

Case No. **20-5612**

ORIGINAL

IN THE UNITED STATES SUPREME COURT

ANTHONY ROY BROWN,

Petitioner,

Supreme Court, U.S.
FILED

MAY - 6 2020

OFFICE OF THE CLERK

v.

THE UNITED STATES OF AMERICA,

Respondent,

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

Anthony Roy Brown
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SUPREME COURT, U.S.

Questions For Review

- (1) Is the Court prohibited from calculating 2 sentences which were imposed on the same day or in the same charging instrument as separate sentences in accordance with SENTENCING GUIDELINES 4A1.2(a)(2)?
- (2) Are convictions that are factored into the sentence and unproven facts or charges grounds for upward departure?

i-1

Statutory Provisions

(1) U.S.S.G. 4A1.2. (a)(2)

(2) U.S.S.G. 4A1.3. (a)(1) and (3)

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Corporate Disclosure Statement

Petitioner has no corporation to disclose to this
Justice Court, Statement hereby nonapplicable.

TABLE OF CONTENTS

Page No.

Questions for Review

Intro

Statutory Provisions

i-1

Corporate Disclosure Statement

i-2

Table of Authorities

i-4

Appended Opinions of Courts

i-5-i-12

Parties Judgment to be Reviewed

1

Statement of Jurisdiction

1

Facts of Case

1

Question 1

2

Statutory Provision Relied Upon

2

Argument

2-4

Question 2

4

Statutory Provision Relied Upon

4

Argument

4-7

Reason why this Certiorari should be granted

7

Conclusion

8

AFFIDAVIT

8

Table of Authorities

Pages

Hologon-Hernandez v. United States, 140 S. Ct. 762, 766 (2020)-	4
Olmos v. U.S., 277 U.S. 438, 478 (1928)-	3, 4
United States v. Smith, 440 F.3d 704, 708 (5th Cir. 2006)-	5, 6
U.S. v. Birkih, 366 F.3d 95, 102 (2nd Cir. 2004)-	6
U.S. v. Booker, 543 U.S. 220, 245-46 (2005)-	6
U.S. v. Gwyn, 481 F.3d 849, 856 (D.C. Cir. 2007)-	3
U.S. v. Longstreet, 567 F.3d 911, 926-27 (7th Cir. 2009)-	3
U.S. v. O'Georgia, 564 F.3d 281, 292-93 (6th Cir. 2009)-	5
U.S. v. Olivero, 552 F.3d 34, 38-39 (1st Cir. 2009)-	3
U.S. v. Wiley, 509 F.3d 474, 478 (8th Cir. 2007)-	5

U.S.S.G.

U.S.S.G. 4A1.2. (a)(2)-	2, 3
U.S.S.G. 4A1.3. (a)(1) and (3)-	4

Fed. R. Evi.

Fed. R. Evi. R. 402-	5
----------------------	---

U.S. Constitution

5th Amendment-	5
6th Amendment-	5

U.S.C.

Title 18 922(g)(1)-	1
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Parties Judgment to be Reviewed

Judge John McBryde of the U.S.D.C. and Judges CLEMENT, GRAVES and OLDHAM are to be reviewed of the 5th Circuit Court.

Statement of Jurisdiction

Judgment from U.S.D.C. took place April 26, 2019 in 4:18-CR-310-A(01). Appeal was dismissed in Case 19-10511 from the 5th Circuit 2-11-2020. This Court has jurisdiction in accordance with Art. 3 Sec. 2 of the U.S. Constitution.

Facts of Case

In the investigation of a burglary of a pawnshop Brown was seized by officers due to various firearms that were retrieved in a apartment officers previously visited in connection with a irrelevant Bank Robbery. Video surveillance led investigators to believe Brown was one of the people in the video due to a tattoo on the arm of Brown which they said matched.

