No. _____

IN THE

Supreme Court of the United States

LARRY LAMAR NANCE,
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

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

JACLYN L. TARLTON
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
jackie_tarlton@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Whether it is sufficient for a sentencing court to address the "central thesis" of a defendant's arguments in mitigation or whether, as a majority of circuits have held, it must address all material, non-frivolous arguments.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit, *United States* v. *Nance*, No. 18-4585 (opinion entered Apr. 21, 2020)

United States District Court for the Eastern District of North Carolina, *United States* v. *Nance*, No. 5:17-CR-404-FL-1 (judgment entered Aug. 14, 2019)

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Petitioner Larry Nance respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's order is reported at 957 F.3d 204. Pet. App. 1a. The District Court's judgment is available at 25a-33a.

JURISDICTION

The District Court entered final judgment on August 14, 2018. Pet. App. 25a-33a. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on April 21, 2020. Pet. App. 1a-24a. This Court entered an order on March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

INTRODUCTION

In order to impose a procedurally reasonable sentence, a sentencing court must conduct an individualized assessment of the facts and arguments presented and impose an appropriate sentence. It must also explain the sentence chosen. The court must analyze the statutory factors set forth in 18 U.S.C. § 3553(a) and consider sentencing arguments made by both parties.

A majority of circuits conclude that a sentencing court discharges this responsibility by considering all material, non-frivolous arguments. But the Fourth Circuit broke from that majority in concluding that addressing the "central thesis" of those arguments is enough.

A district court's failure to address each material, non-frivolous argument made at sentencing undermines the individualized assessment required of sentencing courts as well as the thorough adversarial testing required of them.

The petition should be granted.

STATEMENT

Mr. Nance Is Indicted And Pleads Guilty. Larry Nance was indicted on four counts related to drug and alcohol possession, CAJA11-CAJA13, and he ultimately pleaded guilty to counts one and three pursuant to a written plea agreement. CAJA104-CAJA105. Count one charged Mr. Nance with knowingly and intentionally possessing with the intent to distribute a quantity of cocaine, cocaine base, and heroin, in violation of 21 U.S.C. § 841(a)(1). CAJA11. And count three

charged him with knowingly using and carrying a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). CAJA12.

In his written plea agreement, Mr. Nance reserved the right to appeal a sentence "in excess of the applicable advisory Guideline range that is established at sentencing." CAJA102.

At arraignment, the Assistant United States Attorney proffered a factual basis for the guilty plea, stating that, on April 25, 2017, Fayetteville police responded to a noise complaint at a home. CAJA34. There were six cars in the yard, including Mr. Nance's 2013 Chevrolet Malibu. CAJA34. The officers smelled marijuana and informed the resident that they were going to "seize and freeze" the home so they could apply for a search warrant. CAJA34-CAJA35. Mr. Nance and others ran; he was ultimately found hiding in a nearby shed. CAJA35. Pursuant to a search warrant, the police found in the change tray of Mr. Nance's car sixteen stamped bindles (dosage units) of heroin, a bag containing approximately 3.11 grams of cocaine, 4.02 grams of crack cocaine, a digital scale, and a box of plastic bags. CAJA35; CAJA112.

Three days later, early in the morning, Fayetteville police officers responded to a trespassing call and found Mr. Nance parked in the driveway of his former girlfriend's home. CAJA35. An officer smelled marijuana. *Id.* Mr. Nance refused to roll down his window and drove slowly toward the backyard; he did not stop when officers told him to stop. *Id.* Another officer opened the front passenger door and saw a black handgun on the front passenger seat; the officer reached across to

turn the car's engine off. *Id.* The handgun was loaded, with one bullet in the chamber, and had been reported stolen three years prior. CAJA36. Officers also found twelve bindles of heroin in the driver's door handle. CAJA36. They bore the same stamp as the bindles seized three days before. *Id.* Officers also found 1.17 grams of marijuana in the driver's door handle, a blunt cigar filled with marijuana in the console, and $209. *Id.*

The Probation Office prepared a presentence report. CAJA109-CAJA125. It noted the parties' stipulation that the relevant drug weight is at least five kilograms but fewer than ten kilograms of marijuana equivalency. CAJA111; CAJA112. The Office calculated a criminal history category of V. CAJA116. Applying U.S.S.G. § 2D1.1 to count one, the Office applied a base offense level of twelve, less two levels for acceptance of responsibility, resulting in a total offense level of ten. CAJA121. That resulted in an advisory guideline range of twenty-one to twenty-seven months of imprisonment on count one. CAJA122. Applying U.S.S.G. § 2K2.4 to count three, the Office applied the statutorily mandated sentence of sixty months of imprisonment, to be served consecutively. CAJA121-CAJA122. Together, the total advisory guideline range was calculated to be eighty-one to eighty-seven months. CAJA122.

