**RECORD NO. _____**

# IN THE
# Supreme Court of the United States

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TAVEON NIXON, a/k/a Kodak,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

WHETHER THE TRIAL COURT'S OVERT CONSIDERATION OF THE EXISTENCE AND NATURE OF AN APPEAL WAIVER PRIOR TO VARYING UPWARD TO THE STATUTORY MAXIMUM SENTENCE RESULTED IN A MISCARRIAGE OF JUSTICE AND A PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE SENTENCE?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

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TAVEON NIXON, a/k/a Kodak,
Petitioner,

v.

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**PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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Petitioner respectfully prays that a writ of certiorari issue to review judgment dismissing Taveon Nixon's ("Petitioner's") appeal by the United States Court of Appeals for the Fourth Circuit rendered in this case 17 June 2020.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix, *infra*) is found at *United States v. Taveon Nixon,* 19-4757 (4th Cir. 2013) and is unpublished.

## JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit dismissing Petitioner's appeal based on an appeal waiver in a Plea Agreement entered in the United States District Court for the Eastern District of North Carolina was issued on 17 June 2020. (Appendix, *infra*) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution reads: "…nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…"

## STATEMENT OF THE CASE

On 20 December 2018, an Indictment was returned against Taveon Nixon ("Mr. Nixon") alleging four counts of delivery of a quantity of heroin with separate offense dates of November 29 and 30 of 2018, and December 4 and 10 of 2018. Moreover, the Indictment included an allegation that Mr. Nixon had committed these offenses after at least one prior conviction for a felony drug offense had become final.

On 20 May 2019, pursuant to a written Plea Agreement, Mr. Nixon pleaded guilty to Counts Two and Four of the Indictment which charged him with distributing a quantity of heroin on November 30 and December 10 in 2018. The Plea Agreement contained stipulations as to Mr. Nixon's acceptance of responsibility, and additionally that the "readily provable quantity of controlled substances to be used in determination of the base offense level pursuant to U.S.S.G. § 2D1.1 is at least 10 kilograms but less than 20 kilograms of Converted Drug Weight, corresponding to a base offense level of 14." The Plea Agreement also contained an appeal waiver.

Mr. Nixon engaged in the presentencing interview process, and a presentencing report ("PSR") was issued. The guideline calculation resulting from the PSR was—with a criminal history category IV and a total offense level of 12—a guideline imprisonment range of 21-27 months.

On 22 August 2019, the government filed a motion for upward departure or, alternatively, an upward variance. The basis of the government's variance was that Mr. Nixon's criminal history level did not adequately account for the seriousness of Mr. Nixon's criminal history or Mr. Nixon's likelihood to recidivate.

Sentencing was held on 26 September 2019, before the Honorable Chief Judge Terrence W. Boyle. The sentencing court upwardly varied, sentencing Mr. Nixon to 120 months.

Mr. Nixon timely appealed. The Fourth Circuit Court of Appeals dismissed the appeal pursuant to the appeal waiver provision of the Plea Agreement signed by Mr. Nixon.

## STATEMENT OF THE FACTS

*A. Taveon Nixon.*

At the time of offenses to which Mr. Nixon plead, Mr. Nixon was 20 years old. Mr. Nixon was raised in Wilmington, North Carolina, by a mother with a number of other half-siblings. He never met his father, and his father's whereabouts were unknown at the time of the drafting of the PSR. Mr. Nixon withdrew from school in the 9th grade. With no history of employment, Mr. Nixon fell into the cycle of the criminal justice system at a young age.

