

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALFRED LEE HANZY, 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

- I. Whether the Fourth Circuit's decision is in conflict with the Court's decision in *Gall v. United States*, 552 U.S. 38 (2007).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Alfred Lee Hanzzy, Jr.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by unpublished opinion issued 18 March 2020, in which it affirmed the judgment of the trial court. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming Mr. Hanzy's 84-month upward variant sentence, following his guilty plea to possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1), and maintaining a place for the purpose of manufacturing, distributing, or using controlled substances, in violation of 21 U.S.C. § 856(a)(1). The petition is being filed within the time permitted by the Rules of this Court, as extended by the Court's Order entered 19 March 2020. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Arrest and indictment of Alfred Hanzy

In November 2015, a confidential informant made a controlled purchase of crack cocaine from Alfred Lee Hanzy, Jr. J.A. 131. On 6 November 2015, officers executed a search warrant at Mr. Hanzy's home in Grifton, North Carolina. J.A. 131. Officers found cocaine, crack cocaine, 3,4-methylenedioxymethamphetamine ("MDMA"), and drug paraphernalia. J.A. 131. Mr. Hanzy was arrested on state charges and gave a post-arrest statement admitting that he purchased the drugs

found in his home, and discussing other drug purchases. J.A. 132; *see* J.A. 141.

On 21 November 2016, Mr. Hanzy was indicted in federal court on charges of possession with the intent to distribute a quantity of cocaine and a quantity of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), and maintaining a place for the purpose of manufacturing, distributing, and using controlled substances, in violation of 21 U.S.C. § 856(a)(1). J.A. 11.

Pretrial proceedings and guilty plea

Mr. Hanzy moved to suppress the evidence obtained from the search of his home and his post-arrest statements on the grounds that the evidence and statements were obtained in violation of his Fourth and Fifth Amendment rights. J.A. 14-23. The Government responded in opposition to the suppression motion. J.A. 24-28. After a hearing, the district court denied the motion. J.A. 7; *see* J.A. 39-58.

When the Government refused to consent to entry of a conditional guilty plea allowing Mr. Hanzy to preserve the suppression issues for appeal, Mr. Hanzy pleaded not guilty to both counts of the indictment. J.A. 7, 60-62. Prior to trial, Mr. Hanzy changed his plea, and pleaded guilty without a plea agreement to both counts of the indictment. J.A. 8; *see* J.A. 105.1, 105.2.

Sentencing and judgment

The Probation Office prepared a presentence investigation report. J.A. 129-48. The presentence investigation report included prior convictions dating back to 1993, most of which did not receive criminal history points. *See* J.A. 133-40. The

Probation Office found that Mr. Hanzy's total criminal history score was 9, establishing a criminal history category of IV. J.A. 140. Counts 1 and 2 were grouped for sentencing. J.A. 144. The Probation Office found that Mr. Hanzy was responsible for a total of 68.6 grams of cocaine, 18.06 grams of crack cocaine, and .9 grams of MDMA. J.A. 144. Based on the total drug quantity, the Probation Office calculated a base offense level of 20 under U.S.S.G. § 2D1.1(a)(5). J.A. 144. The Probation Office applied a two-point enhancement under § 2D1.1(b)(12) for maintaining a premises for the purpose of manufacturing or distributing a controlled substance. J.A. 144. The Probation Office also applied a two-point reduction for acceptance of responsibility, to reach a total offense level of 20. J.A. 145.¹ On the grouped counts, the Probation Office calculated a Guidelines imprisonment range of 51 to 63 months. J.A. 145.

Prior to sentencing, the Government filed a motion for upward departure or variance on the ground that the criminal history category substantially under-represented the seriousness of Mr. Hanzy's criminal history and the likelihood that he would commit other crimes. J.A. 65-85. The Government argued that if the district court determined that Mr. Hanzy was not a career offender, the

¹ In the draft presentence investigation report, the Probation Office applied a three-point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a), (b). J.A. 122. The Government objected to the third point under § 3E1.1(b) on the ground that Mr. Hanzy did not timely notify authorities of his intention to plead guilty. J.A. 126. The Probation Office accepted this objection and revised the report to reflect a two-point reduction only. *See* J.A. 144.

court should sentence him as a “de facto career offender.” J.A. 76.² The Government asked the court to impose a sentence of 262 months’ imprisonment. J.A. 80.

