No.

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL NUNEZ
Petitioner

-against-

UNITED STATES OF AMERICA,
Respondent

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

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QUESTIONS PRESENTED

Whether a sentence imposed by an apparently biased judge, based on material falsehood, disregard of the 3553(a) factors, legally unfounded fixed policy, and the arbitrary assumption and use of legally insignificant fact, violates the law and constitution, and a plea agreement appellate waiver does not preclude appellate review, especially when the Court at sentencing advises a defendant that he has the right to appeal?

LIST OF PARTIES

The parties are the Petitioner, Michael Nunez, and the Respondents, United States of America and Paul Van Manen.

RELATED CASES

1. *United States, appellee, v. Medin Kosic, a/k/a Dino, et. al. defendants, Michael Nunez, a/k/a Gordo, Paul Van Manen*, defendants-appellant,19-706(L), 19-3521(Con), *Michael Nunez*, appellant,United States Court of Appeals for the Second Circuit. Judgment entered December 11, 2020.
2. *United States, appellee, v. Medin Kosic, a/k/a Dino, et.al. defendants*, *Michael Nunez, a/k/a Gordo, Paul Van Manen, defendants-appellant, Paul Van Manen,* appellant, 19-706, 19-3521, United States Court of Appeals for the Second Circuit. Judgment Pending
3. *United States v. Medin Kosic, a/k/a Dino, Jasmin Cejovic, a/k/a Min, Mirsad Bogdanovic, a/k/a Mike, Shaun Sullivan Theodore Banasky, a/k/a Freddy, a/k/a Eduardo, Anthony Francese, Alexander Bucci, Joseph Cucciniello, a/k/a Cuch, Kenneth Charlton, Jennifer Bogdanovic, Michael Nunez, a/k/a Gordo, Paul Van Manen, d*efendants. 18 Cr. 30, United States District Court for the Southern District of New York. Judgment entered against Michael Nunez on March 12, 2019.

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Petitioner, Michael Nunez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the Court of Appeals was rendered on December 11, 2021, in an unpublished summary order dismissing the appeal. The judgment/order is attached hereto in Appendix A. The opinion and rationale of the District Court for its sentence of

petitioner was rendered during sentence proceedings on March 12, 2019. The transcript is attached hereto in Appendix B.

JURISDICTION OF THE COURT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C.§1254(1). The decision of the United States Court of Appeals was rendered on December 11, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and 18 U.S.C.§§ 3553(a), 3742(a)(1) and F.R. Crim.P. 32, 51(b), 52 are attached hereto in Appendix C.

STATEMENT OF THE CASE

This petition seeks review of the judgment of the United States Court of Appeals dismissing the appeal from the judgment of the United States District Court for the Southern District of New York rendered March 12, 2019, convicting petitioner, on his guilty plea, of conspiracy to distribute over one kilogram of heroin and a detectable quantity of fentanyl (21 U.S.C. §§841(a)(1),(b)(1)(A), and (b)(1)(C), 846) and sentencing him to 150 months imprisonment and five years supervised release. On November 2, 2018, petitioner pleaded guilty to a one count indictment charging conspiracy to possess one kilogram or more of heroin and a detectable amount of fentanyl with the intent to distribute, in violation of 21 U.S.C. §§841(a) (1),(b)(1)(A),(b)(1)(C), 846. Pursuant to a plea agreement, petitioner stipulated to a Guideline range of 135-168 months and waived his right to appeal a sentence within that range.

The Presentence Report (PSR) recommended the below Guideline mandatory minimum sentence of 120 months. It described petitioner's serious medical conditions including a stroke, kidney disease, diabetes, gunshot wounds to the stomach and leg as the victim of robbery, and noted his obesity at 5'7" and 250 pounds, (PSR, at p.22, ¶'s 55-70). The PSR also noted a contradiction in the facts concerning petitioner's move from his next-to-the-last apartment. The PSR reported that according to petitioner he moved because he could not pay the rent, but a footnote in the PSR reported the government's contention that petitioner moved because he became aware that law enforcement agents were surveilling narcotics dealings out of that apartment, PSR p.12,¶51,n.1.

On March 8, 2019, petitioner appeared for sentencing. His counsel referred the Judge to his sentencing memo (Sentence Minutes at p. 35), and he reiterated the impact on petitioner's mental and physical impairments of his drug abuse, stroke, kidney disease, and gunshot wounds to the stomach (*Id* at 76-77). In prison, he has been diagnosed with diabetes and is taking insulin by injection. Petitioner worked as a medical specimen delivery man and as a sneaker salesman until 2006 when he had the stroke and was victimized in a robbery with three gunshots to the abdomen. He was unable to work thereafter and began using drugs and eventually started selling heroin to "Dino" (Medin Kosic), an indicted coconspirator (*Id* at 39-41, 80; PSR pp. 11-17).

The government stated to the Court,

> while he is not charged, unlike some of his other codefendants, with directly distributing drugs that led to anyone's death, drugs that this drug trafficking organization distributed did lead to deaths ...

> overdoses ... we don't have the evidence that Mr. Nunez was aware of overdoses and continued to distribute ... he wasn't leading a group of people. (p. 79).

Upon the following statement of reasons, the Court sentenced petitioner to 150 months imprisonment and five years supervised release.

