

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Respondent

v.

KIMANI STERLING

Petitioner

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Has the Eighth Circuit imposed upon Mr. Sterling an unlawful burden by finding Sterling waived his argument that the District Court violated procedural due process in sentencing Sterling

- When Mr. Sterling made specific objections to the sentence orally and in writing prior to sentence being imposed,
- When the District Court failed to address any of Mr. Sterling's specific objections in imposing sentence, and
- When the Seventh Circuit has found that such a record, as made by Mr. Sterling, properly preserves a procedural due process claim for full and fair review?

LIST OF PARTIES, PROCEEDINGS, OFFICIAL REPORTINGS

Court: The United States District Court for the Western District of Missouri,

Case Caption: United States v. Kimani Sterling

Case Number 15-408-03

Parties: United States of America and Kimani Sterling

Date of entry of judgment: Mr. Sterling was sentenced on January 23, 2020

Date of Filing of Notice of Appeal by Sterling: January 24, 2020

Court: The United States Court of Appeals, Eighth Circuit

Case Caption: United States v. Kimani Sterling

Case Number 20-1177

Parties: United States of America, Kimani Sterling

Date of Opinion: July 22, 2021

Date Motion for Rehearing Denied: August 24, 2021

Reporting: *United States v. Sterling*, 860 Fed.Appx. 92 (8th Cir. 2021) (Appendix 1)

Court: The United States Court of Appeals, Eighth Circuit

Case Caption: United States v. Kimani Sterling

Case Number 18-2974

Parties: United States of America, Kimani Sterling

Date of Opinion: November 1, 2019

Date Motion for Rehearing Denied: N/A

Reporting: *United States v. Sterling*, 942 F.3d 439 (8th Cir. 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kimani Sterling, for charges of conspiracy to distribute and distribution of narcotics, was sentenced to one hundred twenty-five months imprisonment, said sentence to run consecutive to a previously-imposed twenty-two year state sentence (Appendix 5). Mr. Sterling respectfully requests from this Court a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, in which that Court treated specific procedural objections to the District Court’s sentencing findings as waived, and thereby relegated to plain error review, contrary to the holding of the Seventh Circuit, which would hold that objections raised in the fashion advanced by Mr. Sterling would preserve the issue for full and fair review.

CITATION TO REPORTS OF OPINIONS

The District Court’s Judgment and Sentence is reported at Doc. 224 of the District Court’s file. A copy is provided at Appendix 5.

The Eighth Circuit’s opinion is reported at *United States v. Sterling*, 860 Fed.Appx. 92 (8th Cir. 2021). A copy is provided at Appendix 1.

STATEMENT OF JURISDICTION

The opinion of a panel of the United States Court of Appeals for the Eighth Circuit affirming Mr. Sterling's conviction and sentence was handed down on July 22, 2021 (Appendix 1). On August 24, 2021, Mr. Sterling's requests for rehearing by the Panel and by the Eighth Circuit *en banc* were overruled (Appendix 2). This Petition for Writ of Certiorari is being filed within 90 days of the denial of the motion for rehearing per the dictates of this Court's Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL STATUTORY RULE PROVISIONS

Amendment V to the Constitution of the United States is as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless 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.

STATEMENT OF THE CASE

1. Details about the indictment, plea agreement, and guilty plea in this case, and the disposition of later-filed charges in Missouri State Court

By way of an indictment filed on December 15, 2015, it was charged that, in the Western District of Missouri, Western Division, during the period between May 1, 2015 and November 15, 2015, Mr. Sterling, along with codefendants

Darryl Smith and Antwanette Howard, conspired to distribute crack cocaine in violation of 21 U.S.C. 841(a)(1), (b)(1)(B), (b)(1)(C) and 846 (Count 1); Mr. Sterling was also charged with multiple offenses occurring in the Western District of Missouri, Western Division involving distribution of cocaine and crack cocaine on dates ranging from July 28, 2015 through November 14, 2015, each in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (Counts 8-14, 22, 23 and 26) (Appendix 3). The District Court had jurisdiction of the matters per the dictates of 18 U.S.C. 3231 and 28 U.S.C. 105(b)(1).

