No.

IN THE

SUPREME COURT OF THE UNITED STATES

ADAM BOGEMA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

VERNA WEFALD
65 North Raymond Avenue, Suite 320
Pasadena, California 91103
Telephone: 626-577-2658
Facsimile: 626-685-2562
Email: verna@vernawefald.com

Counsel of Record

QUESTION PRESENTED

Whether this Court should provide some guidance to the appellate courts on the proper evaluation of a within guidelines sentence vis-a-vis 18 U.S.C. § 3553?

RELATED PROCEEDINGS

United States District Court

United States v. Adam Bogema, CR-16-451-JMS (D. Hawaii).

Ninth Circuit Court of Appeals

United States v. Adam Bogema, Ninth Circuit No. 18-10227

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ADAM BOGEMA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner Adam Bogema respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on June 8, 2020. The decision is unpublished.

OPINION BELOW

On June 8, 2020, the Court of Appeals entered its decision affirming petitioner's 300 months sentence for trafficking in methamphematine. (Appendix A [memorandum decision].) No petition for rehearing was filed.

JURISDICTION

On June 8, 2020, the Court of Appeals affirmed Petitioner's sentence. (Appendix B.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on November 5, 2020. Order of March 19, 2020. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553 (Imposition of a sentence) (pertinent part):

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
....

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct

STATEMENT OF THE CASE

A. Introduction

Petitioner pled guilty to trafficking in methamphetamine in violation of 21 U.S.C. §§ 841 and 846. The offense level was 35 and the criminal history category was VI. The guidelines were 292 to 365 months. The district court imposed a sentence in the mid-range of 300 months. Because there was no appeal waiver, Petitioner argued that even though the sentence was within the guidelines it was substantatively unreasonable for three reasons: (1) Petitioner endured a lifelong struggle with mental illness; (2) there was unwarranted disparity with codefendant Agustin; and (3) the court relied on evidence that the government conceded it could not prove. The Ninth Circuit affirmed the sentence in a short memorandum decision that held the sentence not substantively unreasonable. This petition asks this Court to set down some guidelines for the circuit courts to follow in

determining whether a within guidelines sentence is nevertheless substantively unreasonable under § 3553.

B. Codefendant Agustin Was Involved in Assaults, Robberies, and Firearms, in Addition to Drugs

Petitioner was involved in a drug conspiracy with several other people. The lead defendant was Justin Agustin. The investigation of this case began when a cooperating source (CS) reported that Agustin was a multi-pound distributor of narcotics on Oahu. From September to November 2015, the CS conducted a number of monitored transactions with Agustin totaling 362.342 grams of "ice" and 54.124 grams of methamphetamine. (PSR ¶¶ 15,16.)[1] On wiretaps Agustin was overheard discussing assaults, robberies, and obtaining guns. When a search warrant was served at Agustin's residence investigators found a Glock handgun; 1 magazine; miscellaneous bullets; handcuffs; a black vest; small plastic bags containing suspected cocaine and methamphetamine; 2 bags containing military equipment; 2 badges; and a baton. (PSR ¶ 31.)

[1] "PSR" stands for Presentence Report. "ER" stands for Excerpts of Record.

When Agustin was arrested he "immediately cooperated." (PSR ¶ 31.) There was never any evidence presented that Agustin's cooperation was beneficial.

C. Posting of Discovery on Facebook

In the first PSR, Petitioner's criminal history category was VI (22 points). (CR 106, PSR ¶ 115.) The PSR calculated the base offense level as 34 for the amount of drugs. (CR 206, ¶ 45.) It added 4 points for role in the offense and another 2 for obstruction of justice. (¶¶ 48, 49.)

The obstruction of justice allegation derived from a Facebook posting of Petitioner's discovery materials. The discovery contained the proffers of codefendants Agustin and Tan who were cooperating. Anonymous informants asserted that Petitioner had offered a reward for anyone who assaulted Agustin in the jail. This later turned out not to be true. At the government's request, Facebook removed the discovery posting. (PSR ¶ 36.)

In his objections to the PSR, Petitioner disputed, inter alia, the obstruction of justice allegation and requested an evidentiary hearing. (CR 238, 2 Sealed ER 239-257.) Defense counsel showed that the discovery – which was not subject to any protective order – was posted in its entirety (over 2,000 pages) by Petitioner's family under the title "Free Adam Bogema" solely to show the disparity in his treatment. There was nothing in the

discovery to indicate it was "confidential" or that Petitioner had been told the materials were confidential. (2 Sealed ER 245.) There was no evidence that the Facebook posting was intended to bring harm to any codefendant, or even to threaten them. (CR 238, 2 Sealed ER 244.) Evidence indicated that Agustin was an aggressor in the jail.

