feel like he's prepared for this situation and ready for the situation at hand.

(Motion Transcript, Docket 18, page 7).

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." Prior to this decision the Fourth Circuit had been quite strong in a defendant's right to choose his or her lawyer is not absolute. *See*, *Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 612 (4th Cir. 1986), *cert. denied*, 478 U.S. 1008, 92 L. Ed. 2d 719, 106 S. Ct. 3305 (1986).

In *United States v. Mullen*, 32 F.3d 891 (4th Cir. 1994) the Court held that "a defendant must show good cause in requesting a new lawyer." *Mullen*, 32 F.3d at 895, *citing*, *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988), *cert. denied*, 487 U.S. 1211, 101 L. Ed. 2d 895, 108 S. Ct. 2858 (1988). "In evaluating whether the trial court abused its discretion in denying a defendant's motion for substitution, we consider three factors: 'Timeliness of the motion; adequacy of the court's inquiry into the defendant's complaint; and whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense.'" *Id*.

In the case at bar, the motion regarding counsel was filed on May 31, 2018 and considered by the court on June 1st because the trial was scheduled to begin on June 4th. Admittedly, it was close in time to the scheduled beginning of the trial; however, the record does not show that there was an earlier opportunity that Mr.

Hall had to bring such matter to the attention of the court. There does not appear to have been another hearing since the arraignment on March 16, 2018. Also, not only did Mr. McIntyre state that "during our meeting **yesterday** morning, he [Mr. Hall] expressed his dissatisfaction with me…" the Appellant's statement to the court indicated that it was a longer-term problem in the relationship between him and his attorney.

The Fourth Circuit should have considered the adequacy of the district court's inquiry. Judge Conrad conducted a hearing at which he allowed both Mr. Hall and his attorney to speak; however, he asked no questions. He concluded that "[t]here are communication issues, but certainly not a communication breakdown" but made no findings of fact and provided little explanation for the decision. All the court stated was that "I've seen the two of you working together during this hearing, and I've heard from you all about communicating." In contrast, Mr. Hall's objections were based on the weeks of interaction he had *before* the hearing including his attorney displaying a lack of knowledge of certain key points of the case and what Mr. Hall perceived was a lack of preparation and respect. The court was not in a position to determine that the attorney/client relationship was functional from the very few minutes of observation that the court had made in the courtroom.

The district court was required by law to consider whether the attorney client conflict prevented the defendant from getting an adequate defense. That assessment could not be made in the few minutes of court observation. The record

is clear that three days after this hearing, Mr. Hall – who had been preparing for trial – came into court and entered a guilty plea without having any plea agreement. That is certainly some indication of the level of frustration Mr. Hall must have felt with his attorney. The record is also clear that Mr. Hall retained a different defense attorney within weeks of entering the guilty plea. Again, that is some indication of his perception of his inability to receive an adequate defense at trial.

The circuit court also erred in its ruling on the district court's handling of Mr. Hall's request for sentencing considerations. Prior to the sentencing hearing, Mr. Hall's attorney filed a Sentencing Memorandum and Motion for Downward Variance. The initial presentence investigation report calculated a base offense level of 38 based on attribution of more than 25,200 grams of crack cocaine. After objection, the final presentence investigation report attributed between 8,400 grams and 25,200 grams resulting in a base offense level of 36. That calculation was based on combining estimated sales over many years, including, of course, the parties' own stipulations. Some of the drugs included amounts sold in transactions going back to 2002, thirteen years prior to sentencing.

In *United States v. Ganao*, 831 F. Supp. 246 (S.D.N.Y. 1993) the district court noted that the Guidelines "do not consider at all whether, in assessing the culpability of the defendant's conduct, one should give any consideration to the quantity of narcotics in which [the] defendant dealt at any one time." The court was clear in ruling that it was unjust that a person who played a more substantial role

in drug distribution might receive a less harsh sentence than someone with a far less substantial role but who was involved in the conspiracy for a greater time. The *Ganan* judge, therefore, granted a downward departure.

That theory was also considered by the Second Circuit in *United States v. Lara*, 47 F.3d 60 (2nd Cir. 1995) upon the Government's cross-appeal. The *Lara* Court observed that there was no explicit statutory or Guideline language resolving the issue. The Court recognized that "high-end sentences may overrepresent culpability and justify a departure." *Id*. at 66. Looking at the district court's application of this "quantity/time factor" the Court affirmed the sentence of two of the co-defendants.

Here, Judge Conrad found the Second Circuit caselaw to be unpersuasive "because of, again, my finding that Mr. Hall is a substantial quantity drug dealer in an extensive drug conspiracy that occurred for a 5-year period of time. And even a conservative estimate of drug amounts put him in the level 38." (Sentencing Transcript, Docket 18, page 26). This statement was demonstrably wrong because paragraph 12 of the presentence investigation reported drug amounts from 2002 through 2013 and paragraph 19 reported drug amounts in 2006 and 2007. The district court should have been aware of these unchallenged facts in the presentence investigation report and should have realized that an expanded analysis was required by the time portion of the quantity/time consideration. Likewise, the court attributed these amounts to a level 38 instead of the level 36 reflected in paragraph 31.

The record indicates that the district court did not properly understood the facts when it rejected the defense argument for a downward variance. The court, of course, did provide Mr. Hall a separate variance. The Circuit Court gave no consideration to Mr. Hall's argument that the quantity of drugs sold overstated his criminal involvement. Instead, the Court simply affirmed saying that the sentence was presumptively reasonable because it was below the guideline range. Given the lengthy sentence Mr. Hall received, he respectfully requests that this judgment be vacated.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

/s/ J. Edward Yeager, Jr.
J. Edward Yeager, Jr.
Counsel for Dontarius Marquis Hall
P. O. Box 1656
Cornelius, NC 28031
Telephone: 704-490-1518
Facsimile: 866-805-6191
yeager@ncappeals.net