

NO. _____

In The
Supreme Court of the United States

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BERNARD STEVEN BOYD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTION PRESENTED

Did the Trial Court provide insufficient information or explanation to an upward variance in the Petitioner's Guideline Sentence, from a range of 51 to 63 months to 76 months, without material explanation of the enhancement, in violation of Due Process protections of the Fifth Amendment to the U.S. Constitution.

LIST OF PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of this case on the cover page.

STATEMENT OF RELATED CASES

Chavez-Meza v. United States, No. 17-5639. Argued April 23, 2018, Certiorari to the United States Court of Appeals for the Tenth Circuit. Decided June 18, 2018.

Gall v. United States, No. 06-7949. Argued October 2, 2007, Certiorari to the United States Court of Appeals for the Eighth Circuit. Decided December 10, 2007.

Kimbrough v. United States, No. 06-6330. Argued October 2, 2007, Certiorari to the United States Court of Appeals for the Fourth Circuit. Decided December 10, 2007.

Molina-Martinez v. United States, No. 14-8913. Argued January 12, 2016, Certiorari to the United States Court of Appeals for the Fifth Circuit. Decided April 20, 2016.

Rita v. United States, No. 06-5754. Argued February 20, 2007, Certiorari to the United States Court of Appeals for the Fourth Circuit. Decided June 21, 2007.

United States v. Booker, No. 04-104. Argued October 4, 2004, Certiorari to the United States Court of Appeals for the Seventh Circuit. Decided January 12, 2005.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
STATEMENT OF RELATED CASES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	11
APPENDIX:	
Unpublished Opinion of The United States Court of Appeal for The Fourth Circuit Re: Affirming Judgment entered October 18, 2021	1a
Judgment of The United States Court of Appeal for The Fourth Circuit Re: Affirming Judgment entered October 18, 2021	5a

Judgment in a Criminal Case of The United States District Court for The Middle District of North Carolina entered April 7, 2021.....	6a
Indictment of The United States District Court for The Middle District of North Carolina entered July 27, 2020	14a
Transcript of Change of Plea Hearing of The Honorable Thomas D. Schroeder on October 22, 2020.....	15a
Transcript of the Sentencing Order of The Honorable Thomas D. Schroeder on April 1, 2021	47a
18 U.S.C. § 922	75a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Chavez-Meza v. United States</i> , 138 S. Ct. 1959, 201 L. Ed. 2d 359 (2018)	6, 10
<i>Gall v. United States</i> , 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)	9
<i>Kimbrough v. United States</i> , 552 U.S. 85, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007)	9
<i>Molina-Martinez v. United States</i> , 578 U.S. _____, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016)	10
<i>Rita v. United States</i> , 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007)	7, 8
<i>United States v. Booker</i> , 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)	7, 8
CONSTITUTIONAL PROVISION	
U.S. CONST. amend. V	1
STATUTES	
18 U.S.C. § 3231	1
18 U.S.C. § 3553	2
18 U.S.C. § 3553(a)(2)(A)	2
18 U.S.C. § 3742(a)(2)	1
28 U.S.C. § 1291	1
RULE	
Fed. R. App. P. 4(b)	1

GUIDELINES

U.S.S.G. § 3553(a)	10
U.S.S.G. § 3553(c)	7, 11

PETITION FOR WRIT OF CERTIORARI

COMES NOW the Petitioner Bernard Steven Boyd (hereinafter “Boyd” or “Petitioner”), and does respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit’s opinion is unpublished but was filed under case heading Fourth Circuit, No. 21-4206 and decided on October 18, 2021. (1a) The judgment of the United States District Court for the Middle District of North Carolina is found at *United States v. Boyd*, Case No. 1:20cr00287-1, ECF Docket No. 22 (M.D.N.C. April 7, 2021). (6a)

JURISDICTION

The Fourth Circuit entered its judgment on October 18, 2021 (5a), after review of the District Court judgment, with jurisdiction conferred to the District Court under 18 U.S.C. § 3231. Appellate jurisdiction is conferred upon the United States Court of Appeals for the Fourth Circuit under 28 U.S.C. § 1291, and Federal Rules of Appellate Procedure 4(b). Review by the Court of Appeals is authorized to the Fourth Circuit by 18 U.S.C. § 3742(a)(2).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: “No person shall be....deprived of life, liberty or property, without due process of law.”