The government ultimately stipulated that it could not prove obstruction of justice, particularly in regard to any assault on codefendant Agustin. Agustin was "culpable to a degree for the assault ...." (2 sealed ER 175.) The parties further stipulated that Petitioner should be credited with 3 points for acceptance of responsibility; that the total offense level was 35, with a guideline range of 292 to 365 months; and that the criminal history category was VI. (2 sealed ER 175.) The stipulation further required Petitioner to withdraw his other objections, but he would be free to argue that he should be sentenced below the guideline range pursuant to 18 U.S.C. § 3553(a). (2 sealed ER 176.) The court accepted the stipulation. (1 ER 20.)

D. Petitioner's Lifelong Mental Illness is the Driving Force Behind his Drug Offenses

Petitioner was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and severe chronic asthma as a small child, requiring prescription medication. If he went off the medication because of the side

effects, he would experience anxiety and agoraphobia. These medications predisposed him to stimulant abuse. He turned to drugs as a means of self-medicating as he grew older. (PSR ¶¶ 86, 92.)

In addition to ADHD, Petitioner was diagnosed at a young age with bipolar disorder and schizophrenia for which he was prescribed powerful anti-psychotic medicine such as Zyprexa, Geodon, Lithium, and Zoloft. (PSR ¶¶ 96-97.) He began self-medicating with methamphetamine at age 15, which led to his struggle with substance abuse. While he has availed himself of mental health and drug counseling from time to time, thus far it has not been successful. (PSR ¶¶ 97-101.)

Petitioner was close to his family, but his childhood was chaotic. He witnessed his siblings chasing each other with knives and one of them stabbed him. His father was both an alcoholic and a methamphetamine addict. His father was also convicted of stalking his mother and the parents eventually divorced. His brother died of congestive heart failure at only 25 years of age. (PSR ¶¶ 83-887.)

Petitioner has three children. He is close to his daughters but has not seen his son since 2004, as the child's grandparents would not allow any contact. (PSR ¶¶ 88-90.) His mother, sister, daughter, and ex-girlfriend

all wrote supporting letters, emphasizing that he had not been able to get proper treatment for his drug addiction.

E. The Sentence

Pursuant to § 3553, defense counsel requested a sentence of 188 months because it would create unwarranted disparity:

- Codefendant Agustin was involved in the drug trade for 70 weeks while Petitioner was only involved for 7 weeks.
- Agustin made threatening phone calls and attempted to obtain guns for himself and codefendant Tan, while Petitioner did not. Petitioner did not promote violence while selling drugs.
- Wiretaps revealed that Agustin referred to people working for him as "my boys" who would commit violent crimes. There was no such evidence about Petitioner.
- Unlike Petitioner, neither Agustin nor Tan had a history of mental illness.
- A four point increase for role in the offense should be reserved for cartels and large scale organizations.

(CR 242, 1 ER 58-72.)

The final PSR removed the obstruction of justice adjustment. (CR 263, PSR ¶ 49.) It calculated the guidelines as 292 to 365 months for a total offense level of 35, and recommended a sentence of 360 months. (PSR at 45.)

At the sentencing hearing, the court understood that the government could not prove the allegation by a preponderance of evidence, but it believed that the PSR should keep the first two sentences which said that there was a Facebook account titled "Free Adam Bogema" on which investigators discovered confidential discovery materials including the proffered statements of Agustin and Tan. (8/15/18 RT 4-5, 1 ER 17-18.) After consulting with Petitioner, defense counsel agreed. (1 ER 19.) The court then accepted the stipulation. (1 ER 20.)

The parties agreed that the total offense level was 35, and the criminal history category was VI, with a guideline range of 292 to 365 months. (1 ER 22.)

Defense counsel emphasized the disparity with Agustin's sentence of 12 years and 6 months though he was far more culpable, his criminal history was comparable, he was overheard making threats and planning robberies, and he was in possession of weapons when arrested.