At a sentencing hearing held on 1 November 2018, the district court found, without objection, that the Guidelines range was 51 to 63 months’ imprisonment. J.A. 86-88. The Government orally argued its motion for upward departure or variance. J.A. 88-90. Before hearing argument from Mr. Hanzy’s counsel, the district court stated that it was “inclined to upwardly depart, and the reason is that his repeated drug trafficking offenses and criminal conduct are not adequately captured by the guideline. Because if you were able to reach back under guideline computation and score all of those, then he would be a career offender, and he would be sentenced at a level VI.” J.A. 91. The district court continued, “I’m not going to upwardly depart. I’m going to vary, as the law understands it. But I’ll hear from you.” J.A. 91.

Mr. Hanzy’s counsel argued that the upward departure the Government was seeking was “an extraordinary step,” and that Mr. Hanzy’s case was not extraordinary. J.A. 91. When Mr. Hanzy’s counsel started to distinguish cases the Government cited in its motion for upward departure, the district court interjected that Mr. Hanzy’s criminal history was “extraordinary.” J.A. 91. The district court

² The Government did not contend in its objections to the draft presentence investigation report or at sentencing that Mr. Hanzy was a career offender. *See* J.A. 86-95, 125-26.

continued, “And I think that one of the irregularities about guideline sentencing is the inhibition of sentencing judges to take into account the inadequacy of the guidelines when they just mechanically come up with a figure.” J.A. 91. The district court explained that the Guidelines were “illustrative,” but not mandatory. J.A. 92.

Mr. Hanzy’s counsel resumed argument, saying that Mr. Hanzy had been in his twenties and selling drugs on the street at the time of his prior offenses. J.A. 92. Mr. Hanzy’s counsel requested a sentence within the Guidelines range. See J.A. 91-93. He explained that Mr. Hanzy was selling drugs to support his own drug habit, and that he had never had intensive substance abuse treatment. J.A. 93. Mr. Hanzy’s counsel argued that a sentence within the Guidelines range would allow Mr. Hanzy to receive intensive substance abuse treatment and to learn a trade. J.A. 93.

At the conclusion of Mr. Hanzy’s counsel’s argument, the district court asked the Probation Officer what the Guidelines range would be for offense level 20 and criminal history category VI. J.A. 93. The Probation Officer responded that the Guidelines range would be 70 to 87 months’ imprisonment. J.A. 93. The court then announced the sentence and its reasoning:

Okay. I think that a more appropriate sentencing range would be offense level 20, criminal history category VI. That adequately represents his long criminal history and captures the flaw in the Guideline that he’s being charged with in this case. So I’ll sentence him within the 70- to 87-month range.

And I looked at all the requirements of [18 U.S.C. §] 3553(a), and

I find that they support a sentence of 84 months in the Bureau of Prisons, which I'll impose on Counts 1 and 2 concurrent, and five years of supervised release on Count 1, and 5 years on Count 2 concurrent.

J.A. 93-94. The district court reduced the sentence to a written judgment, entered on 6 November 2018. J.A. 96-102. In its statement of reasons, the court identified “[i]nadequacy of criminal history” as the reason for the variance, and explained that it varied upward because “the defendant’s criminal history does not reflect the seriousness of his prior criminal conduct. Had all of the defendant’s criminal history scored, he would have been a career offender.” J.A. 151-52.

Mr. Hanzy filed a pro se notice of appeal on 11 December 2018. J.A. 103.

Fourth Circuit’s opinion

On appeal, Mr. Hanzy argued that his sentence was procedurally unreasonable, and thus in violation of this Court’s decision in *Gall v. United States*, 552 U.S. 38 (2007). Alternatively, Mr. Hanzy argued that the sentence was substantively unreasonable. On 18 March 2020, the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion rejecting Mr. Hanzy’s arguments, and affirming the judgment below. App. 1-3. The Fourth Circuit concluded that the district court sufficiently explained the sentence, and therefore ruled that the sentence was procedurally reasonable. App. 3. The Fourth Circuit also concluded that the sentence was substantively reasonable. App. 3.

MANNER IN WHICH THE FEDERAL QUESTION
WAS RAISED AND DECIDED BELOW

The question presented was argued and reviewed below because Mr. Hanzy argued on appeal that the district court erred by imposing a procedurally unreasonable sentence. *See* App. 2. The Fourth Circuit concluded that there was no error. App. 3.

REASONS FOR GRANTING THE WRIT

Mr. Hanzy contends that there is a compelling reason for granting his petition for writ of certiorari because “a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court,” namely this Court’s decision in *Gall v. United States*, 552 U.S. 38 (2007). *See* S. Ct. R. 10(c).