Mr. Nance Is Sentenced. The Government moved for an upward departure or variance. CAJA39-CAJA56. It argued that Mr. Nance's criminal history category "significantly underrepresents" the seriousness of his past criminal conduct; alternatively, it argued that a higher sentence was necessary to promote respect for

the law and to protect the public. CAJA39. Mr. Nance filed a sentencing memorandum seeking a guideline sentence of eighty-one to eighty-seven months of imprisonment, to be followed by sixty months of supervised release. CAJA57-CAJA65. At sentencing, the Government began by articulating its argument for an upward departure or variance, arguing that Mr. Nance should be sentenced in the range of 262-327 months of imprisonment, commensurate with a career-offender sentence, despite binding Fourth Circuit precedent that Mr. Nance did not have the necessary predicate convictions. CAJA69-CAJA72.

The Assistant United States Attorney argued that an upward departure was warranted pursuant to U.S.S.G. § 4A1.3. CAJA69. She argued that Mr. Nance has "recurring and problematic criminal conduct" and "many" of his criminal acts "were committed while other charges were pending." CAJA70. She noted that while Mr. Nance was in custody for a burglary, he received seventy-nine infractions and is "not demonstrating respect for the law." CAJA70. She argued that the criminal history score calculated in the presentence report does not "reflect the severity of his actions or the danger that he poses to the community." CAJA70.

She argued next for an upward departure pursuant to U.S.S.G. § 4B1.2, on the basis that Mr. Nance's burglary conviction encompassed a kidnapping component and thus constitutes a crime of violence. CAJA70.

In the alternative, she argued for an upward variance, asserting that Mr. Nance has "a substantial criminal history" and a "history of drug trafficking and drug offenses." CAJA71. She asserted that, in this case, Mr. Nance was "found with a

large amount of heroin a few days after being arrested on a heroin charge; she argued that the guidelines "are not structured to reflect the danger that this individual poses to the community." CAJA71.

Mr. Nance's counsel took issue with the Government's description of "a large amount of heroin," explaining that over the course of the two offense dates, he possessed "less than one gram" of heroin, which is not reflective of a "large-scale drug dealer." CAJA72. She noted that U.S.S.G. § 4A1.3 does not permit consideration of a prior arrest record alone for purposes of an upward departure. CAJA73. And she noted that the kidnapping charge referenced by the Government was dismissed. CAJA73.

Mr. Nance's counsel argued for a guideline sentence, explaining that his most recent violent crime occurred thirteen years ago, when he was twenty years old; he is now thirty-three. CAJA74. She noted neurological research reflecting that the frontal lobe, which is responsible for impulse control, is not fully formed until age twenty-five. CAJA74.

She also noted that Mr. Nance has never recidivated after incarceration with a violent crime. CAJA74. He was not incarcerated until 2006 and was released in 2013. CAJA74. Since then, his convictions have been for possession offenses only. CAJA74. Even in this case, there was no evidence that Mr. Nance reached for or attempted to use the gun he was convicted of possessing. CAJA75. She argued that this pattern shows Mr. Nance can be rehabilitated. CAJA75.

She reflected on her own experience teaching middle school in Newark, New Jersey, where Mr. Nance grew up, noting that her twelve-year-old students explained that drug dealers would begin by asking them for favors, like picking up a bag of chips for money, which would turn into selling drugs: "And they took the money because they needed it." CAJA76.

The court inquired about paragraph thirty-three of the presentence report, noting a breaking and entering charge from January 2017 that was dismissed because Mr. Nance was indicted in this case. CAJA77. Mr. Nance's counsel explained that there is no evidence that a weapon or any physical violence was used in that incident. CAJA77. Moreover, the alleged victim was the mother of Mr. Nance's child and the incident arose from a time when he went to her house to try to see his son and she did not want him to. CAJA77.

