SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent,

-against-

NAQUAN REYES,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

By:

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ISSUES PRESENTED

I. Whether the Court of Appeals erred in rejecting Reyes's contention that the sentence was procedurally unreasonable based on the district court's failure to comply with 18 USC § 3553(a)?

II. Whether the Court of Appeals erred in rejecting Reyes's contention that the sentence was procedurally unreasonable based on the district court's failure to comply with 18 USC § 3553(c)?

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INTRODUCTION

The undersigned is counsel to petitioner Naquan Reyes, appointed by order entered December 21, 2018, by the United States Court of Appeals for the Second Circuit, pursuant to the Criminal Justice Act, under docket # 18-3695. Reyes hereby petitions the Supreme Court of the United States for a writ of *certiorari* to the Second Circuit, with respect to its summary order dated July 8, 2020, reported at *United States v. Naquan Reyes*, 819 Fed. App'x 41 (2d Cir. 2020) (Appendix hereto, Exhibit A), which affirmed a judgment of conviction and sentence, including imprisonment for life, entered against petitioner in the United States District Court for the Eastern District of New York on November 8, 2018. The foregoing table of contents includes a list of the documents that make up the appendix attached hereto.

COMPLIANCE WITH CERTAIN SUPREME COURT RULES

Rule 14.1(b): The caption of this case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed. The *nisi prius* court was the United States District Court for the Eastern District of New York, where the action was maintained under the caption *United States v. Naquan Reyes*, Docket # 14-cr-227. A judgment of conviction and sentence entered there August 19, 2016. By summary order of the United States Court of Appeals for the Second Circuit, entered January 2, 2018, under *United States v. Naquan Reyes,* Docket # 16-2936, the judgment was reversed and the matter remanded for resentencing. The district entered a second judgment of conviction and sentence on November 8, 2018 under the original caption and docket number. The Second Circuit affirmed by summary order

entered July 8, 2020 under the caption *United States v. Naquan Reyes,* Docket # 18-3695.

Rule 14.1(d): The summary order entered in the first appeal on the case is reported at *United States v. Naquan Reyes*, 718 F. App'x 56 (2d Cir. 2018) The summary order entered in the second appeal of the case, the review of which we now seek, is reported at *United States v. Naquan Reyes*, 819 Fed. App'x 41 (2d Cir. 2020).

Rule 14.1(e): The date of the judgment about which we seek review is July 8, 2020. Section 1254(1) of Title 28 of the United States Code confers jurisdiction on this Court to review the order for which we seek review on a writ of certiorari.

Rule 14.1(f): The provisions of law involved in this case are sections 3553(a) and 3553(c) of Title 18 of the United States Code. The provisions of the statutes are set out in the Appendix at Exhibit D.

Rule 14.1(g): Jurisdiction in the Court of Appeals for the order for which we seek a writ of certiorari vested under 28 USC § 1291.

STATEMENT OF FACTS

The case commenced April 16, 2014 in the United States District Court for the Eastern District of New York. On February 2, 2015, Reyes pled guilty to Bank Fraud Conspiracy (18 USC § 1349) ("Count One") and to Obstruction of Justice Murder [18 USC § 1512(a)(1)(C)] [second-degree murder under 18 USC § 1111(a)] ("Count Seven"). At the plea hearing, Reyes admits that while working at banks in the County of Kings (Brooklyn) and County of Queens, State of New York, 2008-2014, he knowingly provided fraudulent checks, generated by a co-conspirator, to co-

conspirator account holders, who deposited them and then withdrew funds that posted before the bank realized the fraud, which they shared with Reyes. Reyes admits further that July 22-24, 2010, Nicole Thompson, one of the co-conspirators, was murdered, an act knowingly paid for by he and co-conspirators in the fraud, after they learned that Thompson was cooperating with authorities investigating the fraud.

Conviction under Count One subjected Reyes to sentencing to any term "not more than 30 years". 18 USC §§ 1344, 1349. Conviction under Count Seven subjected Reyes to a sentence of "any term of years or for life". 18 USC § USC § 1111(b), 1512(a)(3)(A). The parties entered into a plea agreement on the same date as the plea proceeding: Reyes waives his right to appeal any sentence of 360 months or less, and the parties stipulate that his Guidelines' sentencing range is 360 months to life.