> All right. I've read the presentence report and Mr. Sanchez's submission and I've read the government's submission, as well. I went back and read the transcript of the plea. I certainly, read the attachments to Mr. Sanchez's submission as well.
>
> This is a very serious matter and I understand from Mr. Sanchez's submission that he emphasizes the following factors about Mr. Nunez.
>
> He's a first time felon violent offender with strong family ties who's had a stroke, gunshot wounds and drug user. He seeks the mandatory minimum so that he can continue with his rehab after he finishes his term of incarceration. He wants to spend time with his family, all of which are laudable goals.
>
> On the other hand, the government talks about Mr. Nunez's criminal conduct which brings us together this morning. He is a long-time supplier to the drug trafficking organization which used heroin in massive quantities and also contained distribution of fentanyl.
>
> Mr. Nunez has had a stroke but that didn't deter him from dealing with the drug trafficking organization. He's had gunshot wounds and that didn't deter him either. He knew he was under surveillance for a long time and what he did was avoided surveillance by moving his drug location to a stash house to another location. So he knew what he was doing for an extended period of time and poison, participated in the poisoning of a number of communities in the city of New York and state of New Jersey by the use of massive quantities of drugs.
>
> So, I've considered the guidelines and I've also considered the sentence that I've imposed on people within the drug trafficking organization similarly situated. I am going to impose, I am going to

> tell you what I am going to impose first, Mr. Sanchez and then give you an opportunity to object.
>
> I don't understand the PSR recommendation of 120 months. I think that is far too lenient given the crimes that have been committed here, the length of time and the amount of drugs involved. I am going to impose a sentence of 150 months and five years supervised release.

(Sentence Minutes at 81-83).

After sentencing petitioner, the Court advised him, "I have to advise you of your right to appeal the sentence." (*Id* at 84). The government made no objection.

Petitioner had been represented by retained counsel, but following sentencing he moved the District Court for *in forma pauperis* relief and the assignment of counsel to permit him to file a direct appeal from the judgment. By order dated June 14, 2019, the District Court denied the motion on the grounds that any appeal would be frivolous.

On December 6, 2019, the Second Circuit vacated the District Court order, granted appellant *in forma pauperis* relief, and assigned the undersigned as counsel on the appeal. The Second Circuit held that the District Court did not have authority to deny *in forma pauperis* relief and the assignment of counsel on the grounds that the appeal would be frivolous. *United States v. Kosic (Nunez)*, 944 F.3d 448 (2d Cir. 2019).

On April 30, 2020, petitioner wrote to appellate counsel asking that he attempt to get assigned to help petitioner prepare a motion in the District Court for compassionate and other relief based on his illnesses in the context of Covid-19. Counsel then wrote to the District Court on May 18, 2020, stating petitioner's request, listing petitioner's

underlying illnesses, reminding the Court that such underlying illnesses render a prison inmate especially vulnerable to serious consequences of infection for Covid-19, stating that counsel would accept the assignment to represent petitioner on the motion but was not a member of the District Court panel, and asking that the Court assign him or counsel from the District Court panel.

On May 29, 2020, the District Court denied the motion, stating that the District Court was empowered in its discretion to deny the assignment of counsel, therefore it was denying the assignment of counsel. Petitioner's *pro se* appeal of the order was dismissed.

On December 11, 2020, the Court of Appeal for the Second Circuit dismissed the direct appeal from the sentencing based on the plea agreement waiver of appeal.

REASONS FOR GRANTING THE WRIT

A SENTENCE IMPOSED BY AN APPARENTLY BIASED JUDGE, BASED ON MATERIAL FALSEHOOD, DISREGARD OF THE 3553(a) FACTORS, LEGALLY UNFOUNDED FIXED POLICY, AND THE ARBITRARY ASSUMPTION AND USE OF LEGALLY INSIGNIFICANT FACT, VIOLATES THE LAW AND CONSTITUTION, AND A PLEA AGREEMENT APPELLATE WAIVER DOES NOT PRECLUDE APPELLATE REVIEW, ESPECIALLY WHEN THE COURT AT SENTENCING ADVISES A DEFENDANT THAT HE HAS THE RIGHT TO APPEAL

The government's "bargaining power generally exceeds that of defendants and the government typically drafts such [plea] agreements" with appellate waivers (*United States v. Tourloukis*, 558 Fed.Appx, 112, 113-119 (2d Cir. 2014), therefore fair contract principles should not stop this Court from setting clear limits to the efficacy of plea agreement waivers of appeal. Furthermore, this Court should resolve a conflict among the

Circuits on whether, as here, a sentencing court's instructions at sentencing that a defendant retains the right to appeal, unobjected to by the government, negates the prior waiver. See *United States v. Cook*, 722 F.3d 477 (2d Cir. 2013); *United States v. Fisher*, 232 F.3d 301, 304-05 (2d Cir. 2000), and cases cited in both.

Despite the Probation Department's recommendation of the mandatory minimum 10 year sentence, the District Court elevated petitioner's sentence to 12.5 years on the basis of the material falsehood that he was a violent felony offender; without consideration of the required factors of 18 U.S.C. §3553(a); on the illogical, legally unfounded fixed policy that petitioner's health and medical conditions were not relevant because they did not prevent him from committing the crime; and on the arbitrarily assumed, and legally insignificant, fact that he moved out of his apartment to avoid law enforcement surveillance. A sentence so contrary to established principals of law, unbounded and unlimited by those principles, against public policy, and seriously affecting the integrity and fairness of sentence proceedings and due process and equal protection of the law and imposed by a judge who twice unlawfully denied petitioner assigned counsel, is not rendered immune from appellate review by a plea agreement waiver of appeal, and the District Court advised petitioner at sentencing that he did have the right to appeal. Trial counsel was ineffective for failing to object to the District Court's statement of reasons, but the Court was aware of the facts and issues presented in the sentencing memorandum and the arguments of counsel at sentencing, and the facts and law rendering the Court's errors were plain.

