

No. _____

In the Supreme Court of the United States

JAY SAWATZKY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The Iowa Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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Question Presented For Review

May a sentencing judge impose an upward variance on a defendant convicted of possessing firearms and ammunition as a felon, based on that defendant's alleged racist views and possession of racist paraphernalia?

Related Proceedings

- I. *United States v. Sawatzky*, S.D. Iowa No. 4:19-CR-22; Judgment entered October 2, 2019.
- II. *United States v. Sawatzky*, Eighth Cir. Ct. App. No. 19-3172; Judgment entered April 19, 2021.
- III. *United States v. Sawatzky*, Eighth Cir. Ct. App. No. 19-3172; Order Denying Petition for Rehearing entered May 24, 2021.

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Opinions Below

On April 19, 2021, the Eighth Circuit affirmed the district court's for the Southern District of Iowa's sentencing decision in a published opinion. *United States v. Sawatzky*, 994 F.3d 919 (8th Cir. 2021), (Appx. 113a). On May 24, 2021, the petition for a rehearing en banc was denied. *United States v. Sawatzky*, 8th Cir. No. 19-3172, Ord. Denying Pet. for R'hrng. May 24, 2021 (Appx. 123a).

Jurisdiction

Jurisdiction of the district court was pursuant to 18 U.S.C. § 3231. Judgment entered October 2, 2019. (Appx. 1a). The Notice of Appeal was filed October 4, 2019. *United States v. Sawatzky*, S.D. Iowa No. 19-CR22, DCD 122 (Oct. 4, 2019). Jurisdiction for the Eighth Circuit was pursuant to 28 U.S.C. § 1295(a)(1). Judgment entered April 19, 2021. (Appx. 123a). This Court has jurisdiction is pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. § 3553(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)(1) 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.

Statement of the Case

Mr. Sawatzky appeals his sentence because it was based on inappropriate considerations in violation of his First Amendment rights. Mr. Sawatzky pled guilty to Count 2: Felon in Possession of a Firearm and Ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), Count 3: Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and Count 4, Felon in Possession of a Firearm and Ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (DCD 100, PSR at 2-3). Each of these counts had a statutory maximum sentence of 10 years. (*Id.*). His guideline's sentencing range was 84-105 months. (*Id.* at ¶ 119).

The government advocated for an upward variance to 150 months. In support of this sentencing request, the government called Special Agent Matthew Jenkins of the Bureau of Alcohol, Tobacco, Firearms, and Explosives to testify for 100 transcript pages about uncharged events concerning the activities of the Sons of Silence (SOS). (Sent. Tr. 23-123). Mr. Sawatzky was the president of the SOS. (*Id.* at 28:12-14).

Regarding Mr. Sawatzky's alleged racism (and the racism of SOS, which was attributed to Mr. Sawatzky), the government presented nine photos of white supremacist paraphernalia (Gov't Sent. Exs. 4A-4H, 5). In its sentencing brief, the

government argued that Mr. Sawatzky deserved a heightened sentence because of his alleged white supremacist beliefs, and those of the SOS: “Defendant and his fellow Sons were also steeped in the ideology of white supremacy. The Sons in Iowa are an all-white gang. And wherever defendant laid his head, he collected and proudly displayed symbols of virulent racism.” (DCD 103, Gov’t. Sent. Mem. 5-6).

The government also argued at the sentencing hearing that Mr. Sawatzky deserved a heightened sentence because he was racist: “The defendant is a man who took that same crossbow to Waterloo to ambush a rival motorcycle gang because he didn’t like their club and he didn’t like that they’re black.” (Sent. Tr. 212:15-17).

The district court enhanced Mr. Sawatzky’s sentence as a result of this evidence:

The presence of weapons here is serious because of the fairly pervasive or persistent possession of racist, Nazi, white supremacist memorabilia which speaks to an anger that was carried out against a Waterloo African American upstart biker club that didn’t have his permission.

(Sent. Tr. 213:8-13).

Reasons Relied on for Allowance of the Writ

I. The Factors Considered at Mr. Sawatzky’s Sentencing Represent a Substantial Departure from The Accepted and Usual Course of Judicial Proceedings

The petition for writ of certiorari should be granted here because the district court enhanced Mr. Sawatzky’s sentence because it believed he was racist, and the Eighth Circuit affirmed that enhancement. These opinions represent a substantial departure from the accepted and usual course of proceedings. Sup. Ct. R. 10(a).