The court also asked about paragraph thirty-four of the presentence report, in which Mr. Nance was charged with assault on a female. CAJA78. The charge was not pursued because the witness would not make herself available, and Mr. Nance's counsel responded that a charge (in the absence of a conviction) may not be considered in imposing an upward departure for inadequacy of criminal history. CAJA78. She reiterated the lack of evidence that Mr. Nance used any physical violence or used any guns after his incarceration in the Department of Corrections. CAJA78-CAJA79. She noted this was "some evidence of maturity . . . some evidence of ability to change." CAJA79.

Finally, she noted that a seven-year sentence, one at the top of the advisory guideline range, followed by sixty months of supervised release, would mean that Mr. Nance would be under the auspices of federal supervision and control for a total of twelve years, taking him to his forty-fifth birthday. CAJA79. She argued that such a sentence would be sufficient, but not greater than necessary. *Id.*

She explained that Mr. Nance's greatest need is for "structure" and a "support system," which he has never really had. CAJA79. She noted that he was in an apartment for one month before he was arrested for this case and, prior to that, he was homeless. CAJA79. He spent the vast majority of his twenties in prison and had no real structure in his life growing up. CAJA79. She noted that he needs "real drug treatment," needs to get his GED, and needs "someone who can direct him where to get a job and put him in touch with a temp agency that can help him get employment and keep employment," help that a federal probation officer could provide. CAJA80.

The court noted that Mr. Nance had sustained seventy-nine infractions in the North Carolina Department of Corrections and asked what had changed since then. CAJA80-CAJA81. Counsel for Mr. Nance replied that, for the first time with this arrest, Mr. Nance has been away from his child—his two-year-old son—and that this "time away from him has made Mr. Nance realize that there is something to live for other than what he has previously had which is not a lot." CAJA81.

The court took a recess to ask the probation officer to report on how Mr. Nance has conducted himself during his pretrial detention. The officer returned with

information about his conduct at Pamlico Jail, which the District Court sua sponte entered into the record. It reflected that, on July 1, 2018, an officer doing security rounds filed a jail incident report alleging that Mr. Nance was shaking his genitals at her. CAJA126. On July 12, an officer filed a report alleging that Mr. Nance failed to put on a shirt in the day room after he was instructed to do so. CAJA127. An officer reported that he made "verbal threats" and "began to kick his cell door violently." CAJA128. Mr. Nance was placed on lockdown for each of these incidents. CAJA126; CAJA128.

Mr. Nance spoke next, apologizing and explaining that he just spent the last seven and a half years in prison, did not have a job when he went in, and could not get one when he got out. CAJA85. He turned to selling drugs because he "gave up"; he "grew up around drugs, and that's all I knew." CAJA85. During his present incarceration, though, he realized "it's not just about me; it's for my son. It's not fair for him to suffer because of the things I chose to do after I went to prison." CAJA85. He explained that he "promised myself I'd never been involved in any robbery or kidnapping or be around people who did things like that again, and I haven't been." He cited this as proof he "can change my lifestyle." He explained his commitment to doing that going forward: "[W]hen I get out, I'm going to, not for me, but for my son." CAJA85. He explained his intent to drive a commercial truck upon his release. CAJA85.

The District Court offered its view that a guideline sentence does not "take[] into consideration fully" the extent of Mr. Nance's "criminal history, the likelihood of

recidivism, the dangerousness of you." CAJA85-CAJA86. The court departed upward to the top end of criminal history category VI, offense level seventeen, imposing a sentence of sixty-three months on the first count, followed by sixty months on the second count, to be served consecutively, for a total term of 123 months of imprisonment, to be followed by three years of supervised release on count one and five years of supervised release on count three, to be run concurrently. CAJA86. The court recommended the most intensive substance abuse treatment, mental health treatment, and educational and vocational training. CAJA87. And it imposed a $200 special assessment. CAJA88.

In the alternative, the District Court stated that it would impose the same sentence as an upward variant sentence if it erred in imposing an upward departure. CAJA86. In its written statement of reasons, the court did not mark any of the boxes or complete any of the sections related to an upward departure, CAJA130, and reflected only its upward variance in response to the Government's motion. CAJA131. It checked boxes indicating its belief the sentence was necessary to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence, and to protect the public from further crimes of the defendant. CAJA131.