A District Court sentence is required to take into account the factors listed in 18 U.S.C. §3553(a).[1] The District Court must "state in open court the reasons for its imposition of the particular sentence" (18 U.S.C. §3553(a)), to "adequately explain the chosen sentence, to allow for meaningful appellate review and to provide the perception of fair sentencing" (*Gall v. United States*, 552 U.S. 38, 50-51 (2007)), and to allow an appellate court to determine if the District Court properly analyzed the relevant sentencing factors. *Rita v. United States*, 551 U.S. 338, 356 (2007).

The Court "must make an individualized assessment based on the facts presented" (*Gall v. United States*, *supra* at 50), use only "reliable and accurate information" (*United States v. Pugliese*, 805 F.2d 1117, 1124 (2d Cir. 1986)), ascertain the reliability and accuracy of the facts, "for any disputed portion of the presentence report or other controverted matter, rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing" (*Fed.R.Crim. P.* 32), and apply the preponderance of evidence standard for finding the facts. *United States v. Awan*, 607 F.3d 306, 312 (2d Cir. 2010).

Failure to fulfill these requirements, reliance on material false assumptions, material irregularities, confusion, misinformation (*United States v. Malcolm*, 432 F.2d

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[1] "(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...."

809, 815-18 (2d Cir. 1970), *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948)), or reliance on a fixed view of how the sentence factors should be applied in certain categories of cases results in a violation of the statutes, rules and due process and equal protection of the law. *United States v. Pugliese, supra*; *United States v. Schwarz*, 500 F.2d 1350 (2d Cir. 1974).

On review, this Court,

> first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence–including an explanation for any deviation from the Guidelines range.

Gall v. United States, *supra* at 51 (2007). Interpretations of the sentencing factors are reviewed *de novo*, and factual determinations are evaluated by clear error. *United States v. Awan, supra.*

A defendant's right to appeal is statutory (18 U.S.C. §3742(a)(1), but its procedures must comport with Constitutional principles (*United States v. Ready*, 82 F.3d 551 (2d Cir. 1996) superseded on other grounds, *United States v. Cook*, *supra*, and must not be unduly burdened. *North Carolina v. Pearse,* 395 U.S. 711, 724 (1969). In a guilty plea agreement, a defendant can waive the right to appeal certain issues, but he cannot waive the right to appeal itself. *Garza v. Idaho*, 139 S.Ct. 738, 748 (2019). Any waiver is construed strictly against the government, is conditioned on the sentencing being conducted according to established principles of law (*United States v. Archie*, 771 F. 3d 217 (4th Cir. 2014)), and

it is reasonable for a defendant "to believe that his plea agreement written by the government lawyers, and scrutinized by his own lawyer, did not authorize an illegally imposed sentence .... [especially when] 'there was no satisfactory explanation [that] the consequences of [the] waiver of [the] right to appeal' included the waiver of an illegally imposed sentence." *United States v. Ready, supra* at 558, quoting *United States v. Baty*, 980 F.2d 977, 979 (5th Cir, 1992).

Appeal from a Constitutionally deficient sentence is not waived. *United States v. Gomez-Perez*, 215 F.3d 315 (2d Cir 2000); *United States v. Johnson*, 347 F.3d 412 (2d Cir. 2003). A sentencing court's disregard of the sentencing factors mandated by 18 U.S.C. §3553(a) is appealable despite a waiver. *United States v. Lutchman*, 910 F.3d 33, 38 (2d Cir. 2018); *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011), citing *United States v. Woltmann*, 610 F.3d 37 (2d Cir. 2010). "The decisive consideration [is whether] 'the sentence was reached in a manner that the plea agreement did not anticipate"' *United States v. Riggi*, *supra* at 148.

In this case, the Probation Department recommended the below Guidelines mandatory minimum sentence of 10 years. The Court instead sentenced petitioner to 12.5 years, relying in its final statement of reasons on the material falsehood that petitioner was a "felon violent offender" (Sentence Minutes at 81), who "participated in the poisoning of a number of communities in the City of New York and State of New Jersey ... given the crimes that have been committed here." (*Id* at 82). The Court also adopted as factually established, without ascertaining its reliability and accuracy, the government's assertion

reported and contradicted in the PSR, contradicted by petitioner's statements in the PSR (PSR, p.12, ¶51, n1), that petitioner moved out of an apartment to avoid law enforcement surveillance (*Ibid*). The Court simply disregarded petitioner's assertion, reported in the PSR, that he moved out because he could not pay the rent, and misconstrued this factor to the effect that "he knew what he was doing for an extended period of time and poison," as a reason to increase the sentence above the mandatory minimum. (*Ibid*).

The Court considered the Guidelines but not the §3553(a) factors. "I've considered the guidelines and ... sentences I've imposed on people within the drug trafficking organization..." (*Ibid*). When it explained that petitioner's stroke and gunshot wounds to the stomach (omitting mention of his kidney disease, diabetes, and obesity) were not relevant to the sentencing determination because "that didn't deter [petitioner] from dealing with a drug trafficking organization," (*Ibid*), the Court violated the requirement to consider 18 U.S.C. §3553(a)(1), "the history and characteristics of the defendant", and §3553(a)(2)(D) "to provide the defedant with the needed medical care ... in the most effective manner." The Court's policy that health and medical conditions are relevant only when the defendant did not commit the crime negates those factors.

