

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of September, two thousand twenty.

United States of America,

Appellee,

v.

Thomas Hoey, Jr.,

ORDER

Docket No: 18-3338

Defendant - Appellant,

Nicole Zobkiw, AKA Sealed Defendant 1, Barry Balaban, AKA
Sealed Defendant 1, Alejandro Noreiga,

Defendants.

Appellant, Thomas Hoey, Jr., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

MANDATE

18-3338

United States v. Zobkiw (Hoey)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of March, two thousand twenty.

PRESENT: PIERRE N. LEVAL,
PETER W. HALL,
GERARD E. LYNCH,
Circuit Judges.

United States of America,

Appellee,

v.

18-3338

Thomas Hoey, Jr.,

Defendant-Appellant,

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MANDATE ISSUED ON 09/25/2020

Nicole Zobkiw, AKA Sealed Defendant 1, Barry
Balaban, AKA Sealed Defendant 1, Alejandro
Noreiga,

Defendants.¹

For Appellant: BRUCE R. BRYAN, Syracuse, New York.

For Appellee: IAN MCGINLEY (Michael D. Maimin *on the brief*) for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Castel, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,
ADJUDGED, AND DECREED** that the judgment of the district court is
AFFIRMED.

Thomas Hoey, Jr. appeals from a judgment of the United States District Court for the Southern District of New York entered on October 25, 2018, sentencing him to a term of 141 months' imprisonment and three years of supervised release. We assume the parties' familiarity with the underlying facts, the record of prior proceedings, and the arguments on appeal, which we reference only as necessary to explain our decision to affirm.

¹ The Clerk of Court is respectfully requested to amend the caption as stated above.

I.

Hoey was convicted, following a guilty plea, of conspiracy to distribute and possess with intent to distribute cocaine in violation of 18 U.S.C. § 371, conspiracy to suborn perjury in violation of 18 U.S.C. § 1622, and obstruction of justice in violation of 18 U.S.C. § 1503. The district court initially sentenced Hoey to a within-Guidelines sentence of 151 months' imprisonment and three years of supervised release. The court also imposed a \$250,000 fine which was later vacated on appeal and not reimposed. Before his initial federal sentencing, Hoey had been convicted for an unrelated matter in New York state court. That conviction increased the criminal history points used in calculating his federal Guidelines range. Following his sentencing on the federal charges here, the New York state conviction was vacated, and Hoey was thus entitled to resentencing. At resentencing, after recalculating the Guidelines range based on a lower criminal history score, the district court imposed an above-Guidelines sentence of 141 months' imprisonment and three years of supervised release. Hoey now appeals, arguing that his new sentence is both procedurally and substantively unreasonable.

II.

We review sentences for reasonableness, which amounts to a review for abuse of discretion. *See United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (*en banc*). “A sentence is procedurally unreasonable if the district court fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence.” *United States v. Singh*, 877 F.3d 107, 115 (2d Cir. 2017) (citation omitted).

Hoey contends that his sentence is procedurally unreasonable for two main reasons: (1) the district court insufficiently explained its decision to impose an above-Guidelines sentence at resentencing, especially given that court’s imposition of an initial sentence within the advisory Guidelines range, and (2) the district court improperly calculated the Guidelines range by refusing to group the perjury and obstruction of justice counts together. Hoey, however, did not challenge the procedural reasonableness of his sentence before the district court, and defense counsel’s general statements that she was “comfortable” with a calculation different than the one ultimately adopted and “mindful” of a plea

agreement containing another calculation were insufficient to preserve an objection for appellate review. App. at 508. We thus review Hoey's challenges of procedural unreasonableness for plain error. *See United States v. McCrimon*, 788 F.3d 75, 78 (2d Cir. 2015); *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007).

To demonstrate plain error, Hoey must show that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (internal quotation marks and alterations omitted). While we have said that "the plain error doctrine should not be applied stringently in the sentencing context," *United States v. Gamez*, 577 F.3d 394, 397 (2d Cir. 2009), Hoey's arguments fail even under a lowered plain error standard.