Defense counsel also stressed that Petitioner has had well-documented mental problems since he was a juvenile. Since his

incarceration, however, he had taken substantial steps towards rehabilitation. He would, of course, need to address his mental health problems and continue taking his medication. Petitioner was studying psychology and hoped to continue his college education in prison. He was well on his way to a degree and planned to specialize in substance abuse counseling. If he could conquer his drug addiction he would be a productive member of society. (1 ER 29-30.)

In allocution, Petitioner apologized to his family and friends. He explained that his treatment as a child for attention deficit disorder, bipolar disorder, and severe asthma actually worsened his illness. He required more and more medications to treat all the side effects. When he no longer had access to health care, he began to self-medicate which in turn led to using and selling. (1 ER 34.)

The government acknowledged that Agustin's guidelines were 235 to 293 months, but "as soon as he was arrested" he cooperated for a sentence of 150 months. (1 ER 42.) The government asked that Petitioner be sentenced anywhere between 305 and 320 months to afford adequate deterrence and to protect the public. (1 ER 42.) It acknowledged Petitioner's mental illness, his family support, and his recent substance abuse programming while incarcerated. However, in aggravation, it believed that

Petitioner was the "leader" and the "common thread with all the other defendants" in this case. (1 ER 37-38.) The government had already exercised its discretion not to seek a mandatory life sentence given Petitioner's prior drug convictions. (1 ER 39.)

The court agreed that the guideline range was 292 to 365 months based on an offense level of 35 and a criminal history category of VI. The court acknowledged that it was required to impose a sentence that was "sufficient, but not greater than necessary, to comply with" 18 U.S.C. § 3553(a)(2). (1 ER 43.) The court also acknowledged that it should "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." (1 ER 43.)

The court did not believe there was "much in mitigation," finding that Petitioner's drug dealing behavior was "bold." (1 ER 44.) His criminal history was 22 points where only 13 were needed to be a level VI. (1 ER 45-46)

The court's only comment about Petitioner's mental illness was: "Now I do understand there's some mitigating factors here, the mental health issues, and Mr. Sierra went through that and it's in the report. I won't go through all of that, but I do certainly take that into account." (1 ER 47.)

The court acknowledged Petitioner's family support and commented that he had taken courses while incarcerated. (1 ER 47.) The court did not find that Petitioner and Agustin were similarly situated as there was no 5k1.1 motion for Petitioner. (1 ER 48.) As for the Facebook posting, the court found it "troubling" and believed it was meant to silence others, even if it was not meant to hurt anyone. (1 ER 48-49.)

REASONS FOR GRANTING THE WRIT

NOW THAT SENTENCING GUIDELINES ARE ONLY ADVISORY, THIS COURT SHOULD CLARIFY WHAT MAKES A WITHIN GUIDELINES SENTENCE SUBSTANTIVELY UNREASONABLE UNDER 18 U.S.C. § 3553

A. Standard of Review

After *United States v. Booker*, 543 U.S. 220 (2005) held that the sentencing guidelines are only advisory, "appellate review of sentencing decisions is limited to determining whether they are reasonable" under the abuse of discretion standard. *Gall v. United States*, 522 U.S. 38, 46 (2007).

In determining the substantive reasonableness of a sentence the Ninth Circuit considers the "totality of circumstances" and attaches no presumption of reasonableness to a sentence that falls within the applicable guidelines ranges. *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055

(9th Cir. 2009) (citations). A guidelines sentence will "usually be reasonable" as the "individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission's judgment in general." *Rita v. United States* 551 U.S. 338, 350-351 (2007).

"Appellate courts must review all sentences, within and without the guidelines range, under a deferential abuse of discretion standard." *United States v. Carty*, 520 F.3d 984, 988 (9th Cir. 2008) (en banc) citing *Gall*, 522 U.S. at 46. When a sentence is appealed, "we first consider whether the district court committed significant procedural error, then we consider the substantive reasonableness of the sentence. *Carty*, 520 F.3d at 993. "The district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when we are left with a definite and firm conviction that the district court committed a clear error of judgment." *United States v. Ressam*, 679 F.3d 1069, 1085, (9th Cir. 2012) citing *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009) (en banc).[2]

---

[2] *Hinkson* adopted a two part test to define what is required to support a conclusion that there was an abuse of discretion: That test 'requires us first to consider whether the district court identified the correct legal standard for decision of the issue before it. Second, the test then requires us to determine whether the district court's findings of fact,

"The abuse of discretion standard is deferential, but it does not mean anything goes." *Ressam*, 679 F.3d at 1087. "Appellate review for substantive reasonableness should not be such a 'rubber stamp.'" *Ibid* (citations). Thus, the mere fact that "the district court said it considered the facts set forth in 18 U.S.C. § 3553(a) and provided some explanation of its reasoning" does not mean that the sentence should be affirmed. "*Gall* explicitly confirmed the responsibility of the court of appeals to review not only the process by which the sentence was imposed but also the substance of the sentence." *Ibid.* While the court "will provide relief only in rare cases" "such appellate review necessarily turns on the particulars of each case." *Id.* at 1088.