Mr. Nixon was arrested for the first time when he was 16 years old. The timeline of his criminal history is best understood as follows:

- On 6 February 2015 - Mr. Nixon plead guilty to possession of a stolen firearm and received a probationary sentence;

- On 2 March 2015, 4 March 2015, and 22 April of 2015, Mr. Nixon sold a quantity of heroin to a confidential informant but was not immediately arrested or charged with these offenses;

- On 7 July 2015, Mr. Nixon was ordered to serve a three-month active sentence for a probation violation on the possession of a stolen firearm offense, which was terminated on 5 October 2015 and the probationary term terminated on 6 October 2015;

- On 15 October 2015, having been released from custody, Mr. Nixon was served and arrested for the controlled purchases occurring on 2 March 2015, 4 March 2015, and 22 April 2015 referenced above;

- On 16 December 2015, just before Christmas and unable to make bond, Mr. Nixon plead to the three offenses and was ordered to two consecutive sentences of 19 to 32 months, suspended for 30 months of probation;

- On 23 March 2016, Mr. Nixon was arrested for alleged possession of a firearm by a felon and remained in custody; and,

- On 8 August 2016, having been in custody for approximately 5 months, Mr. Nixon's attorney entered a plea to the felon in possession charge, which also resulted in amending and shortening the judgements for which Mr. Nixon was on probation at the time of the alleged firearm possession. Mr. Nixon was then released on probation.

Mr. Nixon was between 16 and 18 years of age when he committed these five crimes, as set forth above.

Mr. Nixon was labeled as being a member of a security threat group, though he had no tattoos and otherwise denied any such association. He was provided

these labels both times while in county custody awaiting disposition of pending cases.

*B. Offense Conduct.*

On 29 November 2018, Wilmington Police Department ("WPD") officers observed Mr. Nixon engage with a group of individuals in a car on Dawson Street in Wilmington, North Carolina. WPD effectuated a traffic stop of the car and recovered .18 grams of heroin from the occupants. The occupants informed law enforcement that they had purchased the heroin from Mr. Nixon.

On 30 November 2018, WPD used a confidential informant ("CI") to purchase .24 grams of heroin from Mr. Nixon.

On 4 December 2018, the same CI made a second purchase of .22 grams of heroin from Mr. Nixon.

On 10 December 2018, a probation search of Mr. Nixon's residence was conducted. In Mr. Nixon's bedroom, the search yielded approximately 2.37 grams of heroin, 3.76 grams of cocaine base, drug paraphernalia, and $1,426 in cash. Mr. Nixon was arrested. Mr. Nixon made bond and removed an electronic monitoring device from his person. A federal warrant was issued.

On 17 January 2019, Mr. Nixon was identified by federal agents as a passenger in a car and having the unserved federal warrant. Agents attempted to block the car, and Mr. Nixon exited the car and ran. Mr. Nixon was apprehended

and arrested shortly thereafter. The driver of the car, after Mr. Nixon left, attempted to and did ram the agent's car. The driver and another occupant of the car were arrested. In the center console of the car, officers recovered 5.04 grams of heroin they attributed to Mr. Nixon.

In its review for purposes of the PSR, probation found Mr. Nixon to be a base level 14 with converted drug weight of over 20 kilograms (a base level 16). See U.S.S.G. § 2D1.1. The PSR included that the drug stipulation in the Plea Agreement had the effect of sparing Mr. Nixon two levels at his base offense level.

*C. Plea Agreement and Upward Departure/Variance Motion.*

Mr. Nixon entered into a Plea Agreement with the government which provided a drug weight stipulation at a base offense level 14 pursuant to U.S.S.G. § 2D1.1. This was a stipulation better than that which probation attributed to Mr. Nixon, which was a level 16 as set forth above.

Additionally, the Plea Agreement contained an appeal waiver which stated in part as follows:

> *To waive knowingly and expressly the right to appeal the conviction and whatever sentence is imposed on any ground…*

Mr. Nixon cooperated with probation and a PSR was prepared. As part of the PSR process, Mr. Nixon accepted responsibility for his conduct. The PSR provided to the Court, without taking a position, that an upward departure may be

applicable based on a possible inadequate scoring of Mr. Nixon's criminal history. See U.S.S.G. § 4A1.3(2)(B).

