

No. 21-

IN THE
Supreme Court of the United States

EBONE JAZMINE McAFFEE ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which affirmed two revocation sentences for violation of the terms of supervised release above the applicable advisory ranges—conflicts with the decisions of this Court on an important matter, and therefore the decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Ebone Jazmine McAfee:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, EBONE JAZMINE MCAFEE, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Ms. McAfee respectfully submits the District Court reversibly erred by granting an unreasonable sentence. Furthermore, the Fifth Circuit did not apply the correct standard of review defined by this Court. Accordingly, the decision by the Fifth Circuit is in conflict with decisions of this Court and a compelling reason is presented in support of discretionary review.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Ebone Jazmine McAfee*, No. 20-50236 (5th Cir. Dec. 18, 2020), appears at Appendix A to this Petition and is unreported.

The Judgments in two criminal cases of the United States District Court for the Western District of Texas, Midland Division, appear at Appendix B and Appendix C to this petition and are unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Ms. McAfee. This action is on a criminal prosecution initiated by the Government. Ms. McAfee was on supervised release for two narcotics cases. Her supervision was revoked and the Court ordered Ms. McAfee to serve 24-months in the custody of the Bureau of

Prisons for the revocations, to run concurrently. A copy of the judgments appear at Appendix B and Appendix C. On appeal, the Fifth Circuit affirmed. A copy of the appellate decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

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.

U.S. CONST. Amend. VI

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 witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview

In 2012, in the matter on appeal before the Fifth Circuit which would ultimately be assigned Case No. 20-50238, Ms. McAfee was sentenced in the Western District of Texas to serve 120 months in the custody of the Bureau of Prisons (“BOP”) based on her plea of guilty to a charge of conspiracy to possess with intent to distribute crack cocaine. ROA.44-50. The

sentence was reduced on August 22, 2013, to a prison term of 37 months and 5 years of supervised release. ROA.104-110.

On May 12, 2015, Ms. McAfee's supervised release was revoked and Ms. McAfee was sentenced to 3 months in the custody of the BOP and 4 additional years of supervised release. ROA.144-45. On November 30, 2016, Ms. McAfee's supervised release was revoked for the second time and she was sentenced to 24 months in prison with another 3 years of supervised release. ROA.163-64.

On another case, which would ultimately become Fifth Circuit No. 20-50236, Ms. McAfee was sentenced to 10 months in prison. This sentence was based on a guilty plea to distribute crack cocaine. ROA.44-45.

Finally, on March 20, 2020, Ms. McAfee's supervised release was revoked for the third time in both of the above cases. She was sentenced to 24 months in the custody of the BOP on each case, to run concurrently, with "no further supervised release." ROA.174.

The Revocation Hearing on Both Cases

The District Court addressed the three conditions of Ms. McAfee's supervised release which the Government claimed she violated. The first was that she abstain from alcohol and drug abuse. ROA.239. The second was that Ms. McAfee "not unlawfully possess a controlled substance." ROA.239. The third condition was that she must participate in a substance abuse program and follow the rules and regulations of that program. ROA.239. Ms. McAfee pleaded true to violating all three of her conditions of supervised release. ROA.239-40.

The Government offered the following factual basis for the plea:

On or about August 29, 2019, the defendant admitted she used cocaine.

On or about August 26, 2019, subsequently the defendant agreed she needed counseling services and was referred to outpatient treatment services as CelMar Counseling to address her drug use.

On or about September 18, 2019, the defendant admitted to using cocaine a second time on or about September 11, 2019.

The defendant's treatment services were increased to weekly sessions.

Furthermore, on January 2, 2020, a sweat patch was placed on the defendant's arm after she failed to report for a scheduled drug test on December 31, 2019.

On or about January 15, 2020, the sweat patch result confirmed a positive test for cocaine.

ROA.240. The District Court found the facts were sufficient to support the allegations she had stated were true. ROA.240.