Brown being brought before the U.S.D.C. for unlawful possession of a firearm by a felon Title 18 922(g)(1) pleaded guilty to the 1 Count of the indictment. In sentencing Brown was sentenced outside his guidelines due to juvenile cases that were mentioned by the Court and pending charges that were not proven beyond a reasonable doubt by the Court. Brown who was in offense level 27 and category III with a sentence range of 87-108 months sentenced to 120 months in the B.O.F

On appeal to the 5th Circuit counsel for Brown withdrew from his case which was dismissed from the 5th Circuit.

2

Question 1

Is the Court prohibited from calculating 2 sentences which were imposed on the same day or in the same charging instrument as separate sentences in accordance with SENTENCING GUIDELINES 4A1.2.(4)(2)?

Statutory Provision Relied Upon

U.S.S.G. 4A1.2.(4)(2)

"If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentences covered by (A) or (B) as a single sentence. See also 4A1.1(e).

Argument

The sentencing guidelines are clear in its implementation. Brown who has been scored at category 3 with 5 points seems to have been subject of a miscalculation. Although prior counsel from the 5th circuit appeal may not have spotted the miscalculation deeming such appeal frivolous to proceed, The slightest of errors can have substantial consequences. Brown receiving an upward departure outside the guidelines fits this criterion.

ia. The Burglary Habitation and Theft of Property at age 16 although different charges fall within (A) or (B) of the Sentencing Guidelines 4A1.2. (a)(2). See U.S. v. Olivero, 552 F.3d 34, 38-39 (1st Cir. 2009) (Court properly relied solely on PSR because "any undisputed portion of the PSR" is an acceptable finding of fact). However if a miscalculation such as this occurs which the Court finds as fact and later is a mistake, that mistake must be accounted for. Mathematical calculation is the sole basis of PSR to begin with in arriving to a point where Brown was supposed to be. See U.S. v. Gwyn, 481 F.3d 849, 856 (D.C. Cir. 2007) (remand required to determine if sentence imposed under mandatory Guidelines regime would be different under advisory Guidelines); U.S. v. Longstreet, 567 F.3d 911, 926-27 (7th Cir. 2009) (limited remand required to determine if sentence would be different after considering crack powder cocaine disparity).

Yet the more important fact to consider is that Brown's papers are secure by the 4th Amendment. Thereby a misrepresentation of such papers is a violation of the 4th Amendment due to punishment suffered by such papers. Brown was made to sign a document by the probation officer in order to use his criminal history. Thereby the Court is responsible for an accurate accounting to reflect Brown's points on paper as well as at sentencing.

"The right to be let alone the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy

of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment," *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928)

Question 2

Are convictions that are factored into the sentences and unproven facts or charges grounds for upward departure?

Statutory Provision Relied Upon

U.S.S.G. 4A1.3, (a)(1) and (3)

STANDARD FOR UPWARD DEPARTURE - If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

PROHIBITION - A prior arrest record itself shall not be considered for purposes of an upward departure under this Policy Statement.

Argument

Brown was sentenced to 120 months which was outside his guidelines of 87-108 months. Brown who has requested a lower sentence at his sentencing has reserved his claim for error. See *Hologuin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020) (See also 4:18-CR-00310-A Document 41 Page 8 line 8 to Page 9 line 11). However to start this argument it would

seem that the judge was on a fishing expedition of sorts to make sure a upward departure was warranted. The offense of conviction is "unlawful possession of a firearm by a felon". This is not a robbery case or theft case. This is also not a crime of violence or it would be a different charge. More importantly all the crimes of conviction were listed as crimes already factored into his criminal history score. See U.S. v. Wiley, 509 F.3d 474, 478 (8th Cir. 2007) (upward departure not justified when considerations of adequate deterrence and just punishment that led to departure were already factored into guidelines themselves).