Despite the Plea Agreement, the agreed upon Drug Stipulation and acceptance of responsibility, prior to sentencing, the government moved for an upward departure/variance. Specifically the government asserted Mr. Nixon's criminal history was underscored, there was a likelihood he would commit other crimes, and otherwise had been treated too leniently by the state system. The government sought in its motion an upward departure to 120-150 months from the guideline range of 21-27 months. The government's motion cited issues of probation violations and convictions set forth in the PSR, but did not allege actual specific prior bad acts or conduct.

*D. Sentencing and Judgment.*

Sentencing was held on 26 September 2019. The sentencing court opened the proceeding allowing Mr. Nixon to allocute. Mr. Nixon expressed his remorse, acceptance of responsibility, and a desire to better himself during his sentence to get home to his son.

The sentencing court then invited the government to argue its motion for a departure, to which the government responded: "But I'd be happy just to do it as a variance." The government then stated: "…the Court has our motion so I won't repeat that part…" The government went on to proofer information to the court

that was not in its Motion for Upward Departure/Variance, case discovery, or in the PSR. Moreover, the government offered as grounds to vary upward that Mr. Nixon chose not to cooperate: "…you can help repay any conduct you've done, you can identify your sources of supply, you can help them find guns, you can do things to bring down other members in the gang. And he elected not to do any of that…" The government then sought a sentence of 84 to 105 months.

After the government's motion and proofer of evidence otherwise not in the record before the court, the court sought to determine the nature of Mr. Nixon's appeal waiver. The court stated it "always checks" to determine which waivers allow for an appeal in excess of the recommended sentencing guidelines, and which bar appeal of any sentence. Upon determining the waiver at issue in the case, the court stated: "And so his appellate review would be just on plain error or what?" Moreover, the court stated: "…I just don't want to get into a situation where the people in your office [the U.S. Attorney's Office for the Eastern District of North Carolina] who go to Richmond and concede error, which they do all the time, and it just cuts the absolute legs off the sentencing Judge…"

The court then determined the "stair-stepping process" of a departure is not the nature of the government's motion, but rather a variance for:

> [Court:] …proven recidivism and proven dangerousness and proven disregard for legal rules and lawful behavior because of his gang activity, his abusive conduct in evading arrest and resisting

> arrest, because of his chronic history of returning to drug trafficking, because his chronic use of firearms and manifest dangerousness to the community…
>
> Aren't those the factors that –
>
> [AUSA]: Yes, Judge.
>
> [Court:] You couldn't say it any better.
>
> [AUSA:] I couldn't, Judge. If I –
>
> [Court:] That's why I'm here.

The sentencing court then took judicial notice of crime in Wilmington, North Carolina, and invited this Honorable Court as follows:

> [Court:] [I]nvites the Court of Appeals to inquire and to accept Wilmington is a community, a large Metropolitan community under siege…under siege from gangs and heroin and fentanyl trafficking and victims are dying day by week by month by year in large numbers because of the poison that is being introduced and the violence that's being perpetuated by people just like this defendant in this case. And his removal from the community is essential for its own self-defense, in order to survive and live in a peaceful environment, in a peaceful community, this person has to be extracted from it.
>
> [AUSA:] Exactly, Judge.
>
> [Court:] "The punishment for this crime is zero to 20 years. It's the Court's opinion that no less than half of that statutory punishment would be adequate…
>
> ***
>
> [Court:] You [defense counsel] want to say anything about that?

With this question directed to defense counsel, defense counsel was first invited to respond to the government's motion and the court's own sponsored variance argument, and the court's forecast sentence. Amid defense counsel's argument, the court interjected seeking further information of a related case and that particular defendant's guidelines (the driver of the car that rammed the police). The court then took further judicial notice:

> [Court:] I'm going to add to the record that I'm establishing under 3553(a), that Congress recently reduced punishments over the past year or several years for crack cocaine in order to equalize it with punishments for cocaine, but Congress had done absolutely nothing to increase the penalties for heroin and fentanyl. I believe that is a correct statement.
>
> [AUSA:] I think that's correct.
>
> [Court:] The punishment levels for the quantities of fentanyl and heroin have been static…there's a plague of death in America going on because of the trafficking in heroin and fentanyl. And the punishments that federal law provides for the weights involved are thoroughly inadequate and are allowing this trafficking to build up and kill victims without an adequate federal deterrent….