DISCUSSION

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GALL* BECAUSE THE FOURTH CIRCUIT DETERMINED THAT THE SENTENCE WAS PROCEDURALLY AND SUBSTANTIVELY REASONABLE DESPITE THE LACK OF ADEQUATE EXPLANATION BY THE DISTRICT COURT.

The district court imposed a sentence 33% higher than the top of the Guidelines range without addressing Mr. Hanzy's arguments that a within-Guidelines sentence was sufficient, including that a within-Guidelines sentence would enable him to receive treatment for the source of his crimes—a long-time drug addiction. Citing only Mr. Hanzy's "long criminal history," the district court varied upward from the Guidelines range of 51 to 63 months' imprisonment, and imposed a term of 84 months. The district court's failure to adequately explain its sentence renders the sentence procedurally unreasonable, and precludes meaningful appellate review, in violation of this Court's decision in *Gall v. United States*, 552 U.S. 38 (2007). The Fourth Circuit nevertheless affirmed the sentence in a two-page unpublished opinion. As shown below, the Fourth Circuit's decision conflicts with this Court's direction in *Gall* that district courts must articulate the individualized reasons for a sentence on the record.

Appellate courts review a district court's sentence for abuse of discretion. *Gall v. United States*, 552 U.S. at 51. An appellate court "must first ensure that the district court committed no significant procedural error, such as . . . failing to consider the § 3553(a) factors . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range."

Id. “Regardless of whether the district court imposes an above, below, or within-Guidelines sentence, it must place on the record an individualized assessment based on the particular facts of the case before it.” *United States v. Carter*, 564 F.3d 325, 330 (4th Cir. 2009) (internal quotation omitted). “This individualized assessment need not be elaborate or lengthy, but it must provide a rationale tailored to the particular case at hand and adequate to permit meaningful appellate review.” *Id.* (internal quotation omitted). Failing to adequately explain the sentence on the record is a procedural error. *See id.* Where, as here, the defendant argues for a lower sentence by reference to the § 3553(a) factors, the error is preserved, and warrants reversal unless the Government shows that the error was harmless. *See United States v. Lynn*, 592 F.3d 572, 579-81 (4th Cir. 2010).

If the appellate court determines “that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,]” taking into account “the totality of the circumstances, including the extent of any variance from the Guidelines range.” *Gall v. United States*, 552 U.S. at 51. An appellate court can consider the substantive reasonableness of the sentence “[i]f, and only if, [it] find[s] the sentence procedurally reasonable.” *United States v. Carter*, 564 F.3d at 328. Where, as here, the district court imposed a sentence above the Guidelines range, the sentence does not receive a presumption of substantive reasonableness on appeal. *See Gall v. United States*, 552 U.S. at 51. “In reviewing a variant sentence, [the appellate court] consider[s] whether the

sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range.” *United States v. Washington*, 743 F.3d 938, 944 (4th Cir. 2014) (internal quotation omitted).

The district court committed procedural error in sentencing Mr. Hanzy because it did not “place on the record an individualized assessment based on the particular facts of the case before it.” *See United States v. Carter*, 564 F.3d at 330. The record does not show that the district court considered the § 3553(a) factors, because the district court did not adequately explain its application of those factors or the reasons for imposing an above-Guidelines sentence, *see Gall v. United States*, 552 U.S. at 51, and did not address Mr. Hanzy’s arguments for a lower sentence, *see United States v. Lynn*, 592 F.3d at 584. The district court’s conclusory rationale—that the higher range of 70 to 87 months’ imprisonment “represents his long criminal history and captures the flaw in the Guideline that he’s being charged with in this case”—is insufficient to support the district court’s imposition of a sentence 33% longer than the top of the applicable Guidelines range. *See* J.A. 93.

Following the teachings of *Gall*, the Fourth Circuit established in *Lynn* that a district court does not make the required “individualized assessment” on the record simply by referring to the defendant’s long criminal history. *United States v. Lynn*, 592 F.3d at 583-85. In *Lynn*, one of the defendants argued for a below-Guidelines sentence based on certain of the § 3553(a) factors. *Id.* at 583. Without addressing the defendant’s arguments, the district court imposed a

within-Guidelines sentence, saying that the sentence was “fair and appropriate” and “consistent with the requirements of [§ 3553(a)].” *Id.* (alteration in *Lynn*). The district court also commented that the defendant “had a long criminal history,” and that “they finally caught up with him.” *Id.* The Fourth Circuit found the district court’s explanation inadequate, because “it failed to address [the defendant’s] specific § 3553 arguments or explain why the sentence imposed on him was warranted in light of them.” *Id.* at 584. Because the Government failed to show that the district court’s procedural error was harmless, the Fourth Circuit vacated and remanded for resentencing. *Id.* at 584-85.