The judge also stated that Brown has a tendency for violence and unlawful conduct that is very disturbing (see 4:18-CR-00310-A Document 41 Page 12 line 13 to 15). Yet multiple acts of violence are not in Brown's history. Such is also irrelevant evidence in accordance with Fed. R. Evi. R 402 by the Constitution construed with the 5th Amendment and 6th Amendment. Such must be established by proof that Brown is violent when the case of relevance is a possession of a firearm (see U.S. v. O'Geary, 569 F.3d 281, 292-93 (6th Cir. 2009) (upward departure not justified because circumstances were not sufficiently unusual to depart from guidelines). The sentencing History is altogether irrelevant in this particular case when everything Brown has done or previously done has been factored into his score for the sentence.

"A sentence outside the guideline range is substantively

unreasonable if it (1) fails to account for a factor that should have received significant weight, (2) gives significant weight to irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *Id.* (citing 5th Cir. 2006) *United States v. Smith*, 440 F.3d 704, 708

The judge stated that Brown is in a "gang" but he cannot identify the gang (see 4:18-CR-00310-A Document 41 Page 11 line 16 to 19). If Brown is in a gang that must be a fact not an assumption or the gang would be known. Yet this again is one of the factors the judge sought to use in order to confirm his upward departure. In fact multiple artist in music in this day in age use the term "gang" to describe their entourage from women to men and not in a violent way which can account for such facebook post the judge is referring to. See *U.S. v. Birkin*, 366 F.3d 45, 102 (2d Cir. 2004) (upward departure not procedurally reasonable when judge did not make specific findings about why the defendant was "manager" of operation

With all the crimes of the past already factored into the sentence it must be noted that *Booker* limits a court's discretion to enhance a defendant's sentence. See *U.S. v. Booker*, 543 U.S. 220, 245-46 (2005). A judge may only consider facts that: (1) are reflected in the jury verdict; (2) are admitted by the defendant; (3) are contained in the defendant's guilty plea; or (4) pertain to a prior conviction. See *id.* Otherwise, a jury must find the facts necessary for

the enhancement to be true beyond a reasonable doubt. Thereby the 2 charges that are still pending are also irrelevant that the judge referred too.

With all elements the judge mentioned addressed here in this brief. It can be seen that the judge tried to create a modus operandi that is irrelevant. This is a firearm case and nothing more. A fishing expedition in order to use conduct outside relevance in order to upward depart is a 5th Amendment violation in accordance with due process. The arrest record itself is prohibited to upward depart from the guidelines. Yet this is exactly what happened in this case. Brown has never been incarcerated for a extensive amount of time and as can be seen his offenses are that of juvenile offenses that seem to be petty thefts and burglaries. Brown who in fact admitted that he needed to get a G.E.D. and learn a different way seeking to abstain from recidivism (See 4:18-CR-00310-A Document 41 Page 9 lines 8-11). Thereby the guidelines before the upward departure were in fact fair.

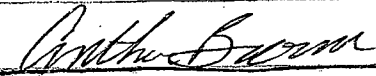
Reason why this certiorari should be granted

The reason why this certiorari should be granted is that Brown has already been placed in the category he was to be in before the departure. All factors were accounted for and nothing was out of the ordinary to warrant deterrent. Thereby this was a violation of Due process.

Conclusion

In conclusion this is not a complicated case, Brown was charged with unlawful possession of a firearm by a felon. There is no relevant conduct to be considered because its only a "gun". If there were more than 1 gun then you factor it into the sentence calculation which was done. The criminal history was accounted for. Nothing else exist especially due to the fact that Brown is not far from a juvenile. Hereby Brown request that his prior guidelines are restored.

Date: 5-5-2020

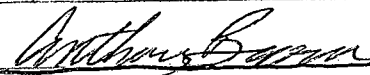


Anthony Roy Brown

AFFIDAVIT

I Anthony Roy Brown, being over 18 years of age do swear all facts and statements are true and correct not meaning to mislead any under the penalty of perjury.

Date: 5-3-2020



Anthony Roy Brown