[JA(51)] The court then imposed a sentence of 120 months. [JA(51, 53-59)] In its statement of reasons, the court provided:

> "The court varied upward based on the defendant's conduct and chronic history of drug trafficking and gun possession. The court also noted the guidelines did not adequately punish the drug weight involved in the offense."

Mr. Nixon timely appealed. The Fourth Circuit dismissed the appeal on the appeal waiver, without reaching the merits of Mr. Nixon's arguments

## SUMMARY OF ARGUMENT

Mr. Nixon respectfully asserts the Fourth Circuit erred in failing to address the merits of his arguments where they related to the appeal waiver in the plea agreement at issue. The sentencing court used the appeal waiver as the threshold consideration when imposing its statutory maximum sentence, and when comfortable it was insulated from further review based on the appeal waiver, violating Mr. Nixon's right to meaningful process; and, moreover, violating the tenants and directives of 18 U.S.C. § 3553(a) where the sentencing court is required by law to issue a reasonable sentence, not greater than necessary.

## MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The question whether the district court unconstitutionally denied Mr. Nixon's guaranteed right to due process, and whether his plea was knowing and voluntary where he suffered a miscarriage of justice based on the sentencing court's assertion that the sentence issued could only be reviewed for "plain error", was presented to the Fourth Circuit below. The Fourth Circuit dismissed the case on the same appeal waiver which the sentencing court used as the basis of issuing its upward departure to the statutory maximum sentence.

Thus, the federal claims were properly presented and reviewed below and it is appropriate for this high Court's consideration. See generally, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

## REASON FOR GRANTING THE WRIT

### I. MR. NIXON WAS DENIED DUE PROCESS WHERE A MISCARRIAGE OF JUSTICE OCCURRED AT SENTENCING CAUSED BY THE SENTENCING COURT'S OVERT CONSIDERATION OF AN APPEAL WAIVER BEFORE IMPOSING A STATUTORY MAXIMUM SENTENCE.

Review by an appellate court is *de novo* whether a defendant has waived his right to appeal. *United States v. Marin*, 961 f.2d 493, 496 (4th Cir. 1992). Knowing and voluntary appellate waivers are presumptively valid. *Id.* ("[T]his court has upheld the validity of a defendant's waiver of the statutory right to appeal a sentence when the waiver was knowingly and voluntarily made."); *United States v. Johnson*, 410 f.3d 137, 151 (4th Cir. 2005) ("Generally, [the Fourth Circuit] upholds the validity of appeal waivers."). For a waiver to be knowing and voluntary, the district court must specifically question the defendant concerning the appeal waiver provision of the plea agreement during the Rule 11 colloquy, and the record must indicate that the defendant understood the full significance of the waiver. *Marin*, 961 f.2d at 496.

However, a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the *whim* of the district court.*" Marin*, 961 F.2d at 496 (emphasis added). "[A]ppellate courts refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice.'" *Johnson*, 410 F.3d at 151 (quoting *United States v. Andis*, 333 F.3d 886, 891 (8th Cir.2003)); see also *United States v. Ware*, 623 F. App'x 119, 120 (4th Cir. 2015) ("We may decline to enforce a valid appeal waiver only where the sentencing court has violated a fundamental constitutional or statutory right. . . , or if enforcing the waiver would result in a miscarriage of justice.") (alterations, citations & internal quotation marks omitted). Despite this standard, the Fourth Circuit Court of Appeals gave no consideration to the asserted miscarriage of justice which occurred in this matter.