Hoey's first argument, that the district court did not sufficiently explain its decision to diverge from the advisory Guidelines range, is not supported by the record. Not only did the district court deliver a long explanation at the resentencing hearing for why it was imposing an above-Guidelines sentence, but the court also issued a six-and-a-half-page Written Statement of Reasons

explaining that the above-Guidelines sentence "more accurately accounts for the extreme callousness of Hoey's actions," App. at 556, and outlining specific reasons for imposing that sentence. Nor is Hoey's argument aided by the fact that many of the same circumstances that existed at the time of Hoey's original sentencing—and which resulted in a sentence within the then-applicable Guidelines—existed at the time of his resentencing. Hoey offers no reason why his new sentence must fall within the lower Guidelines range simply because his prior one fell within the higher range. Contrary to his assertions, we find it eminently reasonable that the district court could find a 151-month sentence appropriate under the circumstances at Hoey's initial sentencing and a 141-month sentence appropriate under the circumstances at Hoey's resentencing, notwithstanding the fact that one fell inside of the Guidelines range and one did not.

In calculating Hoey's Guideline range, the district court grouped the perjury and underlying drug count together under § 3D1.2(c), as provided for under U.S.S.G. § 3C1.1 Application Note 8, and applied Application Note 5 to U.S.S.G. § 3D1.2 to limit the grouping to one count of obstructive conduct with one count of the underlying offense. Application Note 5 explains that, for the purposes of grouping under subsection (c):

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Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count.

On that basis, the district court grouped Hoey's perjury and drug counts together and treated the obstruction of justice count separately. The result was a slightly higher offense level than if one of Hoey's preferred approaches had been adopted.

Hoey contends that the district court erred by not grouping his perjury and obstruction counts together. He argues that the district court should have grouped those counts together pursuant to U.S.S.G. § 3D1.2(b) because the counts were part of a common scheme or plan and victimize the same societal interest. He argues, alternatively, that they should be grouped together pursuant to U.S.S.G. § 3D1.2(c) because each of the perjury and obstruction counts would qualify as an adjustment to his drug count.

How multiple obstruction counts should be grouped is an open question in this Circuit. In *United States v. Jones*, 716 F.3d 851, 859 (4th Cir. 2013), the Fourth Circuit followed the approach complained of here, explaining that "the proper way to group multiple obstruction of justice convictions under the Sentencing Guidelines" is to group only the "more serious" conviction for obstructive conduct

with the underlying offense. While we see the logic in that approach, we need not decide whether that is the correct method because, given the lack of contrary case law from the Supreme Court or this Court, the district court did not plainly err in its Guidelines calculation. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (“For an error to be plain, it must, at a minimum, be clear under current law. We typically will not find such error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court.”) (internal quotation marks omitted). Hoey’s challenge to the procedural reasonableness of his sentence thus fails.

III.

Hoey also challenges the substantive reasonableness of his 141-month term of imprisonment. “Upon review for substantive unreasonableness, we take into account the totality of the circumstances, giving due deference to the sentencing judge’s exercise of discretion, and bearing in mind the institutional advantages of district courts.” *United States v. Brown*, 843 F.3d 74, 80 (2d Cir. 2016) (citations and quotation marks omitted). In giving this due deference, we “provide relief only in the proverbial ‘rare case.’” *United States v. Bonilla*, 618 F.3d 102, 109 (2d Cir. 2010) (quoting *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)). “A sentencing

judge has very wide latitude to decide the proper degree of punishment for an individual offender and a particular crime," and "[w]e will . . . set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 188, 189 (internal quotation marks and citation omitted).

Hoey's chief complaint is that the district court did not give appropriate weight to mitigating factors, such as Hoey's post-incarceration rehabilitation efforts. But the district court was not required to weigh these factors in precisely the way Hoey would have liked and, in reviewing the sentence imposed by the district court, "we do not consider what weight we would ourselves have given a particular factor." *Id.* at 191. Rather we "consider whether a factor relied on by a sentencing court can bear the weight assigned to it" under the totality of the circumstances in a case. *Id.*

Here the record of sentencing proceedings shows that the district court was careful to consider the factors cited by Hoey as mitigation in the context of the case as a whole. For example, the district court explained that Hoey's "steps toward rehabilitation are commendable but they are not extraordinary." App. at 552. On this record, we cannot say that the district court improperly weighed the factors

presented to it for consideration. Nor do we think a 141-month term of imprisonment for distributing drugs to a woman who died after consuming them and then attempting to impede an investigation into that conduct is so high that it "cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 189. We therefore hold that the district court did not abuse its discretion in imposing the sentence it did.