The government informed the Court that it had no evidence that drugs dealt by petitioner caused death, or that petitioner was aware of any deaths caused by others who supplied the organization. (Sentence Minutes at. 79), and petitioner's counsel wrote repeatedly in his sentencing memo that petitioner was a non-violent offender (pp. 39, 44).

Nonetheless, the Court sentenced petitioner as a violent offender who "poisoned" whole communities by the "crimes" that were committed by other conspirators in the case.

Petitioner had pled guilty to one crime, one count of conspiracy to possess narcotics with intent to distribute, and that count did not include a charge that death had occurred. Thus, the Court's attributions to petitioner of "crimes" in the plural, "poisoning" communities, and violence wrongly attributed to petitioner responsibility for the deaths charged against others in the conspiracy. This was a false attribution which rendered the sentence violative of due process of law.

The PSR reported contradictory factual assertions for why petitioner moved out of his apartment: the government's assertion that the move was to avoid law enforcement surveillance, and petitioner's assertion that he could not pay the rent. In addition to arbitrarily choosing the government's purported rationale, which was not supported by evidence, the Court unduly weighted this allegation, reported in a footnote in the PSR, as a major reason why petitioner should not receive the mandatory minimum sentence recommended by the Probation Department.

Even if the government's version had been established by a preponderance of the evidence (*United States v. Awan, supra*), changing residences to avoid law enforcement surveillance is not a fact which elevates petitioner's drug dealing above the Probation Department's recommendation of the minimum sentence. All drug dealers take steps to avoid surveillance, it is part of the nature of the offense, not an aggravation of it. "An appellate court may consider whether a factor relied on by a sentencing court can bear the

weight assigned to it." *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008)(*en banc*).

The Court also omitted mention of the 18 U.S.C. §3553(a) factors in its statement of reasons and applied an erroneous criterion that excluded petitioner's mental and physical health from consideration as required by 18 U.S.C. §§3553(a) (1) and (a)(2)(D). The Court stated: "Mr. Nunez had a stroke but that didn't deter him for dealing with the drug trafficking organization. He's had gunshot wounds and that didn't deter him either. He knew he was under surveillance ... moved his drug location." (Sentencing Minutes at 82). Thus, the Court disregarded petitioner's serious illnesses and injuries, and their debilitations, on the illogical, legally unfounded basis that they did not render him incapable of committing the offense. If they had rendered him incapable of committing the offense, he would not be before the Court for sentencing.

The Court, however, was required to consider whether petitioner's drug dealing had been caused in some part by his inability to get and sustain other work due to his diminished capacities, his "history and characteristics" under 18 U.S.C. §3553(a)(1). Furthermore, the Court was required to consider "the need for the sentence imposed ... to provide the defendant with needed ... medical care, or other correctional treatment in the most effective manner." 18 U.S.C. §3553(a)(2)(D). There were certainly medical concerns in the impact of prison on his health, availability of treatment and the length of the sentence. Petitioner suffers from the sequelae of a stroke, gunshots to the stomach as a robbery victim, kidney disease, diabetes, obesity, and now Covid-19. Section 3553(a)

directs the Court to consider these matters. It is a minimum sentencing procedural requirement according to the statute.

The District Court was clearly presented with these health concerns and medical needs in petitioner's background and expressly partially noted them, but dismissed them as irrelevant according to a policy that has no foundation in law. Although a District Court need not specifically address each of the §3553(a) sentencing factors in its statement of reasons, remand is required when it makes no mention of them. Here issues regarding those factors were presented by the case, and the Court failed to "explain on the record how the §3553(a) factors justify the sentence," and employed a policy that negated their application. *United States v. Woltmann*, 610 F.3d 37, 40 (2d Cir. 2010); *United States v. Riggi, supra*; *United States v. Doe*, 213 Fed. Appx 660, 664 (10th Cir. 2007).

Trial counsel, as did the government, informed the Court that petitioner was a non-violent offender who was not responsible for the overdose deaths caused by others who operated within the ambit of the conspiracy. Trial counsel and the PSR also raised the issue of petitioner's health, and the Presentence Report clearly set forth the contradiction in the facts regarding petitioner's change of residences. These issues were thus presented for the Court's review, despite counsel's lack of additional objection following the Court's oral statement of its reasons. *Fed.R.Crim.P. 51(b)* ("a party may preserve a claim of error by informing the court - when the court ruling ... is sought-of the action the party wishes the court to take ..").

> By "informing the court" of the "action" he "wishes the Court to take," Fed. Rule Crim. Proc. 51(b), a party ordinarily brings to the court's attention his objection to a contrary decision. See Rule 52(b). And that is certainly true in cases such as this one, where a criminal defendant advocates for a sentence shorter than the one ultimately imposed. Judges, having in mind their "overarching duty" under §3553(a), would ordinarily understand that a defendant in that circumstances was making an argument (to put in statutory terms) that the shorter sentence would be "'sufficient"' and a longer sentence "'greater than necessary"' to achieve the purposes of sentencing. Pepper, 562 U.S. at 493, 131 S.Ct. 1229 (quoting §3553(a)). Nothing more is needed to preserve the claim that a longer sentence in unreasonable.