A month after the indictment was filed in this case, on January 14, 2016, Mr. Sterling was arrested by United States Marshals in the State of Tennessee, and was brought back to Missouri (Doc. 134, p. 20). Also on January 14, 2016, State Court charges were brought against Mr. Sterling for the November 15, 2015 murder and armed criminal action against Ja'Que Dawkins (Doc. 134, p. 20-21). Marshals gave over custody of Mr. Sterling to State of Missouri officials, trial was had on the later occurring and filed Missouri charges, and Mr. Sterling was sentenced to twenty-two years for murder and twelve years for armed criminal action, with the State Court Judge in that case finding that those sentences should run concurrently with one another (Doc. 134, p. 20-21).

In August of 2017, nearly two years after the filing of the indictment in this case, the government finally acted to bring Mr. Sterling to Federal Court in

connection with the charges in this case (Doc. 92, 94). Just a little more than two months after that, Mr. Sterling entered pleas of guilty to Counts 1, 8 and 22, with the expressed, mutual understanding that the other charged counts would be dismissed at time of sentencing (Doc. 117, 118, 121). The only other agreement between the parties was that, in light of his pleas of guilty, Mr. Sterling was entitled to all three-levels of acceptance of responsibility reductions off from his base offense level, pursuant to U.S.S.G 3E1.1(a) and (b) (Doc. 118, p. 10).

2. After an initial sentencing, and reversal by the Eighth Circuit, the FPO, the parties and the District Court agreed upon proper base offense level

Per a presentence report recommendation, and over Mr. Sterling's objections, the District Court originally found that the base offense level should calculate to 26; in accordance with that finding, the District Court imposed the within-Guidelines sentence of one hundred twenty-five months imprisonment; the District Court, over Mr. Sterling's objections, also ordered that sentence to run consecutively to the twenty-two year sentence imposed by the Missouri Court; upon appeal, the Eighth Circuit agreed with Mr. Sterling's arguments regarding improper calculation of the base offense level, reversed the sentence, and remanded the matter for resentencing. *United States v. Sterling*, 942 F.3d 439, 442-444 (8th Cir. 2019).

In connection with that resentencing, in accordance with the determination by the Eighth Circuit, the Federal Probation Officer (FPO) who prepared the

presentence report and the parties agreed, and the District Court found, that the proper base offense level should be 24, that the final offense level should be 23, and that the Guidelines range of punishment should be 84-105 months (Doc. 217; Doc. 220, p. 3; R-Tr.² 3-4).

3. The presentence report accurately described and properly accounted for Mr. Sterling's criminal record, consisting of the state murder and armed criminal action convictions and four misdemeanor convictions

In the presentence report filed with the District Court, there were a total of four criminal history points assessed for misdemeanor convictions of domestic battery, intimidation of a witness, violation of a protective order, and several driving offenses (Doc. 134, p. 17-20). Also accounted in the report was Mr. Sterling's prior felony convictions, for the murder and armed criminal action against Ja'Que Dawkins, for which a maximum four criminal history points were assessed (Doc. 134, p. 21). In addition, two criminal history points were applied because the instant offense was committed while Mr. Sterling was under probation supervision for the protective order violation offense (Doc. 134, p. 21). In light of this ten point total, it was concluded that Mr. Sterling's criminal history category should calculate to V (Doc. 134, p. 21).

4. The presentence report concluded that there were no factors warranting upward or downward departures or variances, and neither party objected to the conclusion

² "R-Tr." refers to the transcript of the resentencing hearing.

Having assessed the length and breadth of Mr. Sterling's background, the FPO determined that there were no factors which would warrant an upward or downward departure from the applicable guideline range (Doc. 134, p. 28). That determination was not changed in any report addendum (Doc. 217, 221). Not only did the government not object to these conclusions, the government instead praised that the presentence report in this regard was "well done and accurately calculated" (O-Tr.³ 19).

5. Over objection, the government was permitted to present evidence and arguments, unmentioned in the presentence investigation process, urging upward variance

Despite the concessions made in the presentence investigation process, the government asked to present evidence and argument at sentencing in favor of an upward variance based upon Mr. Sterling's criminal history supposedly being underrepresented (O-Tr. 16). Mr. Sterling objected that, per the dictates of the Western District of Missouri Local Court Rule 99.8, the government had abandoned the right to make such arguments by failing to raise them in the presentence investigation process (Doc. 143, p. 3-5; O-Tr. 17-18). Over Mr. Sterling's objection, the District Court permitted the government's presentation (O-Tr. 20). The District Court did not address the waiver argument, but did indicate the belief that the government's failure to address the matter in the

³ "O-Tr." refers to the Transcript of Original sentencing proceedings before the District Court

presentence investigation process was not sandbagging, and that more time for investigation of the matter by the defense, which had not been requested, was in any event not necessary (O-Tr. 140).