B. Unwarranted Disparity

As noted above, the district court is required to choose a sentence that is "sufficient, but not greater than necessary, to comply with" 18 U.S.C. § 3553(a)(2). The court must also avoid unwarranted dispairty. § 3553(a)(6).

This Court should set down some parameters to guide the courts in determining unwarranted disparity. Agustin was clearly the more

---

and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record. *Ressam* at 1085, citing *Hinkson* at 1251.

culpable defendant. The mere fact that he "cooperated" and was the benefit of a 5k1.1 departure there was no evidence as to how valuable his cooperation was. It may have been completely useless. Furthermore, "the timing of his cooperation suggests that it was prompted by his desire to make the best of a bad situation, not some altruistic motive, sincere regret, or deeper good nature." *Ressm*, 679 F.3d at 1092. The mere fact that Agustin cooperated, without more, renders the stark difference between the two sentences an unwarranted disparity. § 3553(a)(6).

C. Reliance on Facts the Government Conceded it Could Not Prove

The court erroneously found that Petitioner posted only discovery about the cooperating defendants, when in fact the entirety of his discovery was posted. The government did not dispute this. Although the court said it would not go so far as to find that it was "to get them hurt" when it found it was to "silence" them, this is a distinction without a difference. (1 ER 49, emphasis added.)

There was no evidence that Petitioner had anything to do with Agustin being assaulted in the jail and the fact that he was the one sent to segregation for two weeks indicates that Agustin is the one who started the

fight. Agustin was overheard on wiretaps talking about assaulting other people.

The court failed to acknowledge that the discovery (given to him by an earlier lawyer) was not subject to any kind of protective order. There was no evidence presented that Petitioner would have been on notice that he was supposed to keep the discovery confidential. If there were any concerns in that regard, the government should have disclosed the sensitive information only pursuant to a protective order.

This Court should provide some guidance as to how to to evaluate a district court's fact finding when it is contrary to the government's stipulation.

C. Mental Illness as Mitigation

The district court acknowledged Petitioner's mental illness as a mitigating factor but declined to say more about it. It goes without saying that the heavy duty medications he was put on as a child were responsible for turning him into a drug addict, which exacerbated his mental problems, which in turn led to his criminal behavior. It is commonly known that the drugs used to treat ADHD, such as Ritalin and Adderall, are powerful amphetamines. Adult addiction to drugs like methamphetamine are par for

the course. See generally, Schwartz, *ADHD NATION, Children, Doctors, Big Pharma, and the Making of an American Epidemic*, Scribner, 2016.

Though the court found Petitioner's behavior was "bold," this is a classic manifestation of bipolar mood disorder. *See generally*, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM_IV_TR) at 357 (Manic Episode: mood disturbance characterized by, inter alia, "inflated self-esteem or grandiosity, decreased need for sleep, pressure of speech, flight of ideas, distractibility, and increased involvement in goal-directed activities or psychomotor agitation, and excessive involvement in pleasureable activities with a high potential for painful consequences.")

Petitioner's case is a textbook example of someone whose within guidelines sentence, based solely on the offense level and criminal history category, is substantively unreasonable if it is objectively evaluated under § 3553. The lower appellate courts are in dire need of guidance as to how to evaluate a within guidelines sentence vis-a-vis § 3553. "Federal judicial tradition" guides the courts "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *United States v. Pepper*, 562 U.S. 476, 487 (2001) citing *Koons v. United States*, 518 U.S. 81 (1996). Sentencing judges "exercise a wide

discretion" and "highly relevant – if not essential – to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 246-247 (1949). "The punishment should fit the offender and not merely the crime." *Id.* at 247.

As it now stands, a within guidelines sentence will always be upheld on appeal, which hardly makes then "advisory." Furthermore, a within guidelines sentence will often conflict with § 3553. This Court should examine how to properly evaluate a sentence on appeal.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: October 26, 2020 Respectfully submitted,

VERNA WEFALD

Counsel of Record