Holguin-Hernandez v. United States, 140 S.Ct. 762, 766, 206 L.Ed 2d 93 (2020).

Trial counsel was also ineffective for failing to further object to these errors in the Court's statement of reasons, as the Court invited him to do (*Id*. 83). Notwithstanding the Second Circuit's "aversion" to addressing ineffective assistance of counsel claims on direct appeal (*United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000)), it will review, and has reviewed, such claims when, as here, there is new counsel on appeal, and "no ground of ineffectiveness [is argued] that is not fully developed in the trial record." *United States v. Salameh*, 152 F.3d 88, 160 (2d Cir. 1998); *United States v. Helgeson*, 669. F.2d 69 (2d Cir. 1982); *United States v. Aulet*, 618 F.2d 182 (2d Cir. 1988).

No strategy could have been served by failing to object to the Court's erroneous rationales for its sentencing of petitioner, especially when counsel should have been aware that the government would argue that any appeal was precluded by the plea agreement waiver. The reason for counsel's failure to object is thus obvious from the face of the record, his incompetence (petitioner was entitled to "more that just a warm body to stand

next to" him. *Patrasso v. Nelson*, 121 F.3d 297, 304 (7th Cir. 1997)), and the prejudice to petitioner is that he lost the opportunity to do everything possible to obtain the mandatory minimum sentence recommended by the Probation Department. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648 (1984).

Furthermore, the issues were plain, because they were addressed and clear from the record, and the Court had given no notice that it would extract from a footnote in the PSR, an alleged, contradicted fact that, even if supported by a preponderance of the evidence, would not support the elevation of petitioner's sentence above the minimum. *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007) ("We have been more likely to avoid the full rigors of plain error analysis when the sentence was imposed without giving petitioner ... prior notice of the aspect of the sentence challenged on appeal"). *Fed.R.Crim.P. 52.* The error of the Court's mischaracterization as violent the crime of which petitioner was convicted was so blatant that "'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it"'. *Id* at 209, quoting *United States v. Frady*, 456 U.S. 152, 163 (1982).

The errors in the sentencing, singly and cumulatively, denied petitioner due process and equal protection of the laws (*United States v. Doe*, 936 F.3d 15, 18-19 (2d Cir. 2019)), and just as appellate courts will address and overturn a sentence based on material falsehood when the defendant has no counsel, it should do so when false fact impacts the sentence of a counseled defendant. *Townsend v. Burke, supra* at 736. The Second Circuit

also applies a less stringent plain error standard in the sentencing context. *United States v. Pena*, 762 Fed.Appx 34 (2d Cir. 2019).

When a District Court fails to state in open court its reasons for the sentence imposed, the Court remands for resentence, even in the absence of objection, (*United States v. Rosa*, __ F.3d ___, 2020 WL 1897181 (2d Cir. 2020)), hence it should do so when those reasons include falsehoods, arbitrarily chosen and unchecked assumptions of fact, failure to consider the §3553(a) factors, and an erroneous fixed policy against those factors. "Confidence in a judge's use of reason underlies the public trust in the judicial institution," (*Rita v. United States*, *supra*), and that confidence and public trust is undermined when he gives no reason for the sentence or gives plainly inadequate ones. *United States v. Rosa, supra,* at *6.

Public trust is also lost when the District Court here twice denied petitioner assigned counsel, including assigned counsel to prosecute the appeal from its unlawful sentence. The Second Circuit Court vacated the order holding that it was legally unsupported. The District Judge again later denied petitioner assigned counsel, on his pro se motion for counsel to assist him in making a motion for compassionate release. Again the order was based on legally unsupported grounds, i.e., that despite petitioner's serious chronic illnesses, the Court had the discretion to deny counsel, so it would deny counsel. Petitioner submits that the District Court appeared to be biased against him by both its actions at sentencing and thereafter. Any remand for resentencing, should be be referred

to a different judge. *Quercia v. Unites States*, 289 US 466 (1933); *United States v. Filani*, 74 F.3d 378 (2d Cir. 1996).

For all of these same reasons, the sentence imposed on petitioner was "unlimited and unexamined" (*United States v. Ready, supra* at 555; and *United States v. Riggi, supra*)); it was not conducted according to established principles of law (*United States v. Archie, supra*), therefore the plea waiver does not bar this appeal. The appeal waiver does not preclude this appeal of the District Court's failure to consider the §3553(a) factors, and the Court's application of its own policy negating the factors requiring consideration of the health and medical condition of the defendant. *United States v. Woltmann, supra; United States v. Riggi, supra*. Surely, a sentence based on material false, inaccurate, and unreliable facts is against "public policy." *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995). A sentence is a miscarriage of justice when, as here, it was based on impermissible factors, and where it seriously affects the fairness of the sentencing. *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) citing *United States v. Olano* 507 U.S. 725, 732 (1993)).

Finally, the District Court advised petitioner at the conclusion of the sentence that he had the right to appeal. The Court placed no reservation or limitation on that right (*Id* at 84), and the government did not object. The Court's advice should be followed. The Second Circuit ruled in 2000 and 2013 that such advice at sentencing would not negate an unambiguous plea agreement waiver of appeal, but it noted a conflict among the Circuits on this issue, and alerted prosecutors to speak up to make sure defendants are correctly

apprised of their rights. This caution by the Court has not been observed. *United States v. Fisher, supra* at 304-05; *United States v. Cook, supra*.