The District Court further determined the violations of supervision should be classified as Grade B, with a criminal history category of I. ROA.240-41. Thus, the Court concluded the guidelines range was 4 to 10 months in the custody of the BOP, with a statutory maximum prison term of 60 months. ROA.241. Finally, the Court noted "life" of supervised release was available. ROA.241.

Ms. McAfee's lawyer addressed the Court and argued:

Your Honor, I guess starting with the Cause No. CR-330, and that has a different range of months. It is to where she's eligible--doesn't necessarily mean she deserves it, but it is to where she is eligible for a split sentence if it is six months--or not more than six months. And under her present condition, we would implore the Court to fashion--I think it was done one time before--in regards to placing her in housing or counseling housing because of a prior

pregnancy. It was successful then in regards to the delivering of the baby and hopefully that she continues to term here without any problems.

Outside of that, simply I'll defer to allowing her to make her plea to you as to why she is deserving of another chance.

ROA.241-42.

The Judge then asked Ms. McAfee if she would like to address the Court. Ms. McAfee accepted the opportunity and explained:

Because of well, in the beginning, I would say I was doing good my first year of being out; and I got off my medication for bipolar and depression. I had some complications with family members, and I had some deaths in the family which I always kept in contact with my PO. So she knew everything that was going on, which I probably shouldn't have gotten off my meds because, you know, I fell weak into doing the drugs which I should have stayed on my meds, you know. And I did tell my PO about it and had a sit-down with her and asked her for some help.

And right not, it's just—I'm just asking for anything other than jail at this point because I am due in like three and a half months, and I don't want to lose my baby to the system because I already lost one. And my daughter is already jumping from house to house at this point in time.

ROA.242-43.

The discussion then focused on Ms. McAfee's drug abuse and her children. ROA.243.

She stated she wanted to get better for her children and herself. ROA.243.

The Judge then discussed "the trend" he saw with respect to Ms. McAfee. ROA.244.

He reviewed her initial conviction and the circumstances surrounding the subsequent revocations. ROA.243-45. The Judge concluded:

You know, you said these aren't excuses; but they sound like excuses to me. I don't think we're not getting anywhere. I can tell we're not getting anywhere. We're making good time, but we're getting nowhere. I have to feel

for your child that you're carrying. Abusing drugs while you're carrying a child.

ROA.245. Ms. McAfee responded: "I'm not trying to make no excuses." ROA.245.

The Government requested a period of incarceration with no supervised release to follow. ROA.246. The prosecutor claimed:

Your Honor, I think the Court has hit on the issue. I understand that Ms. McAfee doesn't want to go back to prison, but I think that may be the safest thing for her baby. Because when she's not in prison, she uses drugs. She did that in 2015; she's done it now.

ROA.246.

The Court revoked Ms. McAfee's supervised release in both cases. ROA.246. The Judge stated he applied the policy statement in Chapter 7 and the sentencing factors set forth in 18 U.S.C. § 3553(a) in determining the sentence. The Judge then sentenced Ms. McAfee to 24 months imprisonment in each case to run concurrently. ROA.246. In doing so, the Judge noted this sentence was "not even half of the statutory maximum." ROA.247. The Judge further determined the upward departure from the guidelines was appropriate because:

The defendant has been afforded ample opportunity to participate and repeated opportunity to participate in substance abuse treatment to address her specific needs, continues to revert to criminal behavior.

She's being supervised for two federal cases to which one was committed while she was already on supervision in the older case. Furthermore, she reports being pregnant, continues to use cocaine. The court has lost any trust it might have ever had over the course of two judges in Ms. McAfee's willingness to make an effort even for herself, for her children.

There is certainly a tendency toward recidivism and failure to take advantage of a favorable sentence imposed in the original sentence, which was reduced

from 120 to 37 months. Certainly likelihood-likelihood is almost certain to reoffend, and the defendant's history and characteristics. Hopefully this helps to deter the criminal conduct at least for the amount of time that she's in custody and the duty that the court has to protect the public from additional crimes.