Judges are granted the discretion to consider a number of factors at sentencing. The primary factors are laid out in 18 U.S.C. § 3553(a), which provides that the judge shall consider the nature and circumstances of the offense and the history and characteristics of the defendant. The judge will also typically consider the presence of any aggravating or mitigating circumstances that may bear on the § 3553(a) factors. These vary between jurisdiction, but traditional aggravating circumstances include things like the heinousness of the crime, the defendant's lack of remorse, or the defendant's record of prior criminal convictions. *See Clemons v. Mississippi*, 494 U.S. 738 (1990); *Mitchell v. U.S.*, 526 U.S. 314 (1999); *Zant v. Stephens*, 462 U.S. 862 (1983). However, while the judge has discretion to consider a variety of factors in handing down a sentence, this determination is still subject to certain limitations. Most notably, the judge cannot base a sentencing enhancement on constitutionally protected activity. *See Zant*, 462 U.S. at 885 (noting that an aggravated circumstance is invalid if "it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected.").

A. The *Dawson* Framework and Consideration of Abstract Beliefs

In *Dawson v. Delaware*, the Supreme Court established the framework for determining when a judge's consideration of sentencing factors strays impermissibly into constitutionally protected territory. 503 U.S. 159 (1992). Defendant Dawson was convicted of 1st degree murder after escaping from prison and embarking on a string of robberies culminating in a brutal murder. *Id.* at 160-1. Before the penalty hearing, the parties agreed to a stipulation regarding evidence related to Dawson's

membership in an Aryan Brotherhood prison gang. *Id.* at 162. The stipulation was narrowly drawn and provided only that the Aryan Brotherhood is a white supremacist prison gang with a nationwide presence and that Dawson was a member of the Aryan Brotherhood. *Id.* Dawson was sentenced to death, and, on appeal, the Supreme Court of Delaware rejected his claim that evidence related to the Aryan Brotherhood should have been excluded from the sentencing hearing entirely. *Id.* The Delaware Supreme Court held that the evidence was permissible because it bore on Dawson's character and stated that it was desirable that the jury have as much information before it as possible when conducting its inquiry. *Id.* at 163.

This Court rejected that reasoning, concluding the evidence presented with respect to the Aryan Brotherhood was "totally without relevance." *Id.* at 165. Chief Justice Rehnquist, writing for the majority, held that "[e]ven if the Delaware group to which Dawson allegedly belongs is racist, those beliefs...had no relevance to the sentence proceeding in this case," for the evidence "was not tied in any way to the murder of Dawson's victim." *Id.* at 166. Dawson's victim was white, the Court observed, which meant that "elements of racial hatred were therefore not involved in the killing." *Id.* This Court contrasted the circumstances of Dawson's killing with that of an earlier holding in *Barclay v. Florida*, where evidence of the defendant's membership with the Black Liberation Army and his desire to start a race war were understood to be related to the murder of a white hitchhiker. 463 U.S. 939, 942-944 (1983). Because the defendant's racial biases were not implicated in the crime Dawson committed, this Court observed that "one is left with the feeling that the

Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible.” *Id.*

Balancing its prior decision in *Barclay*, this Court’s holding came down as two parts. It first concluded that “the Constitution does not erect a per se barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.” *Id.* at 165. But, that evidence must still have some bearing on the crime of which the defendant was convicted. Thus, the evidence in *Barclay* was properly considered because racial hatred was a key element of the murder. In *Dawson*, however, Dawson’s offense had no relation to his racist philosophy, and therefore an enhanced sentence based on his white supremacist affinities penalized mere “abstract beliefs” and impinged on constitutionally protected associational rights. *Id.* at 168. In short, “a defendant’s abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.” *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (citing *Dawson*, 503 U.S. 159).

B. Subsequent Interpretations of *Dawson*

In the years following *Dawson*, courts applying its framework have consistently reaffirmed the requirement that evidence concerning one’s beliefs or associations be sufficiently related to the issues involved at sentencing to be permissible. Even when denying the defendant’s challenge to use of his or her beliefs or associations at sentencing, subsequent decisions have emphasized the need to establish some nexus between the evidence presented and the offense charged.