In the Court below, the government mischaracterized petitioner's claims about the sentence as constituting mere procedural and substantive errors and unreasonableness, which it argued are barred from this Court's review by petitioner's plea agreement waiver of appeal (AUSA Ghosh Aff. at 13-14). Petitioner contests more than the "misapplication of a guideline, or a mistake of law, or a dubious finding of fact" (*Id* at 14), and the government's argument that the District Court's procedural "failures" to act, as in *United States v. Buissereth*, 638 F.3d 114 (2d Cir. 2011) (Ghosh Aff at 15, 20-21), controlled in this case to bar the appeal does not withstand analysis.

Unlike *Buissereth,* this case involves affirmative conduct of apparent judicial bias, falsehood, arbitrary unfounded assumption of law and fact, use of fixed policy and insignificant fact, and negation of a statutorily mandated sentence consideration. This is a case like those posited in *Buissereth, supra*, and in others of the Second Circuit's decisions when it upholds appeal waivers, where the appeal waiver would not bar the appeal, because "an arbitrary practice of sentencing" left the defendant "entirely at the whim of the District Court" (635 F.3d at 118, citations omitted). In this case, the Judge also appeared to be biased against him. Petitioner's sentence was reached in a manner that the plea agreement did not anticipate" (*United States v. Riggi*, 649 F.3d 143, 148 (2d Cir. 2011)), because, here the District Court imposed a sentence two and a half years higher than recommended by the Probation Department. Unlike in *Buissereth*, "the sentence ...

was [not] reasonably foreseeable ... and taken into account ... in entering the plea agreement" Id at 118.

The District Court twice issued legally unfounded rulings denying petitioner counsel and the right to appeal, demonstrating his appearance his bias. The Second Circuit reversed the first of those rulings, which had denied counsel and *in forma pauperis* relief to petitioner, in effect denying him the means to make the instant appeal. *United States v. Kosic* (*Nunez*) 944 F.3d 448 (2d Cir. 2019). The second of the rulings, denying petitioner, without reason, assigned counsel on a motion for compassionate release, was not issued until after petitioner's opening brief on his direct appeal was filed, therefore, petitioner filed a supplemental brief arguing that two such unfounded rulings denying assigned counsel to the destitute, ill petitioner demonstrated the District Court's appearance of bias against him. This appearance of bias is manifest in the misconduct of the sentencing itself.

The Second Circuit holds that an appeal waiver does not bar review when "the sentencing judge was biased or ... abdicated his judicial responsibility." *United States v. Riggi, supra*, at 148. An apparently biased sentencing judge is certainly an impermissible sentencing factor that is against"public policy" (*United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995)), undermines "public trust" (*Rita v. United States, supra* at 356), and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Rosa, supra*; *United States v. Hahn*, 359 F.3d 1315, 1329 (10th Cir. 2004). This standard applies for both plain error and for appellate review notwithstanding an appeal waiver.

The government was mistaken that the bias of the Judge is irrelevant (AUSA Ghosh Aff. at 13n.3). Perhaps, if he had given petitioner the minimum sentence allowed by law, but he did not. Petitioner's Supplemental Brief argued that the Judge's appearance of bias and the unfairness of the sentencing voided the sentence and the appeal waiver and required remand to a different Judge. (Supplemental Brief at 4, 6).

Petitioner cited *United States v. Gomez-Perez, supra* at 319 and argued throughout his opening brief that this case contains the factors set by the Second Circuit for review despite an appeal waiver: petitioner did not know he would be sentenced by a biased judge and had a right not to be so sentenced; the sentence was based on "constitutionally impermissible factors"; and the District Court did not enunciate a "rationale" for its sentence that expressly or impliedly took account of the §3553(a) factors or logic itself. The government's claim that petitioner did not invoke *Gomez-Perez* was false (Ghosh Aff. at 17).

Constitutionally "impermissible sentencing factors" in this case were the falsehood that petitioner was a violent felon, the failure to address the §3553(a) factors, the negation of the factor requiring consideration of petitioner's health, and the arbitrary assumption and irrational applications of facts and law.

The government argued that the Court should disregard the plain words of the transcript where the Judge stated that petitioner is a violent felon and rely on the transcript for other content, then reverse the plain meaning of violent felony (*Id* at 11 and 19). The government, without evidence, claimed the transcript is mistaken and that the Judge said

the opposite of what he said. Not only is this not the method of resolving alleged transcription errors, but the context corroborates the fact that the words as recorded were said. The Court, two paragraphs later in the transcript, said, "for an extended period of time and poison, [petitioner] participated in the poisoning of a number of communities in the city of New York ..." (Sentencing Minutes at p. 82). The context affirms that the Judge equated violence with petitioner's poisoning of whole communities and thus that petitioner was a violent felon, This was a false equation because the government explained that it had no evidence that drugs dealt by petitioner had caused the death of anyone (*Id* at 79).

The context also included other statements by the Court contrary to fact and logic, indicating that the Court could well have believed that petitioner was a violent felon poisoner: the Court's emphasis on the fact that petitioner changed residences as a reason the sentence should be greater that the recommended minimum (*Id* at 82); and the policy that the health of a defendant matters in sentencing only if it prevented the defendant from committing the crime (*Ibid*). But petitioner need not prove what the Court actually believed, because his words are plain in the text, and because it is the appearance of bias, not its actuality, which requires the vacatur of a sentence notwithstanding an appeal waiver. See cases cited *supra*.