**A. *Knowing and Voluntary Waiver.***

Initially, the record is slim as to the Court's Rule 11 colloquy with Mr. Nixon and whether he clearly and knowingly waived the full breadth of his appeal rights. The court sites generally Mr. Nixon waived his right to trial, and his "right to appeal" but does not inquire if he understand this. The sentencing court did not detail the contours of the appellate waiver as set forth in the plea agreement—specifically, that Mr. Nixon was waiving whatever sentence was to be imposed, on any ground. It is respectfully submitted that a knowing and voluntary waiver of a

right is constrained by fundamental fairness of process and substance, and should not be subject or exposed to otherwise impermissible and unconstrained factors such as the existence and nature of the appeal waiver itself. This is addressed more fully below.

*1. Miscarriage of Justice.*

Many courts of appeals have similarly circumscribed the situations in which otherwise valid appeal waivers will be ignored to a "narrow class of claims." *United States v. Blick*, 408 F.3d 162, 171 (4th Cir. 2005) (citations omitted) (upholding appeal waiver when defendant's claims were clearly within the scope of the waiver); see also *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (limiting the miscarriage of justice exception to sentences based on impermissible factors such as race, sentences exceeding the statutory maximum, situations of ineffective assistance of counsel in connection with the waiver, or when the waiver is otherwise unlawful such that it seriously affects the fairness of judicial proceedings); *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir. 1997) (an appeal waiver "will not be enforced if a sentencing judge relied on impermissible facts (such as a defendant's race) or if the judge sentenced a defendant in excess of the statutory maximum sentence for the crime committed. But an improper application of the guidelines is not a reason to invalidate a knowing and voluntary waiver of appeal").

In the case at bar, the sentencing court premised its sentence on the appeal waiver—it was the threshold inquiry of the court before undergoing its variance analysis. This was a patent miscarriage of justice where a defendant's waiver of a statutory right to appeal is the lead factor in a court's analysis for an upward variance, and all its analysis to follow. The sentencing court opened its inquiry as to both the existence of the waiver, and the nature of the waiver, before addressing the government's motion for an upward variance and then conducting its own variance analysis. The record reflects that once the sentencing court was comfortable with the existence and nature of the waiver, sentencing Mr. Nixon to 120 months was a foregone conclusion. The sentencing court made the government's argument for a variance, finished the government's sentences in many respects, and then moved further to take judicial notice of Wilmington, North Carolina as a community under siege because of "people just like this defendant…"

The record in this case clearly establishes the court's determination to vary and to what extent to vary was conditioned on the existence and nature of the appeal waiver. The sentencing court sought assurances from the government that a sufficient waiver was in place. This is not a factor to be considered under 18 U.S.C. § 3553(a), and it is respectfully submitted to this Court as a bald affront to the "integrity or public reputation of judicial proceedings." *United States v. Hahn*,

359 F.3d 1315, 1327 (10th Cir. 2004). Whether the actual resulting sentence was reasonable or not (respectfully, it is submitted the sentence was not and far greater than necessary), the imposition of a sentence premised on whether the court felt sufficiently insulated from appellate review seriously affected the fundamental fairness of the proceedings where the sentencing court openly expressed that as a basis for the sentence. Both the appearance of impartiality and actual impartiality become more suspect to the observing public when the sentencing court ostensibly conditioned its sentence on whether or not it will be subject to appellate scrutiny.

Once the appeal waiver was evident to the sentencing court, the court did not entertain Mr. Nixon's objections to the PRS, but moved to the government's variance motion. During the government's argument for its upward departure/variance, the government proffered highly prejudicial evidence of prior bad acts that were not included in the PSR or even the government's motion for upward departure/variance. The court then took the reins of the government's variance motion, clarified it and expounded on it by taking judicial notice of its opinion of gangs, drugs and violence occurring in Wilmington, North Carolina. The court then, before allowing counsel for Mr. Nixon to speak, forecast a 120-month sentence. The record reflects the court then abridged defense counsel's argument, and sought further information from the Assistant United States Attorney as to Mr. Nixon's arrest and the status of a related case. The sentencing

court then supplemented the record for purposes of the court sponsored upward variance to 120 months and provided an additional consideration that heroin punishments have remained "static" and insufficient due to congressional inaction.

