

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTONYO REECE, ALSO KNOWN AS SEVEN,
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

James P. Whalen
WHALEN LAW OFFICE
9300 John Hickman Pkwy, Suite 501
Frisco, Texas 75035
Tel: (214) 368-2560
Fax: (972) 829-8654
jwhalen@whalenlawoffice.com

**CJA COUNSEL OF RECORD FOR
ANTONYO REECE**

QUESTION PRESENTED FOR REVIEW

Whether imposing an upward departure of 200 months to a criminal defendant who has exemplary rehabilitation evidence is incongruous to this Court's holding in *Pepper v. United States*, 52 U.S. 476, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011).

STATEMENT REGARDING PARTIES TO THE CASE

The names of all parties to the case are contained in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Antonyo Reece respectfully petitions for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in *United States v. Reece*, No. 20-10319, 2021 WL 1016429 (5th Cir. Mar. 16, 2021).

OPINIONS BELOW

In 2009, the United States District Court for the Northern District of Texas Dallas Division (District Court) sentenced Reece to a total of 1,680 months (140 years) imprisonment. The Fifth Circuit Court of Appeals (Fifth Circuit) reversed some of the convictions and remanded for resentencing in January of 2012. (Appendix A).

At resentencing in 2019, the district court sentenced Reece to 1,080 months (90 years) imprisonment, which was affirmed by the Fifth Circuit in 2019. However, after *United States v. Davis*, 139 S. Ct. 2319 (2019) was decided, the Fifth Circuit vacated some of Reece's firearm convictions and remanded for resentencing. (Appendix B).

On March 12, 2020, Mr. Reece was resentenced to 395 months (about 33 years) imprisonment to which he filed an appeal. The Fifth Circuit affirmed Reece's conviction and sentence via opinion published on March 16, 2021. (Appendix C). The judgment was also issued on March 16, 2021. (Appendix D).

STATEMENT OF JURISDICTION

This Petition is being filed within 150 days after entry of the Judgment, pursuant to Supreme Court Emergency Orders (Order List: 589 U.S.) and (Order List: 594 U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3661 provides that no limitation shall be placed on the information a sentencing court may consider concerning the defendant's background, character, and conduct.

18 U.S.C. § 3553(a) sets forth certain factors that sentencing courts must 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.

(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.

18 U.S.C.A. § 3553 (West).

These provisions allow sentencing judges to consider a wide breadth of information, including rehabilitation evidence, about a defendant on resentencing.

INTRODUCTION

This case provides this Court an opportunity to exercise its supervisory power because a United States Court of Appeals has so far departed from the accepted and usual course of judiciary proceedings as to grant an upward variance in a situation this Court has held should result in a downward variance.

STATEMENT OF THE CASE

On November 19, 2008, a Superseding Indictment was filed in the Northern District of Texas, Dallas Division, which charged Appellant, Antonyo Reece, and six co-defendants with violating 43 counts arising from alleged bank robberies. Specifically, against Reece, the Superseding Indictment alleged violations of conspiracy to commit bank robbery (18 U.S.C. § 371) in Counts 1, 16, and 20; attempted bank robbery (18 U.S.C. §§ 2213 (a) and (d) and 18 U.S.C. § 2) in Counts 3 and 18; bank robbery (18 U.S.C. §§ 2213 (a) and (d) and 18 U.S.C. § 2) in Count 22; and using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence (18 U.S.C. §§ 924(c)(1)(A)(i) and 924(c)(1)(C)(i)) in Counts 2, 4, 17, 19, 21, and 23. (Appendix E).

In August 2009, a jury convicted Reece for three counts of conspiracy to commit bank robbery, two counts of attempted bank robbery, one count of bank robbery, and six counts of using and carrying a firearm during and in relation to a

crime of violence. The District Court sentenced Reece to a total of 1,680 months (140 years) imprisonment.¹

An appeal of those convictions was taken challenging the multiple conspiracy convictions and the attempted bank robbery convictions. On direct appeal, the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) reversed the convictions for the two attempted robbery charges and two associated firearm charges, affirmed the other convictions, and remanded for sentencing. At resentencing, on November 29, 2012, the District Court resentenced Reece to 1,080 months imprisonment.²