This Court encountered this issue in *Wisconsin v. Mitchell*. That case dealt with a Wisconsin hate crime statute that allowed for enhanced penalties for offenses motivated by racial bias. 508 U.S. at 476. Mitchell, a young black man, led a group of his friends in the assault of a young white man. *Id.* at 480. He was subsequently convicted of aggravated battery, and evidence of his racial bias was brought forward to justify an enhanced penalty under the hate crime statute. *Id.* at 481. Mitchell appealed, arguing that the consideration of his racial prejudice at sentencing violated the Court's prior decision in *Dawson*, because it impermissibly penalized his abstract beliefs. *Id.* at 485-6. This Court rejected this claim and upheld the two-part ruling of *Dawson*. Noting again that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing," the Court reaffirmed its prior holding that the proper test for the use of expressive and associational activity at sentencing is relevance. *Id.* at 486 (citing *Dawson*, 503 U.S. at 165). Here, the Court found Mitchell's racially biased statements to be relevant because they had a bearing on motive. *Id.* at 487. Unlike in *Dawson*, where the white supremacist defendant was convicted of the murder of a white woman, the evidence demonstrated that Mitchell intentionally sought out his victim on the basis of the victim's race. Therefore, Mitchell's beliefs about race clearly demonstrated the heinousness of the hate crime with which he was charged. *Id.*

Subsequent courts have charted closely the path laid out in *Dawson* and *Mitchell*: while there is no absolute bar to the consideration of the defendant's beliefs or associations at sentencing, that evidence must still be relevant to the offense that

forms the basis of conviction. *Boyle v. Johnson*, for example, is typical of the cases that have followed. 93 F.3d 180 (5th Cir. 1996). In that case, the defendant was convicted on capital murder charges for the kidnap, rape, and murder of a female hitchhiker. *Id.* The defendant appealed the admission into evidence of letters and drawings concerning the defendant's preoccupation with sex. *Id.* at 184. The appeals court, following *Dawson*, denied his claim. *Id.* The appeals court stressed the first step of its analysis: "we must determine if the evidence of [the defendant's] sexual relations and expressions was sufficiently related to the issues at sentencing." *Id.* The evidence tended to show that the defendant had an unhealthy obsession with sex and that his sexual expression "had a violent component." *Id.* at 185. The defendant was convicted for a murder that had a sexual component, so, the appeals court found, the "evidence was sufficiently related to the crime committed." *Id.* at 184.

Other courts have followed the same path. The Second Circuit has allowed the consideration of evidence of expressive activity when that evidence bears on the defendant's lack of remorse. *U.S. v. Stewart*, 686 F.3d 156, 167 (2nd Cir. 2012) (allowing for "review of the defendant's public statements indicating that she considered her sentence to be trivial, or exhibiting a lack of remorse, does not violate her right to speak under First Amendment principles"). In the 9th Circuit, evidence of the defendant's possession of pedophilic pornography was properly considered at sentencing when the defendant was convicted of traveling across state lines with the intent to engage in a sexual act with a minor. *U.S. v. Curtin*, 489 F.3d 935 (9th Cir. 2007). Evidence of membership in the Aryan Brotherhood was properly fair game at

sentencing when the defendant murdered another member of the gang in retaliation for the latter's perceived disobedience to gang rules. *U.S. v. Fackrell*, 368 F. Supp. 1010 (E.D. Tex. 2018). Likewise, the defendant's membership in the Aryan Brotherhood was an appropriate sentencing consideration when the defendant, a white man, assaulted an unarmed Black man during a traffic dispute. *Tafolla v. State*, 446 P.3d 1248 (Okla. Crim. App. 2019) (finding a nexus between a white man's attack on an unarmed Black man and holding that evidence of gang affiliation may be admissible when it is "fundamental to understanding what happened and why" (citations omitted)).

Elsewhere, courts have reversed sentences where the district court considered evidence implicating First Amendment protected activity when that evidence has no bearing on the issues involved at sentencing. In *U.S. v. Alvarez-Núñez*, the First Circuit reversed a sentence for possession of firearms where "the sentencing court confused the message with the messenger. . . . blur[ring] the line between the artistic expression of a musical performer and that performer's state of mind qua criminal defendant." 828 F.3d 52, 53 (1st Cir. 2016). The district court made this error based on the prosecution's evidence of violent song lyrics the defendant had recorded as a musical artist. *Id.* at 54. Stressing that conduct protected by the First Amendment may only be considered at sentencing "to the extent that it is relevant to the issues," the appeals court found that the prosecution failed to establish a link between the song lyrics and the offense charged. *Id.* at 55. "[A]ny such connection" between the

expressive conduct and the offense charged “must be established, not merely assumed, in the context of the particular case,” the appeals court cautioned. *Id.* at 56.