6. The government's presentation regarding the killing of Martez Diaz

The government's evidence was that a man named Martez Diaz was shot to death on September 12, 2015, and that no one has ever been formally charged with the killing (O-Tr. 22, 29, 33-34). One of the Codefendants in this case, Antwanette Howard, swore that she saw Mr. Sterling shoot and kill Mr. Diaz (O-Tr. 78). Ms. Howard provided the background that, on September 12, 2015, during a party in the 1800 block of East 59th Terrace in Kansas City, Missouri, Mr. Diaz had pointed his own weapon at Mr. Sterling and others, using the laser scope on the gun to spot for precise aim (O-Tr. 81, 99-100). Ms. Howard went on that Mr. Sterling left to obtain his gun and then, while Mr. Diaz was attempting to drive away, Mr. Sterling shot Mr. Diaz multiple times resulting in Mr. Diaz's death (O-Tr. 82-83). Ms. Howard further detailed that Mr. Diaz had money, jewelry and a gun in a satchel, and that all of those items were stolen at the time by some other person or persons, though Howard claimed to not know who had committed this robbery part of the crime (O-Tr. 109-110).

In her testimony before the District Court, under leading questioning by the government, Ms. Howard claimed that Diaz got into his car, and drove west to

east, and that Mr. Sterling did the shooting from the 1801 E. 59th Terrace side of the street, so as to be able to shoot into the driver's side of the car (O-Tr. 84-86, 107, 108-109). Other evidence showed that the shooting was done into the driver's side of the car from the 1801, or north, side of the street (O-Tr. 52-54, 70-71).

However, it was established through other testimony, and upon cross-examination of Ms. Howard, that when Howard originally told her story to police, she had indicated that, when the shooting of Mr. Diaz occurred, it was she who was on the 1801 side of the street (i.e. the driver's side, and shooter's side, of Mr. Diaz's passing car), and Mr. Sterling was on opposite side of the street (i.e. on the passenger side of Mr. Diaz's passing car) (O-Tr. 54-56, 103-105). Moreover, Ms. Howard admitted that she also informed against Mr. Sterling in connection with the November 15, 2015 Ja'Que Dawkins killing, at that time was asked whether Mr. Sterling had been involved in any prior murders, and then said no, thereby failing at that earlier time to mention anything about Mr. Sterling's supposed involvement in the September 12, 2015 Martez Diaz killing (O-Tr. 97). Ms. Howard also swore during the sentencing hearing that the gun which Mr. Sterling used to kill Mr. Diaz was the same gun used to kill Ja'Que Dawkins (O-Tr. 83, 110). However, ballistics comparisons established that two different guns were used in the killings of Mr. Diaz and Mr. Dawkins (O-Tr. 75). And, ultimately, Ms. Howard admitted that she was testifying against Mr. Sterling in an effort to receive

a “shorter sentence” than the thirty-two months imprisonment which she was still, at that time, bound to serve (O-Tr. 88, 98). In fact, six weeks after Ms. Howard testified against Mr. Sterling, her sentence was lowered to time served, and she was released from prison (Doc. 185).

Jailhouse informer Mylin Smith, for his part, claimed that, while he and Mr. Sterling were housed in same pod at the Caldwell County Missouri Jail, Sterling supposedly said he killed Diaz by shooting Diaz 14-16 times (O-Tr. 116, 118, 119, 125). According to Mr. Smith, Mr. Sterling explained that he was angry with Mr. Diaz for threatening him (Sterling) with a gun, for providing bad cocaine to him (Sterling), and for Diaz defending the quality of the bad drugs (O-Tr. 120-121, 123-124).