An appeal of that sentence was taken and affirmed by the Fifth Circuit on November 1, 2019, but the court later granted a Certificate of Appealability. *United States v. Reece*, 938 F.3d 630 (5th Cir. 2019), as revised (Sept. 30, 2019). While Reece's appeal was pending, the Supreme Court held that 18 U.S.C. § 924(c)(3)(B)'s definition of "crime of violence" was unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). As such, the Fifth Circuit vacated Reece's three

¹ The District Court sentenced Reece to 60 months on Counts 1, 16, and 20 (conspiracy to commit bank robbery) and 120 months on Counts 3, 18, and 22 (attempted bank robbery and bank robbery) to run concurrently with all other counts. The District Court also sentenced Reece to 60 months on Count 2 and 300 months on Counts 4, 17, 19, 21, and 23 (using and carrying a firearm during and in relation to a crime of violence) to run consecutive to any sentence imposed.

² The District Court resentenced Reece to 60 months on Counts 1, 16, and 20 (conspiracy to commit bank robbery) and 120 months on Count 22 (bank robbery), all to run concurrently. The District Court also resentenced Reece on the firearm counts to 60 months on Count 2 and 300 months on Counts 17, 21, and 23, all to run consecutively.

firearms convictions and remanded his case back to the District Court for resentencing.

On March 12, 2020, Reece was resentenced to 60 months on three counts of conspiracy to commit bank robbery and 135 months on one count of bank robbery to run consecutively with each other, and 200 months on one firearm conviction to run consecutive to any other sentence imposed. Mr. Reece was resentenced for a total aggregate sentence of 395 months imprisonment, 200 months above the top end of the Guideline range.³

Reece appealed again, challenging the procedural and substantive reasonableness of his sentence. The Fifth Circuit affirmed Reece's sentence via Opinion published on March 16, 2021.

REASONS FOR GRANTING THE WRIT

This Court should invoke its supervisory powers to rule on this case and set a clearer standard for how the lower courts should apply *Pepper*, particularly regarding upward variances.

Eleven years ago, this Court decided that when a defendant's sentence has been set aside on appeal, a District Court at resentencing may consider evidence of the defendant's rehabilitation, and such evidence may, in appropriate cases, support

³ The recommended Guideline Range was 108 to 135 months on Counts 1, 16, 20, and 22 (conspiracy to commit bank robbery and bank robbery) and 60 months on Count 23 (firearm count) to run consecutively.

a downward variance from the advisory federal Sentencing Guidelines range.

Pepper, 562 U.S. 476 at 504-505.

While *Pepper* provided good groundwork for defendants who have rehabilitated and are facing resentencing, this Court needs to clarify how to properly apply *Pepper* – especially in relation to upward variances. Currently, confusion over the decision in *Pepper* and its application has caused detriment for rehabilitated defendants who are being resentenced unjustly, such as Reece.

Pepper ensured that a punishment will suit not merely the offense, but the individual defendant when it clarified that sentencing courts are permitted to consider the widest possible breadth of information about a defendant. *Pepper*, 562 U.S. at 488. *Pepper* ultimately held that:

When a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range.

Pepper, 562 U.S. at 490.

There is a need for this Court to clarify when and how to apply *Pepper* – especially regarding upward variances.

ARGUMENT AND AUTHORITIES

The decision below was wrongly decided because the District Court's substantial upward variance was inconsistent with the intent of this Court in light of *Pepper*.

This Court adequately reasoned that Congress' intent for what sentencing courts can consider is broad:

Congress could not have been clearer in directing that *no limitation* be placed on the information concerning the background, character, and conduct of a defendant that a district court may receive and consider for the purpose of imposing an appropriate sentence.

Pepper, 562 U.S. at 490-491 (internal quotation and citation omitted, emphasis added). Included in this broad information that sentencing courts can consider is evidence of a defendant's rehabilitation. *Pepper*, 562 U.S. at 490. This Court even went so far as to say that the district court in *Pepper* "should consider and give appropriate weight to that evidence." *Pepper*, 562 U.S. at 505 (emphasis added).

A. The failure to apply this Court's standards to resentencing will lead to more detrimental and disparate sentences for similar defendants.

It is Reece's contention that allowing courts to apply the ruling in *Pepper* and consider a defendant's rehabilitation evidence is counterintuitive if the courts are allowed to disregard it and then give an upward variance at resentencing.