The Pre-sentence report ("PSR"), filed July 28, 2016, states as to the offender: Reyes is 30 years old, an African-American male, raised in Brooklyn. Except for a bank fraud arrest, dismissed in 2008, this arrest is his first. And as to the offense the PSR states: Nicole Thompson was arrested for check fraud in Bronx County, New York, on July 16, 2010. Promising continued cooperation with law enforcement, Thompson identified Reyes as a co-conspirator. Her body was recovered from a dumpster in Landover, Maryland on or about July 24, 2020. Investigation showed that she's been strangled to death in Brooklyn on July 22, 2010.

The district court (Hon. Sandra L. Townes) received evidence at sentencing on July 28, 2016, and then relied on Reyes's pre-arrest recorded admission to find that

he'd just testified falsely that he was not present at the murder. (The government claimed has always claimed only that he was nearby, and Judge Townes did not find that he strangled Thompson). The court found that the conduct warranted withholding the "additional" level credit for acceptance of responsibility contemplated by USSG § 3E1.1(b), and awarding only the two levels credit contemplated by § 3E1.1(a). The finding is the difference between the parties' stipulation that Reyes's Guidelines range is 360 months-to-life, and the court's determination that his Guidelines' range is life imprisonment. The court imposed sentence: imprisonment for 360 months on Count One, and imprisonment for life on Count Seven.

By summary order dated January 2, 2018, *United States v. Naquan Reyes*, 718 F. App'x 56 (2d Cir. 2018), the United States Court of Appeals for the Second Circuit found error in the sentencing court's conclusion that the record permitted denial of the "additional" credit for acceptance of responsibility [USSG § 3E1.1(b)], while also awarding two levels credit [USSG 3E1.1(a)], vacated the sentence, and remanded for resentencing.

Following remand, sentence was imposed October 24, 2018 (Hon. Sterling Johnson, Jr).[1] (The sentencing transcript is Exhibit B to the Appendix attached hereto). Judge Johnson awarded Reyes three-levels for acceptance of responsibility, and thus found that Reyes's Guidelines' range is 360 months to life. Judge Johnson imposed the same sentence as Judge Townes did, imprisonment for 360 months and life, respectively, on Counts One and Seven. Neither the government nor the Second

[1] Judge Townes passed away February 8, 2018. https://www.fjc.gov/history/judges/townes-sandra-l.

Circuit disagreed with us that only the following brief excerpt might conceivably constitute compliance with 18 USC §§ 3553(a) and 3553(c) at sentencing (and it doesn't):

THE COURT: It's agreed this is a particularly heinous crime. It wasn't a knife. It wasn't a gun. It was personal, the deceased was strangled.

*****

3553(a) says that I must impose a sentence that is sufficient but not greater than necessary to comply with the purposes of the statute. I must take into the consideration the nature and circumstances of the offense. The offense, as I said before, was personal and horrendous. I must take into consideration the seriousness to promote a respect for the law.

I listened to the argument of counsel. I read the submissions and I think that a sentence that is sufficient but not greater than necessary is the following.

I'm going to sentence the defendant to life in prison. I'm going to sentence to, how many counts is it?

[AUSA]: Two counts....

THE COURT: $100 special assessment on each count. And there will be no supervised release – make it five years supervised release.

[AUSA]: Yes, Judge. I assume you're imposing life on the obstruction count, and 30 years which is the statutory maximum?

THE COURT: Same thing that Judge Townes said....

(Appendix hereto, Exhibit B, pp. 17-19) The judgment of conviction and sentence, entered November 8, 2020, is attached as Exhibit C to the Appendix hereto.

Reyes appealed. The undersigned's first association with the case was upon the December 21, 2018 entry by the Second Circuit of an order appointing him as CJA counsel. (Appendix hereto, Exhibit F) We urged in our brief that the sentence was procedurally unreasonable because the above-quoted excerpt did not comply with either 18 USC § 3553(a) or 18 USC § 3553(c). As Reyes hadn't lodged these challenges at sentencing, we acknowledged that review is for plain error. The Second Circuit affirmed in a summary order entered July 8, 2020 (Appendix hereto, Exhibit A), reported at *United States v. Naquan Reyes*, 819 Fed. App'x 41 (2d Cir. 2020). The mandate entered July 29, 2020 (Appendix hereto, Exhibit C) This petition asks this Court to review that judgment.[2]