In sum, one of the narrow exceptions to blanket enforcement of appeal waivers is when a clearly impermissible consideration for sentencing, such as race, form at least a partial basis for the sentence imposed. In this case, the court's impermissible consideration was the appeal waiver itself, and the nature of the waiver. With this threshold consideration, it is reasonably apparent that the sentencing court felt free to impose a sentence that would otherwise be deemed substantively unreasonable as to Petitioner, Mr. Nixon.

## II. MR. NIXON WAS DENIED DUE PROCESS WHERE HIS SENTENCE WAS PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE RESULTING FROM THE SENTENCING COURT'S OVERT ASSERTED INSULATION FROM APPELLATE REVIEW.

Procedure is always substantive in the criminal justice system. Procedure plays heavily on the fundamental rights of an accused, their decision-making process and the context during which those decisions are made, and ultimately the decided course towards disposition of the case.

In sentencing a defendant, the court must first identify the applicable guideline range. "If [the Court] decides that an outside-Guidelines sentence is

warranted, [it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597 (2007). "The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be….an extraordinary reduction (increase) must by supported by extraordinary circumstances. *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006) ("[i]n reviewing a variance sentence, this court must consider—in light of the factors enumerated in § 3553(a) and any relevant guideline provisions—whether the district court acted reasonably with respect to (1) the imposition of a variance sentence and (2) the extent of the variance." *Id.* at 433-434. *United States v. Abu Ali*, 528 F.3d 210, 261 (4th Cir. 2008)("[W]hen determining whether the district court's proffered justification for imposing a non-guidelines sentence is sufficiently compelling to support the degree of the variance, common sense dictates that a major departure should be supported by a more significant justification than a minor one.") (internal citation and quotations omitted).

In this case, the threshold inquiry by the sentencing court of the parties—before considering any variance—was the potential review and level of scrutiny of any varied sentence it imposed. The sentencing court, after walking the

government through the government's variance argument, ultimately sponsored by the court, and taking its own judicial notice of its opinion of the gangs, drugs and violence sieging Wilmington, North Carolina, essentially imposed its sentence of 120 months. The sentencing court reached this sentence without hearing any argument from Mr. Nixon's counsel as to relevant 18 U.S.C. § 3553(a) as they pertained specifically to Mr. Nixon.

The sentencing court then gave nominal opportunity to defense counsel to present argument. What defense counsel was permitted to offer was summarily dismissed as unpersuasive without any consideration pursuant to 18 U.S.C. § 3553(a) factors. Specifically, Mr. Nixon had lodged an objection to being labeled a gang member (as further corroborated by his lack of any gang tattoos or related marking), his limited resources and poverty stricken upbringing, having no relationship with his father at any point in his life and no other father figure, the fact Mr. Nixon still faced approximately three years of state time yet to be served for his probation violations, and the evident considerations that Mr. Nixon was a low-level, street drug dealer. Moreover, the court failed to consider that the city it termed was under "siege" with gangs, drugs and violence—Wilmington, North Carolina—was the same city in which young Mr. Nixon was raised, was a product of, and from which he had not had opportunity to escape.

In *United States v. Howard*, 773 F.3d 519 (4th Cir. 2014), this Court looked at the factor of the age of the defendant. "We acknowledge that Howard would never be mistaken for a model citizen, but we cannot ignore that fact that most of his serious criminal convictions occurred when he was eighteen years of age or younger." *Id.* at 531. The *Howard* Court noted:

> The Supreme Court has recognized, in the sentencing context, the diminished culpability of juvenile offenders, given their lack of maturity, vulnerability to social pressures, and malleable identities. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012) (holding that a state sentencing scheme that mandated life without parole for offenders under the age of eighteen at the time the offense was committed violates the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (adhering to Roper's statements regarding the nature of juvenile offenders and holding that a life without parole sentence for a juvenile defendant who did not commit homicide violates the Eighth Amendment's prohibition on cruel and unusual punishment); [**30] *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (describing these three general differences between juveniles under eighteen and adults). "These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573).