The framework established by the Court in *Dawson*, and reaffirmed in *Mitchell*, has been markedly consistent in its application. Courts have permitted use of conduct protected by the First Amendment at sentencing only when the prosecutor can demonstrate a clear nexus between the First Amendment protected activity and the offense charged. Beliefs and associations are relevant when gauging the motive of a white man who assaulted a black man, or when considering the violently sexual expressions of a man who raped and murdered a young woman, or when evaluating the sexual proclivities of a defendant convicted of intent to engage in a sexual act with a minor. They are not admissible, however, when the expressive or associational conduct is not implicated in the offense charged. Thus, song lyrics glorifying violence, selling drugs, and the like when the defendant was convicted of unlawful possession of a firearm while using controlled substances is unconstitutional. The evidence presented must relate back to the conduct charged.

C. The Court Violated Mr. Sawatzky’s First Amendment Rights in Considering Evidence of His Abstract Beliefs and Associations at Sentencing

The district court considered evidence of Mr. Sawatzky’s abstract beliefs and associations in imposing an upward variance on his sentence. The district court observed that “[t]he presence of weapons here is serious because of the fairly pervasive or persistent possession of racist, Nazi, white supremacist memorabilia.” (Sent. Tr. 213:8-13). This consideration is entirely inappropriate. As explained above, “a defendant’s abstract beliefs, however obnoxious to most people, may not be taken

into consideration by a sentencing judge.” *Mitchell*, 508 U.S. at 485. Mr. Sawatzky’s purportedly racist beliefs have no bearing on the offense for which he was convicted and for that reason consideration of that evidence is a violation of the Constitution.

The factors considered at Mr. Sawatzky’s sentencing do not pass judicial scrutiny under the framework established by *Dawson*. The *Dawson* court found that because “elements of racial hatred” were not involved in *Dawson’s* offense of conviction, evidence of the defendant’s membership in a white supremacist gang had no bearing on the issues at hand. *Dawson*, 503 U.S. at 166. The same logic applies here. There is no component of racial antipathy in a felon in possession of a weapon offense. Therefore, evidence of the defendant’s racial antipathy is irrelevant to the issues at sentencing. And unlike in the decisions subsequent to *Dawson*, alluded to above, Mr. Sawatzky’s alleged racial animus is irrelevant to any other aggravating factors. With respect to the offense charged, evidence of Mr. Sawatzky’s racism does not bear on motive, nor does it show lack of remorse. Mr. Sawatzky’s allegedly racist views are in no way fundamental to understanding what happened and why.

The prosecution’s attempt to establish a nexus between the white supremacist memorabilia in evidence and the offenses charged cannot withstand judicial scrutiny. The prosecution brought in Special Agent Matthew Jenkins to introduce evidence of an altercation between Mr. Sawatzky’s biker gang and a rival Black biker gang in Waterloo as bearing on Mr. Sawatzky’s future dangerousness. However, this evidence was not credible. The source of information placing Mr. Sawatzky at the scene of the incident was Mr. Sawatzky’s ex-girlfriend, with whom he had a turbulent

relationship. The informant was a chronic meth user, who, by Jenkins' own admission, would often approach law enforcement hoping to sell information so she could buy drugs. (Sent. Tr. 152:7). Jenkins conceded that the informant "had an axe to grind" with Mr. Sawatzky. (*Id.* at 152:18).

Even setting aside the issue of the reliability of the evidence concerning the confrontation in Waterloo, the consideration of racist memorabilia was improper. The language of *Dawson's* holding is clear: the court is barred from admitting evidence of a defendant's abstract beliefs "when those beliefs have no bearing on the issue being tried." *Dawson*, 503 U.S. at 168. While white supremacist memorabilia would certainly have a bearing on the seriousness of the altercation with a Black biker gang had Mr. Sawatzky been charged with or convicted of that conduct, he was not. There was no allegation Mr. Sawatzky possessed a firearm at the time of the incident. The nexus must exist between the defendant's abstract beliefs and the offense forming the basis for conviction, not between the defendant's abstract beliefs and the defendant's uncharged and unproven conduct. Consideration of Mr. Sawatzky's actual history and personal characteristics, not just incredible allegations of uncharged conduct, makes clear that there is an insufficient basis for a finding of future dangerousness. Mr. Sawatzky's criminal history is comprised primarily of narcotics-related offenses. He has two convictions for operating while intoxicated. There is only one crime implicating violence in his criminal record, a 2016 conviction for disorderly conduct. Significantly, Mr. Sawatzky has never been convicted of a crime of violence involving a firearm. Mr. Sawatzky's history and characteristics

simply do no support a finding that his purportedly racist views justify a finding of future dangerousness. The district court and Eighth Circuit's decisions to the contrary have so far departed from the accepted and usual course of judicial proceedings so as to justify this Court's exercise of its supervisory power to correct error.

Conclusion

Mr. Sawatzky respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

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