Mr. Nance appealed, arguing that the District Court's sentence was procedurally unreasonable because it varied upward without providing adequate reasons for its sentence, without proceeding incrementally through the sentencing table, and may have improperly relied on bare arrest records. He also argued that the District

Court's 123-month sentence was substantively unreasonable when it varied upward by three years—forty-one percent—above the top of the advisory guideline range in a possession case where Mr. Nance has never recidivated after incarceration with use of a firearm or physical violence and most of his prior convictions were sustained when he was a teenager.

A panel of the Fourth Circuit affirmed the sentence in a published opinion. It found the sentence procedurally reasonable because, even though the court failed to address some of Mr. Nance's "specific claims," in the view of the Court of Appeals, it did "fully address Nance's central thesis—that his purportedly de-escalating criminal history made a Guidelines sentence appropriate." Pet. App. 16a. The court acknowledged that the District Court did not address "the fact that the instant § 924(c) offense—carrying a firearm in furtherance of a drug-trafficking offense—did not involve actual use of the gun." Pet. App. 16a.

The panel also affirmed the sentence as substantively reasonable even though the District Court put significant weight on his prior violent offenses, which date back to before he turned twenty-five years old. Pet. App. 18a-19a. Chief Judge Gregory concurred separately "to emphasize the significance of Nance's argument regarding delayed brain development in the context of a departure based on an extensive youthful criminal history." Pet. App. 23a-24a.

This petition followed.

REASONS FOR GRANTING THE PETITION

THE FOURTH CIRCUIT'S DECISION IS WRONG AND ITS CONCLUSION THAT ONLY THE "CENTRAL THESIS" OF A

DEFENDANT'S ARGUMENTS IN MITIGATION MUST BE CONSIDERED GOES AGAINST THE MAJORITY OF CIRCUITS

To impose a sentence that is procedurally reasonable, a district court is bound to conduct an "individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 50 (2007). The court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* As part of that adequate explanation and individualized assessment, the district court is bound to address every "material, non-frivolous" argument made in mitigation; it may not simply address the "central thesis" of those arguments. This procedure ensures that each federal sentence is subject to the "thorough adversarial testing contemplated by federal sentencing procedure." *Rita* v. *United States*, 551 U.S. 338, 351 (2007).

The Fourth Circuit's conclusion that addressing the "central thesis" is enough creates a split with other courts of appeals. A majority of circuits require district courts to address each of a defendant's material, nonfrivolous arguments for a sentence below the advisory guideline range. *E.g.*, *United States* v. *Poulin*, 745 F.3d 796, 801 (7th Cir. 2014) (sentencing judge must "consider" a nonfrivolous sentencing argument and "provide reasons explaining his acceptance or rejection of it"); *United States* v. *Corsey*, 723 F.3d 366, 376-377 (2d Cir. 2013) ("Trujillo presented nonfrivolous arguments, and the district court did not at all explain the reasons for rejecting them; this was legal error."); *United States* v. *Lente*, 647 F.3d 1021 (10th Cir. 2011) (vacating and remanding for resentencing where district court failed to address the cases and sentencing data cited by Ms. Lente to support her material,

non-frivolous argument about the need to avoid unwarranted sentencing disparities); *United States* v. *Peters*, 512 F.3d 787, 788 (6th Cir. 2008) (reversing because "the District Court did not address the defendant's 'time-served' argument").

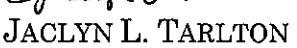
This requirement assures that *Gall*'s mandate of an "individualized assessment" at sentencing and *Rita's* mandate of "thorough adversarial testing" through sentencing are realized.

The Fourth Circuit's decision is wrong and creates a circuit split. Mr. Nance made specific, material, non-frivolous arguments at sentencing that the Fourth Circuit acknowledged the District Court did not specifically address. This issue has been pressed and passed upon at each level of review and is outcome-determinative for Mr. Nance; if the District Court procedurally erred in failing to address his material, non-frivolous arguments, he is entitled to a new sentencing hearing. This Court's review is needed to maintain uniformity among the courts of appeals on this critical issue of federal sentencing; its nationwide importance cannot meaningfully be disputed where 76,538 defendants were sentenced in federal court in fiscal year 2019. United States Sentencing Commission, 2019 Quarterly Report, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2019_Quarterly_Report_Final.pdf (last visited Sept. 18, 2020).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

JACLYN L. TARLTON
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
jackie_tarlton@fd.org

SEPTEMBER 2020

Counsel for Petitioner