Before resentencing, Reece had been sentenced to 60 months for three conspiracy counts, 120 months for one bank robbery count, and 360 months for four firearm counts. After this resentencing (where his exemplary rehabilitation efforts

should have been given heavy weight), Reece's sentence was *raised* 15 months on the bank robbery count, and he was given 200 months on *one* firearm count for which 60 months is recommended by the Guidelines.

Allowing this logic to hold would allow District Courts to claim to consider a defendant's rehabilitation evidence, while at the same time sentencing that defendant to an upward variance. In Reece's case, there was no new evidence or 3553(a) factors to consider, so an additional upward variance should not hold. For the Court to still grant an upward variance, even after this Court has enacted *Pepper*, is exceptionally departed from the accepted and usual course of what Congress and this Court intended from *Pepper*.

B. The District Court's considerations at resentencing were inconsistent with this Court's standards.

In Reece's case, the district court did not give weight to his rehabilitation. In fact, based on the 200-month upward variance, it seems Reece has been punished further at his resentencing even though his rehabilitation is exemplary. As of the date of resentencing (March 12, 2020), Reece had completed twelve (12) years of imprisonment. During that time, he had completed his GED, participated in numerous classes to rehabilitate himself, and had no disciplinary problems while incarcerated. (Appellant's Brief 10-11). The District Court mentioned it loved the fact that Reece had rehabilitated and believed that he had. (Appellee's Brief 25).

However, it did not take Reece's rehabilitation into serious consideration or give it enough weight when it resentenced Reece with an upward variance of 200 months.

Not only did the District Court not give enough credit to Reece's rehabilitation, it gave too much credit to information that is incongruous with the holding in *Pepper*. This Court was clear that a "court's duty is always to sentence the defendant *as he stands before the court on the day of sentencing.*" *Pepper*, 562 U.S. at 492 (emphasis added). However, the District Court considered Reece's juvenile criminal history from when he was fourteen (14) years old. Appellant Brief 12. At the time of resentencing, Reece was before the court as a forty-three (43) year old man. This is certainly backwards looking and not consistent with sentencing him "as he stood on the day of sentencing." *Pepper*, 562 U.S. at 492.

Furthermore, the Court considered Reece's offenses at his previous sentencing. In particular, the Court suggested that because one of the base offense levels increased by five, it was reasonable to increase his sentence by fifteen (15) months. *United States v. Reece*, No. 20-10319, 2021 WL 1016429 (5th Cir. Mar. 16, 2021).

In using the reasoning behind *Pepper*, it may be fair for the court to consider these things. However, this Court made it very clear that post sentencing conduct and rehabilitation should be given weight during resentencing. The District Court did not do so here. Instead, it resentenced Reece with a significant upward variance,

making a ruling that was inconsistent with its past proceedings and in complete disregard of this Court's holding in *Pepper*.

CONCLUSION

For the forgoing reasons, the Court should grant the Petition for Writ of Certiorari and definitively resolve the question of how this Court's decision in *Pepper* applies to defendants on resentencing who receive upward departures. Mr. Antonyo Reece respectfully asks the Court to grant a Writ of Certiorari.

Respectfully submitted this 13th day of August 2021.

Respectfully submitted,

WHALEN LAW OFFICE


JAMES P. WHALEN
State Bar No. 24081689
9300 John Hickman Pkwy, Suite 501
Frisco, Texas 75035
Tel: (214) 368-2560
Fax: (972) 829-8654
jwhalen@whalenlawoffice.com

**COUNSEL FOR PETITIONER
ANTONYO REECE**

CERTIFICATE OF SERVICE BY MAILING

I hereby certify that, on the 13th day of August 2021, the original Petition and its Appendix, **as well as the Motion to Proceed in Forma Pauperis**, were sent to the Court by overnight mail.

I also certify that on the same day, one copy of both the Petition and its Appendix were sent to Antonyo Reece, at:

Fairton FCI
P.O. Box 420
Fairton, NJ 08320

Lastly, I hereby certify that, on the same day, a true and correct copy of this Petition and Appendix was sent by overnight mail, as well as email, to:

Solicitor General of the United States
950 Pennsylvania Ave., N.W.; Room 5616
Washington, DC 20530-0001



JAMES P. WHALEN

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 3,050 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED THIS THE 13th DAY OF AUGUST 2021.



JAMES P. WHALEN