Gall, as applied in *Lynn*, compels the same result in this case. The district court expressed its intention to vary upward before hearing Mr. Hanzy’s arguments, and then did not address any of Mr. Hanzy’s arguments for a lower sentence, including the age of many of Mr. Hanzy’s prior drug convictions, the fact that Mr. Hanzy sold drugs to support his own habit, that he was a user in need of intensive treatment, which he had never before received, and that a Guidelines sentence would allow him to receive vocational training. J.A. 91-93; see 18 U.S.C. § 3553(a). After hearing argument, the district court reiterated what it had already said—that it was going to vary upward because of Mr. Hanzy’s “long criminal history.” J.A. 93. The district court then stated that it had looked “at all the requirements of 3553(a),” and found that “they support a sentence of 84 months in the Bureau of Prisons.” J.A. 93-94.

Simply citing a long criminal history is not a “rationale tailored to the

particular case at hand” that allows meaningful appellate review. *See United States v. Carter*, 564 F.3d at 330. What constitutes a long criminal history is subject to interpretation, and this factor could be cited in support of a sentence at the high end of the Guidelines range, or above the Guidelines range, in every case where the defendant has multiple prior convictions. *See, e.g., United States v. Dury*, 336 F. App’x 371, 373 (4th Cir. 2009) (per curiam) (recitation of factors that could apply in any case is insufficient to explain sentence).

The district court’s statement that Mr. Hanzy would have been a career offender if all of his criminal history was scorable does not provide any additional explanation of the sentence. *See* J.A. 91, 151-52. Although the Government suggested in its motion for upward departure that Mr. Hanzy would have been a career offender if all of his prior sentences were scorable, the Government did not identify which prior convictions would have supported a career offender designation if the corresponding sentences had been scored. *See* J.A. 72-76. The presentence investigation report does not identify the potential career offender predicate convictions, *see* J.A. 133-40, and the district court did not identify them, *see* J.A. 91. By saying Mr. Hanzy would have been a career offender, the district court did nothing more than highlight its concern with Mr. Hanzy’s criminal history; the court did not explain why it rejected Mr. Hanzy’s arguments for a Guidelines sentence. *See* J.A. 91, 151-52.

Finally, the district court did not adequately explain its sentence by announcing that it had looked at the § 3553(a) factors. *See* J.A. 93. Applying this

Court's decision in *Gall*, the Fourth Circuit has repeatedly held that a district court commits procedural error when it recites that it has considered those factors, without discussing which factors the court considered or found important, or how the factors apply to the defendant. *See, e.g., United States v. Lynn*, 592 F.3d at 584 (district court's statement that sentence was consistent with § 3553(a) was insufficient to explain sentence); *United States v. Carter*, 564 F.3d at 329 (district court's statement that it was considering § 3553(a) factors, without explaining how factors applied to defendant, was insufficient); *accord United States v. Martinez-Martinez*, 378 F. App'x 302, 304 (4th Cir. 2010) (per curiam); *United States v. Pacheco Mayen*, 383 F. App'x 352, 355 (4th Cir. 2010) (per curiam) (same).

The district court's failure to make an "individualized assessment" of Mr. Hanzy's case on the record forecloses meaningful appellate review of Mr. Hanzy's above-Guidelines sentence. *See United States v. Carter*, 564 F.3d at 330. The district court's error was not harmless, because "explicit consideration" of Mr. Hanzy's sentencing arguments might have persuaded the district court to impose a lesser sentence. *See United States v. Lynn*, 592 F.3d at 582. By reaching the question of substantive reasonableness, and affirming Mr. Hanzy's sentence, the Fourth Circuit sanctioned the district court's procedural error. *See App. 2-3*. The Fourth Circuit's decision is therefore inconsistent with this Court's directive in *Gall* that a district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. at 50.

Mr. Hanzy is entitled to remand for resentencing, to allow the district court to impose a sentence only after properly considering and addressing the sentencing factors. *See United States v. Lynn*, 592 F.3d at 583-84.

CONCLUSION

For the foregoing reasons, Petitioner Alfred Lee Hanzy, Jr., respectfully requests that the Court grant his petition for writ of certiorari, reverse the decision of the Fourth Circuit, and remand for resentencing.

This the 17th day of August, 2020.

/s/ Kelly Margolis Dagger

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari was served on the Respondent herein by depositing a copy thereof in the United States mail, postage prepaid, first class, addressed as follows:

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This the 17th day of August, 2020.

/s/ Kelly Margolis Dagger
Kelly Margolis Dagger