ROA.247-48.

However, counsel for Ms. McAfee noted his objection and argument as to the upward departure and a reasonable sentence:

For the record, the allocution on our part for the defendant did ask for a sentence that was at the bottom end of the guideline and/or a split sentence which was lower than—and within the guideline. The fact that the Court chose to upward depart, we object to the sentence being outside the guideline range, and that it was after a request for a lower sentence.

ROA.248.

The Opinion of the Fifth Circuit

On appeal, Ms. McAfee argued the revocation sentences were substantially unreasonable. The Fifth disagreed and affirmed the District Court. (Appendix A). Ms. McAfee now respectfully files this Petition for Writ of Certiorari.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. Standard of Review

A. The Fifth Circuit's Opinion

Ms. McAfee argued to the Fifth Circuit that the 24-month sentences were unreasonable and therefore constituted reversible error. (Opening Brief, pages 8-9). To this end, Ms. McAfee contended that the standard of review was for abuse of discretion because

she had argued she did not deserve more than 6-month sentences and specifically objected to the upward departure sentence after it was imposed. ROA.248. However, the Fifth Circuit disagreed with respect to the standard of review. (Appendix A, page 3). The Fifth Circuit reasoned:

McAfee argues that the revocation sentences were substantively unreasonable because the district court gave significant weight to an irrelevant or improper factor when upwardly departing and because the court did not account for factors that should have received significant weight. Because she did not raise these arguments in the district court, review is for plain error.

(Appendix A, page 3) (citing *United States v. Fuentes*, 906 F.3d 322, 325 (5th Cir. 2018)).

B.
The Error was Preserved

At the outset, the Government did not argue review was for plain error. Rather, the Government declared the revocation sentences were reviewed under the plainly unreasonable standard and made no mention of plain error review. ROA.248. Therefore, this should be observed as persuasive authority that Ms. McAfee did preserve error as to the issue of whether her revocation sentences were unreasonable.

This Court’s jurisprudence further establishes that the error was preserved. In *Holguin v. United States*, 140 S. Ct. 762, 766 (2020), it was explained that, “[b]y ‘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 to a contrary decision.” The rules do not “require an objecting party to use any particular language or even to wait until the court issues its ruling.” *Id.* Thus, “the question is simply whether the claimed error was ‘brought to the

court's attention.'" *Id.* (citing FED. R. CRIM. P. 52(b)). The word "reasonable" does not have to be uttered. *Id.*

As noted above, Ms McAfee argued for sentences lower than or at the low end of the advisory Guidelines ranges, or sentences for home confinement based on her pregnancy. ROA.241-42, 248. Ms. McAfee also expressed concerns because she was due to give birth in three and one-half months and did not want to lose her baby to the system. ROA.242. The prosecutor responded that the Court should put her in prison because she should have her baby in jail. ROA.246. The District Court's response, noted above, confirmed that the Judge was addressing Ms. McAfee's argument for a reasonable sentence below 24 months. ROA.245, 247-48. Further, Ms. McAfee's attorney's objections to the sentences were "for the record." ROA.248. Thus, this issue was preserved for review and it was reversible error for the Fifth Circuit to apply the plain error standard of review.

II. The Sentence was Unreasonable

"Congress has instructed sentencing courts to impose sentences that are 'sufficient but not greater than necessary,' to comply with (among other things) certain basic objectives, including the need for 'just punishment, deterrence, protection of the public, and rehabilitation.' *Holguin-Hernandez*, 140 S. Ct. at 765-66 (quoting *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017) (emphasis in original)). Therefore, once the District Court's actions were procedurally sound, the issue is whether the Court abused its discretion in determining that the 18 U.S.C. § 3553(a) factors supported the sentence. *Id.* at 766.