* * *

We have considered Hoey's remaining arguments and find them to be without merit. We hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe

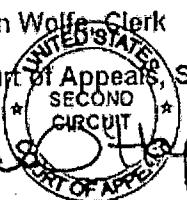


A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe



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UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

THOMAS HOEY, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: 1: S6 11 CR 00337-003 (PKC)

USM Number: 92147-054

Joanna Hendon, Esq. (AUSA, Ian McGinley)

Defendant's Attorney

THE DEFENDANT:

 pleaded guilty to count(s) One, Two and Three of the S 6 Indictment pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 371	Conspiracy & Possess w/Intent to Distribute Cocaine	12/31/2010	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

 The defendant has been found not guilty on count(s) _____ Count(s) underlying indictments is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/24/2018

Date of Imposition of Judgment



Signature of Judge

Hon. P. Kevin Castel, U.S.D.J.

Name and Title of Judge

Date

10-25-18

DEFENDANT: THOMAS HOEY, JR.

CASE NUMBER: 1: S6 11 CR 00337-003 (PKC)

ADDITIONAL COUNTS OF CONVICTION

DEFENDANT: THOMAS HOEY, JR.

CASE NUMBER: 1: S6 11 CR 00337-003 (PKC)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

60 months on Count 1; 60 months on Count 2; 21 months on Count 3, all to run consecutively for a total of 141 months.
(Written Statement of Reasons for Sentence is attached.)

The court makes the following recommendations to the Bureau of Prisons:

- (1) defendant be imprisoned as close as possible to New York City to facilitate family visits;
- (2) defendant be evaluated for appropriate drug and alcohol treatment.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

- at _____ a.m. p.m. on _____
- as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- before 2 p.m. on _____
- as notified by the United States Marshal.
- as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: THOMAS HOEY, JR.

CASE NUMBER: 1: S6 11 CR 00337-003 (PKC)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: THOMAS HOEY, JR.

CASE NUMBER: 1: S6 11 CR 00337-003 (PKC)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: THOMAS HOEY, JR.

CASE NUMBER: 1: S6 11 CR 00337-003 (PKC)

SPECIAL CONDITIONS OF SUPERVISION

The defendant will participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol. The Court authorizes the release of available drug treatment evaluations and reports to the substance abuse treatment provider, as approved by the probation officer. The defendant will be required to contribute to the costs of services rendered (co-payment) in an amount to be determined by the probation officer, based on ability to pay or availability of third-party payment.

The defendant shall submit his person, residence, place of business, vehicle, or any other premises, including any electronic devices under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of release may be found. The search must be conducted at a reasonable time and in reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant will participate in an alcohol aftercare treatment program under a co-payment plan, which may include testing via breathalyzer at the direction and discretion of the probation officer.

The defendant is to report to the nearest Probation Office within 72 hours of release from custody.

The defendant may be supervised by the district of his residence.

* Justice for Victims of Trafficking Act of 2013, Pub. L. No. 114-22, ** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

The interest requirement for the time institution is modified as follows:

The interest requirement is waived for the time resolution.

The court determined that the defendant does not have the ability to pay interest and it is ordered that

to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

Restitution amount ordered pursuant to Plea Agreement \$

TOTALS **96** **0.00** **96** **0.00** **96** **0.00**

Figure 1. The four panels show the results of the simulation of the 1999-2000 El Niño event.

Figure 1. The four stages of the process of the formation of the *lithoclast* (lithoclastogenesis).

Figure 1. The four stages of the process of the formation of the concept of the "new" in the 1990s.

Figure 1. The four panels of the 3D visualization of the 1999-2000 winter monsoon over the Indian subcontinent.

10.1007/s00339-010-0633-0

before the United States is paid.

142. *Journal of the American Revolution*, 10, 1 (1969), 10-11.

After such determination, the Commissioner or his designee may issue a written order to the taxpayer.

TOTALS Assessment \$ 300.00 JVTA Assessment* \$ Fine \$ Restitution \$

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

CRIMINAL MONETARY PENALTIES

CASE NUMBER: 1: S6 11 CR 00337-003 (PKC)

DEFENDANT: THOMAS HOEY, JR.

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SHEET 5 — Criminal Monetary Penalties

DEFENDANT: THOMAS HOEY, JR.

CASE NUMBER: 1: S6 11 CR 00337-003 (PKC)

SCHEUDLE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 300.00 due immediately, balance due

not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); orC Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; orD Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; orE Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; orF Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.