*Howard*, at 532.

In *Howard*, this Court went on to state that the district court focused too much on the defendant's criminal history in its review for substantive reasonableness of a varied "life" sentence. "A review for substantive reasonableness, however, 'demands that we proceed beyond a formalistic review

of whether the district court recited and reviewed the § 3553(a) factors and ensure that the sentence caters to the *individual* circumstances of a defendant, yet retains a semblance of consistency with similarly situated defendants." *Id.* at 531 (citation omitted)(emphasis added).

As best summarized, the sentencing court considered the following points to support its upward variance as to Mr. Nixon:

- The presence of an appeal waiver;
- Mr. Nixon prior record and likelihood to recidivate (though his entire criminal record he was 16 to 18 years old, and 20 for the instant offense);
- Judicial notice of its opinion of general gangs, drugs and violence plaguing Wilmington, North Carolina; and
- The legislature's failure to effectively punish heroin and fentanyl crimes.

As argued above, the first consideration of the appeal waiver reflects such a manifest injustice it should throw the balance of the sentencing court's considerations out as tainting any further findings supporting the court's variance. Moreover, the balance of the Court's considerations, while reasonable in support of

some variance, do not support a 450% variance from the upper end of the stipulated guidelines.[1]

"When rendering a sentence, the district court 'must make an individualized assessment based on the facts presented.'" *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009) (quoting *Gall*, 552 U.S. at 50) (emphasis omitted). Accordingly, a sentencing court must apply the relevant § 3553(a) factors to the particular facts presented and must "state in open court" the particular reasons that support its chosen sentence. *Id.* (internal quotation marks omitted). The court's explanation need not be exhaustive; it must be "sufficient 'to satisfy the appellate court that [the district court] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decision making authority.'" *United States v. Boulware*, 604 F.3d 832, 837 (4th Cir. 2010) (quoting *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007)). Moreover, the explanation must be sufficient to allow for "meaningful appellate review" such that the appellate court need "not guess at the district court's rationale." *Carter*, 564 F.3d at 329-30 (internal quotation marks omitted).

While the appellate court is not left to "guess" the sentencing court's rational to impose a variance—primarily that this case involved heroin and was in the

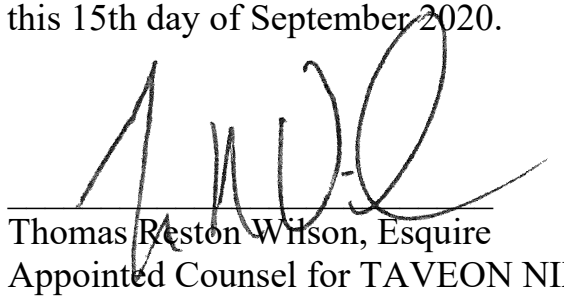
[1] The government provided a stipulation in the plea agreement of a lower than provable drug amount, and then mooted any meaningful sentencing considerations by the plea agreement in seeking an upward departure of 120-150 months just prior to sentencing.

Wilmington area—what a reviewing court is left to "guess" is what the extent of the variance would have been had there been no appeal waiver. In that unknown difference, as well as the sentencing court's failure to meaningfully consider any of Mr. Nixon's mitigating circumstances, it is respectfully submitted lies the procedural and substantive unreasonableness of Mr. Nixon's sentence.

## CONCLUSION

It is respectfully submitted that this Honorable Court issue its Writ in this matter and allow the parties time to more fully brief these issues before the court or that this matter is remanded to the Fourth Circuit for review on the merits.

Respectfully submitted, this 15th day of September 2020.



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