On cross-examination, Mr. Smith readily admitted he was testifying to get a sentence reduction, and for no other reason (O-Tr. 125). Mr. Smith said too that he had previously provided other forms of cooperation to the government in return for leniency (O-Tr. 128). Mr. Smith went on to admit that, even before being jailed with Mr. Sterling, he (Smith) knew details helpful to his testimony in that he himself had drug dealings with Mr. Diaz, he heard on the streets facts about how the Diaz killing occurred, and he was well-familiar, through personal experience, with the area where the Diaz killing took place (O-Tr. 127, 129). Mr. Smith went on to admit that he personally had dealings with bad drugs, and so from that point

of reference alone knew how to describe such matters (O-Tr. 127-128). In addition, Mr. Smith conceded that, when housed in the same jail cell with Mr. Sterling, he had access to any of Sterling's paperwork which might have been contained in Sterling's unlocked storage container (O-Tr. 130-131). Also, Mr. Smith admitted he had personal animosity toward other members of Mr. Sterling's family (O-Tr. 127-128). As for Mr. Smith's claim about Diaz supposedly supplying bad drugs to Mr. Sterling, Ms. Howard testified to the contrary, that to her knowledge Diaz did not supply to her, Sterling and Smith, and that no one ever supplied bad drugs to her group (O-Tr. 92-93). Moreover, lab testings showed that all drugs purchased from Smith, Howard and Sterling during undercover operations were of high quality (O-Tr. 131-132)

It was also brought out at the hearing that Mr. Sterling's fingerprints did not match to any of the latent prints collected from the scene of the Martez Diaz killing (O-Tr. 49-50). And, testimony was adduced that Mr. Diaz was the primary suspect in a convenience store owner shooting in the area of the killing (O-Tr. 61-62).

Ultimately, the District Court never made findings with regard to the government's presentation (O-Tr. 132-134). In fact, at the first sentencing hearing, the District Court stated that the sentencing determinations being made were "separate and apart from the evidence presented" (O-Tr. 143). Then, at the resentencing, the District Court never mentioned this presentation.

7. While particularized objections were made during the sentencing process, the District Court addressed none of those in pronouncing its sentence

At the resentencing, well aware of the recommendation by the government for a gargantuan upward variance through the means of a 125 month sentence consecutive to the 22 year state sentence Mr. Sterling was already serving, undersigned counsel detailed, through briefings and arguments to the District Court, five specific objections against imposition of this gargantuan upward sentencing variance (Appendix 4; Doc. 220, p. 11-15; R-Tr. 12-13). After that extensive presentation of objections, the District Court inquired about “any good reason” regarding sentence, undersigned counsel responded “(o)nly those already stated”, the District Court followed up “(a)nything else from the defense” and undersigned counsel responded “nothing further” (R-Tr. 16, 18). In pronouncing a 125 month consecutive sentence against Mr. Sterling, the District Court addressed none of the objections made by counsel, and instead briefly expressed to Mr. Sterling that “I do, sir, honestly, think you’re a danger to the community” and further indicated that the sentence was being imposed as “specific deterrence with respect to you, sir, and your conduct” (R-Tr. 16-17). The Court went on that “I think you are a danger to the community when you are out there” and that a “sentence of this type will protect the community from you sir” (R-Tr. 17). The District Court had made similar statements at the time of the original sentencing (O-Tr. 145). In the Statement of Reasons for a sentence variance, the District

Court cited generally the history and characteristics of the defendant, the seriousness of the offense, deterrence, and protection against further crimes by the defendant (Doc. 225, p. 3). However, the District Court did not make any more specific findings in any regard.

Ultimately, the District Court sentenced Mr. Sterling to 125 months imprisonment on each of the three Counts, with the sentences to run concurrently to one another, but consecutive to the twenty-two year state case sentence (Appendix 5; R-Tr. 16-17).

8. Mr. Sterling's appeal to the Eighth Circuit, and that Court's opinion

The day after sentencing, the District Court granted leave for Mr. Sterling to proceed *in forma pauperis* upon appeal (Doc. 228). Immediately thereafter, Notice of Appeal was filed (Appendix 6: Doc. 229).

Upon appeal, Mr. Sterling urged that the District Court had erred, procedurally in failing to lawfully explain the gargantuan upward variance, and substantively in imposing a sentence which was simply not justified under the facts and the law (Appellant's Brief, p. 15-23). *United States v. Sterling*, 860 Fed.Appx. 92-93 (8th Cir. 2021). Despite the extensive record upon objections to the sentence made before the District Court, the Eighth Circuit found that "Sterling failed to object", applied plain error analysis to the procedural claim, and found that Mr. Sterling had not shouldered the "daunting task" of proving plain error.

United States v. Sterling, 93. As to Mr. Sterling’s substantive claim, the Eighth Circuit found that the District Court’s reliance upon the only two facts which that Court mentioned, specific deterrence and community protection, were appropriate and reasonable. *United States v. Sterling*, supra.