Supreme Court Rule 10

The petition should be granted in part because the Second Circuit's order of affirmance sanctioned such a great departure from the accepted and usual course of sentencing as conducted by the district court, that an exercise by this court of its supervisory power is warranted. Moreover, courts of appeals and district courts are everyday confronted with the issues present by the petition. (Indeed, these sentencing issues are about as bottom-line as one could conjure up.) And, as we show, this Court's standards on these issues are intangible and warrant teeth. Also, this

[2] In its brief at the Second Circuit, the government argued that the "Statement of Reasons" form, filed by the district court under seal post-sentencing, acts to supplement the sentencing transcript, and to render the sentencing compliant with § 3533(c). We replied that the Statement contained misstatements of material fact, and omitted material facts. The Second Circuit did not rely on the Statement of Reasons in finding the sentence not procedurally unreasonable.

record suits such purpose perfectly, given (i) the utter absence of reasoning that the district court set out at sentencing, and (ii) the imposition of a non-mandatory life sentence, where the Guidelines' range too allowed a sentence less other than imprisonment for life.

Section 3553(a) of Title 18 of the United States Code, lists the factors that a district court must consider "in determining the particular sentence to be imposed", and directs that the sentence imposed should be "not greater than necessary" to comply with the purposes of sentencing (§ 3553(a) is set out in its entirety at Appendix hereto, Exhibit D, pp. 1-2).

Section 3553(c) of Title 18, United States Code, provides in pertinent part:

> "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;"

(emphasis added). (§ 3553(c) is set out in its entirety at Appendix hereto, Exhibit D, p. 3)

A district court's failure to consider the § 3553(a) factors, and its failure to adequately explain the reasons for its chosen sentence under § 3553(c), each constitute "significant procedural error" warranting resentencing anew. *Gall v. United States*, 552 U.S. 38, 51 (2007).

On their face, § 3553(a) and 3553(c) show substantial overlap: the sentencing court is required by the former to base its sentence on certain factors, and by the

latter to articulate the reasons for the sentence. Appellate decisions show that, as here, appellants urging error as to one, invariably urge error as to the other.

In *Rita v. United States*, 551 U.S. 338 (2007), the Court was asked to determine whether the district court's complied with § 3553(c)'s requirement that it state its reasons for imposing the particular sentence. This Court observed that the requirement:

> reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.
>
> That said, we cannot read the statute (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances....
>
> In the [sentencing] context, a statement of reasons is important. The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority. Nonetheless, when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation.
>
> Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical.

(*Id* at 356-67).

On its face the "depends on the circumstances test" must be the amorphous legal standard ever. (Lawyers chuckle when they hear lawyers, themselves included, respond to a request for advice with "it depends" -- as they are always wont to do). It offers no guidance. One attempt the passage makes to provide some guidance is the

"principle" that a district court is empowered a deem a case "typical" – which warrants less discussion. *See also Chavez-Mesa v. United States,* 138 S. Ct 1959, 1964 (2018) ("[w]hen a judge applies a sentence within the Guidelines range, he or she often does not need to provide a lengthy explanation").

A decision by this court here would serve to illustrate that no case where a non-mandatory sentence of life is imposed (and the Guidelines range also authorizes a sentence an immeasurably lower sentence as 360 months inarguably is) may be deemed "typical" for purposes of assessing the district court's compliance with §§ 3553(a) and 3553(c). The Court should grant the instant petition.

ARGUMENT

It appears that not unlike Rear Admiral Farragut at the Battle of Mobile Bay (1864), who said, basically, "damn the torpedoes ... full speed ahead", the district court felt that deference to sentencing proprieties and the requirements of Congress was unnecessary, as the court forged forward inexorably to ensure that Reyes received the same life sentence imposed previously by his Honor's colleague.[3]

As to proprieties, the district court stated the bases in the record for its sentence: "I listened to the argument of counsel. I read the submissions". But the conspicuous omissions in this list of two was not the only matter of record to which we pointed below to argue that, upon imposing sentence, Judge Johnson had not read (i) the PSR, (ii) the extended sentencing proceeding before Judge Townes (where the

[3] As noted, though, Judge Townes assumed that Reyes's Guidelines' range was life imprisonment, whereas Judge Johnson contemplated a Guidelines' range of 360 months-to-life.

court received evidence, including Reyes's testimony, and made extensive findings of fact), (iii) the Second Circuit's 2018 summary order vacating the sentence imposed by Judge Townes, and (iv) the parties' written submissions (notwithstanding the court's assertion to the contrary as to the parties' written submission). To be sure, the law does not require a sentencing court to have read any of it, but such proprieties should and do count, a lot, especially when a sentence of life is imposed and available sentences range from zero-to-life.