These unlawful and illogical assumptions by the Court are separately and cumulatively operative to void the sentence and the appeal waiver for the reasons argued above. The government made no substantive argument in support of the Judge's illogical and unjustified policy that a defendant's health is irrelevant on sentencing unless it

precluded him from committing the crime. There would be no sentencing if the defendant had not committed the crime. The Second Circuit holds that the appeal waiver does not bar review of disregard for the §3553(a) factors. *United States v. Woltmann, supra*, The government did not attempt to justify the Judge's assumption of fact, contradicted by evidence in the PSR, that petitioner moved out of his apartment to avoid surveillance. The government trivialized that assumption by comparing it to a "dubious finding of fact" (Ghosh Aff. at 19-20), but actually it was no finding of fact at all. The government then made an attempt in a footnote at a rationalization for the relevance of the arbitrarily chosen fact, using the fact itself to support the rationalization. (*Id* at 20n). But, the rationalization, i.e., that the fact proved that petitioner knew his conduct was wrong for a long time, was not in dispute and was nothing more than commission of the offense itself.

The appeal waiver cases cited by the government for barring review are inapposite (*Id* at 18). They are cases where the Judge failed to do something resulting in sentences "conceivably imposed in an illegal fashion." *United States v. Gomez-Perez, supra* at 319. Here, the Judge affirmatively engaged in conduct and sentencing practices that did not comport with due process of law. As argued above, the government did not attempt to substantively support at least one or two of them. Additionally, the Second Circuit holds that appeal waivers are construed strictly against the government (*United States v. Tourloukis*, 558 Fed. Appx. 112, 115(2d Cir. 2014). Here, the appeal waiver did not specifically "authorize an illegally imposed sentence... [and] "there was no satisfactory explanation [that] the consequences of [the] waiver ... included the waiver of an illegally

imposed sentence." *United States v. Ready, supra* at 558. An illegally imposed sentence was not included in the appeal waiver in this case, and the appeal should proceed.

The government asserted, without substantive argument in support, that the problems with the sentence are "garden variety" and merely matters of discretionary weight the District Court gave them. (Ghosh Aff. at 20). But, sentences conducted by a judge with the appearance of bias, without consideration of the statutorily mandated sentencing factors, without consideration of petitioner's serious health problems, on the basis of arbitrary, contradicted, illogical and false assumptions of law and fact are significant abuses of fairness and public policy. (*United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995)) such that review on appeal should not be denied. Petitioner submits that the District Court Judge has no discretion to choose to sentence this way. Were that the law, repeated significant unfair processes in District Court sentencing could carry on and become the norm. The government cited no case that has held that such unfair conduct is not enough to merit appellate access.

This should be especially so when the plea waiver was obtained against petitioner by the prosecutor, whose "bargaining power generally exceeds that of defendants and the government typically drafts such agreements." *United States v. Tourloukis*, 558 Fed. Appx. 112, 113-14 (2d Cir. 2014). Thus, the often mentioned rationale for upholding the waiver, i.e., that the government would otherwise lose the benefit of its fair contract (*United States v. Yemitan, supra* at 747-48) is no longer supported. Sentences are very severe, and the prosecutor is in control of the indictment variables that set the parameters

of time in prison. The defendant must accept the appeal waiver to avoid longer imprisonment. Petitioner urges the Court to apply its ultimate principles of fairness and due process to the sentencing in this case and hold that it cannot be countenanced and shielded by the appeal waiver.

CONCLUSION

FOR THE ABOVE STATES REASONS, THE WRIT SHOULD ISSUE, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE VACATED AND THE CASE REMANDED FOR CONSIDERATION OF THE APPEAL

Respectfully submitted,

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Counsel of Record
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lmstern@verizon.net
Attorney for Petitioner
Michael Nunez

March 10, 2021

APPENDIX A

S.D.N.Y.– N.Y.C.
18-cr-30
Crotty, J.

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 11th day of December, two thousand twenty.

Present:

Rosemary S. Pooler,
Richard C. Wesley,
Susan L. Carney,
Circuit Judges.

United States of America,

Appellee,

v.

19-706 (L),
19-3521 (Con)

Medin Kosic, AKA Dino, et al.,

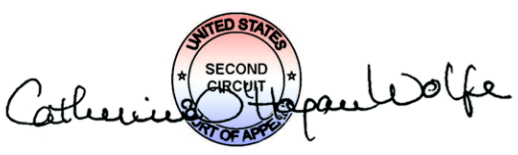
Defendants,

Michael Nunez, AKA Gordo, Paul Van Manen,

Defendants-Appellants.

The Government moves to dismiss this appeal by Appellant Michael Nunez as barred by the waiver of appellate rights contained in Nunez's plea agreement. Upon due consideration, it is hereby ORDERED that the motion is GRANTED and the appeal is DISMISSED. Nunez has not demonstrated that the waiver of his appellate rights is unenforceable under *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX B

AO 245B (Rev. 02/18) Judgment in a Criminal Case (form modified within District on February 22, 2019)
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
MICHAEL NUNEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: S1 18CR30-012(PAC

USM Number: 51773-069

Sammy Sanchez 917-304-8119
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) I

☐ 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
21USC 841(b)(1)(A), 841(b)(1)(C) and 846 (Class A Felony)	Conspiracy to Distribute and Possess with intent to distribute heroin and fentanyl	2/14/2018	I

The defendant is sentenced as provided in pages 2 through 6 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) underlined counts & Indictment ☐ 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.