9. Motion for Rehearing

On August 3, 2021, Mr. Sterling timely filed his Motion for Rehearing (Appendix 8), and then on August 22, 2021, the Eighth Circuit denied the motion (Appendix 2).

REASONS IN SUPPORT OF GRANTING THE WRIT

Certiorari review of this case is warranted because the Eighth Circuit decision upon the matters presented contains an issue of exceptional importance, a lynchpin holding in conflict with the manner in which the same subject is treated in a Sister Circuit. In particular, though undersigned counsel for Mr. Sterling copiously and vigorously made written and oral specific objections prior to the pronouncement of sentence, because counsel answered the District Court’s ending query for “(a)nything else from the defense” with the words “nothing further” (R-Tr. 18), the Eighth Circuit found that only plain error review would be afforded to Sterling’s argument that the District Court committed procedural error in sentencing (Appendix 1). *United States v. Sterling*, 860 Fed.Appx. 92 (8th Cir. 2021). By limiting review in this fashion under these circumstances, the Eighth

Circuit brought themselves into conflict with the persistent, diametrically opposed holdings by the Seventh Circuit, that such circumstances do not constitute waiver, and instead require full appellate review of the procedural error raised. *United States v. Mzembe*, 979 F.3d 1169, 1173 (7th Cir. 2020). What makes this all momentous is that Mr. Sterling has been prejudiced by the Eighth Circuit's failure to employ the proper standard of review since the District Court did indeed commit significant error to Mr. Sterling's detriment.

ARGUMENT

A. Summary of Mr. Sterling's challenge against procedural and substantive error committed by the District Court in assessing and imposing a 125 month consecutive sentence against Mr. Sterling

In his briefing to the Eighth Circuit, Mr. Sterling recounted how the District Court, through the means of a 125 month sentence consecutive to a 22 year state sentence, engaged a gargantuan upward sentencing variance, which locked Mr. Sterling in to incarceration through to the middle of the 2040 decade (Appellant's Brief, p. 15-16). Mr. Sterling went on to detail how, through briefings and arguments to the District Court, a host of specific objections were lodged against imposition of this gargantuan upward sentencing variance; Mr. Sterling then went on to note that, when the District Court went ahead and imposed that gargantuan upward variance, the District Court mentioned only sentencing principle

generalities, and never addressed a single one of the objections which were raised (Appellant's Brief, p. 16-18; Doc. 220, p. 11-15; R-Tr. 12-13).

First, attention was drawn that Sterling's recommendation, that he be sentenced to 84 months concurrent with all other sentences, was in keeping with the Guidelines calculation made by the District Court's presentence investigative officer, and therefore the defense-recommended sentence was presumptively reasonable, and a longer and consecutive sentence, as recommended by the government, was presumptively unreasonable (Appellant's Brief, p. 17-18; Doc. 220, p. 4, 7-8; R-Tr. 13).

Second, it was argued that the defense-recommended 84 month concurrent sentence for Mr. Sterling was right in line with the time assessed against codefendants for this particular criminal enterprise; thus, it would be reasonable that such a sentence for Mr. Sterling would fully, properly and reasonably reflect the nature, circumstances and seriousness of the offense, and the needs for general deterrence and respect for the law, all per the dictates of 18 U.S.C. 3553(a) (Appellant's Brief, p. 17-18; Doc. 220, p. 11; R-Tr. 13).

Third, focus was trained on how the Guidelines had already dealt harshly with the 3553(a) factors of Mr. Sterling's history, characteristics and needs for specific deterrence; the Guidelines calculation had meted out significant criminal history points assessments to each and all of Mr. Sterling's prior misdeeds, and in

particular exacted the ultimate four-criminal-history-points toll for the worst part of Mr. Sterling's background, his Missouri state court murder and armed criminal action convictions (Appellant's Brief, p. 8, 17, 20; Doc. 220, p. 7-8; R-Tr. 12-13).

Fourth, it was advanced that any upward variance from the Guidelines recommended sentence would have to turn a blind eye to the determination by the District Court's own presentence investigative officer that there were no factors justifying an upward variance (Appellant's Brief, p. 17; Doc. 220, p. 2; Doc. 134, p. 28; R-Tr. 12-13).