As to the requirement that the sentencing court consider the sentencing factors listed at 18 USC § 3553(a), the district court identified only (i) "the nature and circumstances of the offense", and (ii) "the seriousness to promote a respect for the law". The court thus cites only two of seven factors, reciting them only, and none of the mitigating ones. And as to the second factor cited by the court, "the seriousness to promote a respect for the law", it is misstatement of the statute, an amalgamation of two factors: the need for the imposed sentence to "reflect the seriousness of the offense" and to "promote respect for the law".

As to the requirements of § 3553(c) and (c)(1) that the sentencing court state (i) the reason for the imposition of the "particular sentence", and (ii) the reason why it chose the "particular point" within a defendant's Guidelines' range where the range exceeds 24 months, respectively, the district court never addressed the latter. As to the former, the sum and substance of all of Judge Johnson's statement of reasons is: (i) murder by strangulation is worse than murder by knife or gun because it is less impersonal; (i) disciplinary action against Reyes in prison undermines his claims of

rehabilitation; (iii) the offense was "personal" "heinous" and "horrendous", and (iv) "the seriousness to promote respect for the law".

Once these considerations are broken down, the Court's assertion that murder by strangulation is more "heinous" than murder by gun or knife can't sit well with loved ones of those murdered as innocent bystanders to a shooting, or as victims of mass shootings, or those murdered on September 11, 2001. Moreover, while Judge Johnson may be accurate that murder by strangulation is more "personal" than the murder of a stranger from far away, the "personal" nature of a murder, as Judge Johnson considered that term, is not a cognizable § 3553(a) factor.

Moreover, Reyes's sentencing memorandum set out many mitigating factors weighing against imposition of the maximum sentence: (i) his Guidelines range is based on double-counting -- an obstruction of justice enhancement stacked onto an obstruction of justice conviction, (ii) his extraordinary efforts at rehabilitation (including 53 certificates awarded in custody), (iii) the effect of substantial trauma on his development, including lead poisoning as a child, (iv) the low levels of recidivism associated with persons released from prison at near-age 60 as Reyes would be if the Court imposes a sentence of 360 months, and (v) to avoid disparity in sentencing, pointing to a United States Sentencing Commission study showing that the "medium sentence imposed nationwide for a conviction of murder" is a term of imprisonment of 277 months. But the district court addressed only one, the claim of rehabilitation, pointing to four alleged minor prison infractions, three that pre-dated sentencing by Judge Townes, with Reyes challenging the accuracy of the fourth. The district court's

failure to address other mitigating circumstances contributes to making this record scanty, as does the one factor addressed: as counsel stated, she had no way to challenge the accuracy of the allegations regarding the incidents. .

The district court's naked references here to two of the § 3553(a)'s subdivisions do not amount to "reasons" for the sentence as § 3553(c) requires, especially in light of the severity of the life sentence imposed. Nor do such comments, with Reyes's Guidelines sentencing range set at 360 months to life, satisfy the additional requirement under subdivision (c)(1) that the Court provide the "reason" for choosing the "point" at the top in the range.

As *Rita* shows, where the district court has discretion as to what sentence to impose, the length and breadth of its stated reasons for the sentence imposed must be directly proportional to the severity of the sentence. It follows that no discretionary sentence requires a greater explanation than one of imprisonment for life.

The meagerness of the Judge Johnson's statement of reasons renders this sentence unamendable to appellate review and, similarly, leaves the public guessing as to why his Honor determined that the maximum sentence alone is "not greater than necessary" to meet the purposes of sentencing.

CONCLUSION

For these reasons, and for reasons that this Court may deem just and proper, the petition for a writ of certiorari should be granted.

Dated: October 5, 2020
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Respectfully submitted,

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