3/8/2019
Date of Imposition of Judgment

Paul A. Crotty
Signature of Judge

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 3-12-19

Paul A. Crotty, U.S.D.J.
Name and Title of Judge

3/12/2019
Date

DEFENDANT: MICHAEL NUNEZ
CASE NUMBER: S1 18CR30-012(PAC

IMPRISONMENT

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

One Hundred and Fifty (150) Months.

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

That the defendant be designated to a facility close to New York City. The defendant should also be enrolled in RDAP.

☐ 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: MICHAEL NUNEZ
CASE NUMBER: S1 18CR30-012(PAC

SUPERVISED RELEASE

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

Five (5) 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: MICHAEL NUNEZ
CASE NUMBER: S1 18CR30-012(PAC

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. 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: MICHAEL NUNEZ
CASE NUMBER: S1 18CR30-012(PAC

SPECIAL CONDITIONS OF SUPERVISION

The defendant will participate in an outpatient program approved by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on the defendant's ability to pay and the availability of third-party payments. 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 shall submit his person, residence, place of business, vehicle, or any other premises 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 the 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 shall provide the probation officer with access to any requested financial information.

The defendant be supervised by the district of residence.

DEFENDANT: MICHAEL NUNEZ
CASE NUMBER: S1 18CR30-012(PAC

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, 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.

DEFENDANT: MICHAEL NUNEZ
CASE NUMBER: S1 18CR30-012(PAC

SCHEDULE 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 $ 100.00 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); or

C ☐ 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; or

D ☐ 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; or

E ☐ 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; or

F ☐ 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.

APPENDIX C

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018
Currentness

(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--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

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

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [2] **Sentencing.--**In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--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; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the

order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.--As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216; Pub.L. 115-391, Title IV, § 402(a), Dec. 21, 2018, 132 Stat. 5221.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. No subpar. (B) has been enacted.

3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 235. Appeal (Refs & Annos)

18 U.S.C.A. § 3742

§ 3742. Review of a sentence

Effective: April 30, 2003
Currentness

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.--In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure--

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.--If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals--

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.--If the court of appeals determines that--

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and--

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.--A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that--

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that--

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.--An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.--For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.--For purposes of this section--

(1) a factor is a "permissible" ground of departure if it--

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 213(a), Oct. 12, 1984, 98 Stat. 2011; amended Pub.L. 99-646, § 73(a), Nov. 10, 1986, 100 Stat. 3617; Pub.L. 100-182, §§ 4 to 6, Dec. 7, 1987, 101 Stat. 1266, 1267; Pub.L. 100-690, Title VII, § 7103(a), Nov. 18, 1988, 102 Stat. 4416, 4417; Pub.L. 101-647, Title XXXV, §§ 3501, 3503, Nov. 29, 1990, 104 Stat. 4921; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 103-322, Title XXXIII, § 330002(k), Sept. 13, 1994, 108 Stat. 2140; Pub.L. 108-21, Title IV, § 401(d) to (f), Apr. 30, 2003, 117 Stat. 670, 671.)

18 U.S.C.A. § 3742, 18 USCA § 3742
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
Title VII. Post-Conviction Procedures

Federal Rules of Criminal Procedure, Rule 32

Rule 32. Sentencing and Judgment

Currentness

(a) [Reserved.]

(b) Time of Sentencing.

(1) In General. The court must impose sentence without unnecessary delay.

(2) Changing Time Limits. The court may, for good cause, change any time limits prescribed in this rule.

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) Exclusions. The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(j) Defendant's Right to Appeal.

(1) Advice of a Right to Appeal.

(A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) Appealing a Sentence. After sentencing--regardless of the defendant's plea--the court must advise the defendant of any right to appeal the sentence.

(C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) Clerk's Filing of Notice. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(k) Judgment.

(1) In General. In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

(2) Criminal Forfeiture. Forfeiture procedures are governed by Rule 32.2.

CREDIT(S)

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(31)-(34), 89 Stat. 376; Apr. 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980; Oct. 12, 1982, Pub.L. 97-291, § 3, 96 Stat. 1249; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98-473, Title II, § 215(a), 98 Stat. 2014; Nov. 10, 1986, Pub.L. 99-646, § 25(a), 100 Stat. 3597; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, Pub.L. 103-322, Title XXIII, § 230101(b), 108 Stat. 2078; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1996, Pub.L. 104-132, Title II, § 207(a), 110 Stat. 1236; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 23, 2008, eff. Dec. 1, 2008; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Cr. Proc. Rule 32, 18 U.S.C.A., FRCRP Rule 32
Including Amendments Received Through 2-1-21

End of Document

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
Title IX. General Provisions

Federal Rules of Criminal Procedure, Rule 51

Rule 51. Preserving Claimed Error

Currentness

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court--when the court ruling or order is made or sought--of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

CREDIT(S)
(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Fed. Rules Cr. Proc. Rule 51, 18 U.S.C.A., FRCRP Rule 51
Including Amendments Received Through 2-1-21

End of Document

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
Title IX. General Provisions

Federal Rules of Criminal Procedure, Rule 52

Rule 52. Harmless and Plain Error

Currentness

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

CREDIT(S)
(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Fed. Rules Cr. Proc. Rule 52, 18 U.S.C.A., FRCRP Rule 52
Including Amendments Received Through 2-1-21

End of Document