Fifth, it was urged that a consecutive sentence by the District Court would amount to a repudiation and deconstruction of the Judgment imposed by the Missouri Circuit Court Judge, who having heard the state court murder trial, and having considered the question of Mr. Sterling's future dangerousness, eschewed a similar invitation for consecutive sentencings of the Counts in that case, and instead imposed concurrently the jury recommended sentences of 22 years for murder and 10 years for armed criminal action (Doc. 220, p. 13-14; Doc. 134, p. 20; Jackson County Missouri Case # 1516-CR04693-01; R-Tr. 13).

Additionally, a distraction which the government introduced, but which the District Court rightly devalued, was addressed: accusations that Mr. Sterling committed a different murder, of a man named Martez Diaz (Appellant's Brief, p. 20-23). Undersigned counsel reminded how the government chose to never submit

the Martez Diaz accusations to the scrutiny of the presentence investigative process, and thus avoided the risk of the accusations being discredited by an arm of the District Court (Appellant's Brief, p. 20-23; Doc. 134). Instead, the government offered their evidence, such as it was, directly to the District Court, along with the argument for a gargantuan upward variance premised upon this otherwise unaccounted murder (Appellant's Brief, p. 20-23; O-Tr. 20-131). Fortunately, the District Court provided, and undersigned counsel took full advantage of, ample opportunity to debunk the accusations, and thereby demonstrate precisely why state authorities had deemed the evidence so feeble as to not warrant the bringing of criminal charges against Mr. Sterling (Appellant's Brief, p. 20-23; O-Tr. 20-131). It was then observed that the District Court refused to take the government's bait, accorded no weight at all to the Martez Diaz accusations, and thus made the matter irrelevant to this drug case sentencing appeal (Appellant's Brief, p. 23).

The briefing summed up that, in imposing its gargantuan sentencing enhancement, the District Court addressed nary a one of the five specific objections raised by Mr. Sterling, and instead invoked only the generalized sentiments that Mr. Sterling is "a danger to the community" in need of "specific deterrence" so that a "sentence of this type will protect the community" (Appellant's Brief, p. 18-19; R-Tr. 16-17). Undersigned counsel then explained, in words borrowed from the precedent of the Eighth Circuit, that such generalities are

procedurally and substantively unreasonable, and that the District Court erred since it did not and could not give specific reasons how and why the guidelines calculations were too low, and what appropriate recalculations of those items should have been (Appellant’s brief, p 19-20). *United States v. Sullivan*, 853 F.3d 475, 478-479 (8th Cir. 2017).

B. The Eighth Circuit’s choice to deem Sterling’s arguments waived is not supported by Circuit precedent, and is contrary to persistent holdings by the Seventh Circuit

Rather than giving Mr. Sterling’s appellate points the full consideration they deserved, the Eighth Circuit followed the government’s urgings, deigned that “Sterling failed to object to the district court’s explanation for the sentence it imposed”, and relegated Sterling to “review for plain error.” *United States v. Sterling*, supra.

This completely ignored Reply briefing to the Eighth Circuit in which Mr. Sterling countered the government’s claim by reminding of the ways in which he had fastidiously preserved these issues for appeal

- by setting forth the matters in copious detail in written and oral arguments to the District Court, and
- by twice reiterating and renewing those objections, first responding to the District Court’s generalized inquiry about “any good reason” regarding the imposition of sentence with the response “(o)nly those already stated”, and

second by answering the District Court’s “(a)nything else from the defense” with the words “nothing **further**” (emphasis added) (R-Tr. 16, 18; Reply Brief, p. 7-8).

Undersigned counsel next reminded that another Panel of the Eighth Circuit has held that an approach similar in kind to the one undertaken by Mr. Sterling is sufficient to preserve all matters for review (Reply Brief, p. 9). *United States v. Anderson*, 926 F.3d 954, 956-957 (8th Cir. 2019).

Undersigned counsel then slogged through the arm-load of cases advanced by the government, and distinguished the proper means of preservation undertaken in this case with very different means employed and deemed lacking in that arm-load of cases (Reply Brief, p. 9-13).

Unfortunately, the Eighth Circuit chose to neither address these preservation arguments of undersigned counsel in any wise, nor explain its finding of waiver in any way.

The Eighth Circuit’s finding of waiver would seem contrary to its own precedent on the subject set in *United States v. Anderson*, supra. There is no question that the Eighth Circuit’s finding of waiver is diametrically opposed to holdings on the subject from the Seventh Circuit.