Ms. McAfee submitted to the Fifth Circuit that it was an abuse of discretion for the Court to give significant weight to the 24-month statutory maximum sentences on the ground that it was strictly related to drug abuse. ROA.126-27. She argued the Fifth Circuit has explained that a sentence is substantively unreasonable if the sentence gives significant weight to an irrelevant or improper factor when balancing the sentencing factors. *United States v. Mathis*, 759 F. App'x 205, 210 (5th Cir. 2018). She argued “there is nothing in 18 U.S.C. § 3553(a) which directs the Courts to consider that, based on drug addition, the statutory maximum [substantially above the Guidelines range] requires an upward departure from the guidelines.” (Opening Brief, page 13). In fact, as noted, the Supreme Court of the United States has made it clear the sentence cannot be greater than necessary to comply with the sentencing factors. *Holguin-Hernandez*, 140 S. Ct. at 746. Respectfully, the District Court gave significant weight to an irrelevant or improper factor in upward departing and thus the sentence was substantially unreasonable. In other words, the error was compounded by the Court’s observation that a prison term of 24 months was reasonable because it was substantially less than the 60 month statutory maximum one of the cases. ROA.126.

Furthermore, there are other matters the Court used to impose the upward departure which could not have justified the sentence. As set forth above, the District Court reviewed Ms. McAfee’s numerous re-sentencings pursuant to her first sentencing reduction and her subsequent revocations on the other case. ROA.122-24. By the time she stood before the Judge at the final revocation hearing, she had received in the 2011 case a 37-month prison

term, another 3-month prison term, a 10-month prison term in this case to run consecutively with a 24-month prison term on a revocation on the 2011 case, and she had been placed back on community supervision 3 times in the past decade. Respectfully, under the applicable sentencing principles, the Court should have given greater weight to the time she had already been in prison for issues related to her drug use. In this regard, the Court was required under 18 U.S.C. § 3553(a) to take into account when sentencing Ms. McAfee that she never possessed a gun or committed an act of violence. Rather, her entire criminal history establishes she is profoundly addicted to crack cocaine. All of this is additional evidence which establishes the sentence was substantively unreasonable.

The Fifth Circuit disagreed and reasoned:

The record does not clearly or obviously show that the district court gave significant weight to an irrelevant or improper factor or failed to account for factors that should have received significant weight. *See United States v. Warren*, 720 F.3d 321, 332 (5th Cir. 2013). The district court explained that it had reviewed the policy statements contained in the Sentencing Guidelines and the applicable 18 U.S.C. § 3553(a) factors. The district court properly relied on the need to deter criminal conduct, the need to protect the public from further crimes, and the history and characteristics of the defendant when sentencing McAfee. Furthermore, the district court was allowed to impose any sentence within the appropriate statutory maximum term of imprisonment. *See 18 U.S.C. § 3583(e)(3); Warren*, 720 F.3d at 332. Thus, the district court did not plainly err in imposing the revocation sentences. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

(Exhibit A, page 3) (full citations to *Warren* and *Puckett* added).

Respectfully, as an initial matter, the Fifth Circuit's opinion is unpersuasive because, as established above, the Appellate Court applied an improper standard of review. Further, the opinion does not address the core of Ms. McAfee's argument that the District Court

relied on a statutory maximum to justify sentences below that maximum. The Fifth Circuit also failed to address that the District Court's decision gave no weight to Ms. McAfee's drug addition. Indeed, the Fifth Circuit observation that "the district court was allowed to impose any sentence within the appropriate statutory term of imprisonment" is not relevant to the inquiry of whether a revocation sentence was plainly unreasonable. Therefore, Ms. McAfee respectfully requests that this Court grant this Petition and allow this case to proceed for further review.

CONCLUSION

Therefore, Ms. McAfee respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit conflicts with decisions of this Court on important matters of sentencing and preservation of error. Therefore the decision by the Fifth Circuit calls for an exercise of this Court's supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, EBONE JAZMINE MCAFEE, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari.

Respectfully Submitted,

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