In *United States v. Mzembe*, 979 F.3d 1169, 1173 (7th Cir. 2020), the Seventh Circuit decided to “reject” outright precisely the same argument leveled

by the government against Mzembe, that though he had made specific objections which were unanswered by the District Court in pronouncing sentence, he somehow waived procedural objections by responding with a simple “no” to the Sentencing Judge’s ending, general query of “anything else?” Following a significant line of Seventh Circuit precedent, that Court held that such silence by counsel, when preceded by detailed objections, “...is not sufficient, however, to show a waiver of challenges to the sufficiency of an explanation. *United States v. Mzembe*, supra. The clear conflict between Seventh Circuit holdings and the approach by the Eighth Circuit in this case amounts to reason aplenty for this Court to grant certiorari to settle the conflict.

C. The Eighth Circuit’s treatment of the matter acts to hide a lawless result

The Eighth Circuit found solace that the District Court did specify reasons for the sentence imposed, all of which summed into a singular theme that the sentence imposed was correct because Mr. Sterling amounts to a “danger to the community” (R-Tr. 16, 17). *United States v. Sterling*, supra. However, the Eighth Circuit does not acknowledge the trouble with the singularity and brevity of this explanation about the sentence: the inescapable conclusion that the District Court unlawfully ignored the specific, compelling objections made by Mr. Sterling.

Mr. Sterling particularly objected that all of the indicia of dangerousness identified in the proceedings had been fully accounted in the guidelines-suggested

range of punishment of 84-105 months, and that imposition of a higher sentence would therefore be unreasonable (Appellant's Brief, p. 17-18; Doc. 220, p. 4, 7-8; R-Tr. 13). It was incumbent upon the District Court to address this objection if he could, but he did not.

Mr. Sterling specifically objected that the Court's own presentence investigative officer concluded that there were no additional reasons, over and above the guidelines calculations he made, which would justify an upward variance (Appellant's Brief, p. 17; Doc. 220, p. 2; Doc. 134, p. 28; R-Tr. 12-13). It was incumbent upon the District Court to address this objection if he could, but he did not.

Mr. Sterling objected that imposition of a Federal sentence consecutive to Mr. Sterling's state court sentence would vitiate the substance and effect of the judgment about future dangerousness made by the State Court Judge in granting concurrent sentencing for the 22 years for murder and 10 years for armed criminal action recommended by the jury in that case (Appendix 4; Doc. 220, p. 13-14; Doc. 134, p. 20; Jackson County Missouri Case # 1516-CR04693-01; R-Tr. 13). When a State Court Judge, fully versed about the defendant's background, makes a determination about consecutive versus concurrent sentencing in a State case against the defendant, a Federal Court Judge can and should take that State Judge's determination on the subject into serious account in deciding the question about

whether a Federal Court sentence should run concurrently or consecutively to that state sentence. *United States v. Mzembe*, 1175-1176. It was incumbent upon the District Court to address this objection if he could, but he did not.

Most likely, the District Court did not answer these objections because there were no legitimate answers to be offered. But at the very least, it was incumbent upon the District Court to give what answers he could in order for this Court to properly assess the propriety of the sentencing determination. *United States v. Sullivan*, supra. Mr. Sterling has been improperly prejudiced by not being given a full and fair appellate hearing upon the matter.

D. Conclusion

Because the Eighth Circuit Opinion has been wrongly decided, and conflicts with decisions by the Seventh Circuit, this Court should grant certiorari to resolve the Circuit conflict, and ultimately reverse and remand for resentencing.

CONCLUSION

WHEREFORE, Mr. Sterling prays that this Honorable Court enter its Order in this case granting to Mr. Sterling its writ of certiorari to the Eighth Circuit Court of Appeals, and granting any further relief which this Court deems just and proper under the circumstances.

Respectfully submitted

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CERTIFICATE OF SERVICE AND COMPLIANCE

It is hereby certified

- that required privacy act redactions have been made to the foregoing,
- that this document complies with the typeface requirements of Supreme Court Rule 34.1(g) because the document was prepared in Microsoft Word using Times New Roman 14 font style and typesize,
- that, the portions of this document countable under Supreme Court Rule 33.2(b) contains less than 40 pages, and therefore this Petition complies with the dictates of Rule 33.2(b),
- that, this item was converted to pdf format for electronic filing and was properly scanned for viruses, with none being found, and
- that, copies of the petition and appendix were e-mailed and mailed to the following on this 18th day of November, 2021

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