The Court's imposed variance was on motion of the Government, and adopted by the Trial Court was a result of findings under 18 U.S.C. § 3553(a)(2)(A) under the Court's Statement of Reasons:

§ 3553. Imposition of a sentence

(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.

INTRODUCTION

In this case, Boyd was sentenced to an upward variance in the Guidelines, even though the Petitioner presented adequate evidence that the circumstances in which a gun may have been possessed resulted from the dangerous activities of others, the defendant was on heightened alert and was having difficulties coping

with issues regarding his mental health, that other individuals had intervened to cause him to possess the weapon, his family's lack of stability, and his efforts to assist his family. While the court described a number of reasons for its use of a variance, the Trial Court did not indicate in what method the reasons were weighted, or the priorities for the Court. The Trial Court did not explain how a sentence within the Guidelines would have not been sufficient. As a result of the sentencing explanation by the court, the Petitioner was not told how the court might incrementally increase a sentence based on each factor, which factor was the most important, or otherwise explain the Trial Court's incremental selection for a sentence of 76 months.

STATEMENT OF THE CASE

The Petitioner was involved in a series of incidents investigated by the Winston-Salem Police Department. These incidents began on April 7, 2019 in an investigation of a shooting at a local bar. The Winston-Salem Police Department continued later investigations which took place on April 18, 2019 during an interview with the defendant.

As part of the investigation, police officers found that the Petitioner, Mr. Boyd, had previously been convicted of a Felon in Possession of a Firearm on August 20, 2008, in Forsyth County Superior Court, Winston-Salem, North Carolina. Boyd was also convicted of Felony Possession with Intent to Sell and Deliver Cocaine, Felony Possession of Intent to Sell and Deliver Marijuana and Felony Trafficking in Cocaine on November 3, 2015, in North Carolina State Court.

On April 7, 2019, at approximately 1:30 a.m., officers of the Winston-Salem Police Department responded to a call regarding shots fired at the Nova Lounge, located at 515 N. Cherry Street, Winston-Salem, North Carolina. An anonymous caller contacted Winston-Salem Police Department Communications and advised that Mr. Boyd had been identified as a potential shooter, and was driving a black Dodge Challenger. Officers also received information that several shooters were present at the scene.

On the same date, April 7, 2019, at approximately 11:43 a.m., two Winston-Salem Police Department officers located a black Dodge Challenger parked in the 900 block of East 2nd Street, near Holland Avenue in Winston-Salem. The officers discovered that the vehicle was registered to Mr. Boyd. As the officers spoke with the vehicle occupants, a distinct odor of marijuana was coming from inside the vehicle, according to the officers. Mr. Boyd, an occupant, was asked to exit the vehicle and he was frisked for weapons, which yielded negative results. The officers made inquiry about the incident that occurred at the Nova Lounge the night before. Boyd and his acquaintance, Nakeisha Giles, denied having been involved in the incident, and claimed they took cover inside the club during the shooting. The officers eventually asked Ms. Giles if she had any contraband, and subsequently Ms. Giles opened her purse and the officers retrieved a loaded Taurus .380 caliber handgun, model TCP PT738 from inside her purse. The handgun also contained 6 rounds of ammunition.

After further inquiry of Ms. Giles, she reported that she had been at the club the previous night before and that Mr. Boyd had concealed a firearm in a wheelchair of an unidentified male. Ms. Giles indicated that a fight started inside the club, and that she retrieved the firearm from the unidentified male's wheelchair. At that time she gave the firearm to Boyd and they exited the club. She indicated that there was an additional argument and fight that occurred outside the club. Mr. Boyd attempted to break up the fight and fired one round of the firearm into the air. Ms. Giles said that after Boyd shot the gun she heard a number of other gunshots from other individuals, but did not see who was engaged in the shooting.

During Boyd's subsequent arrest on April 18, 2019, Winston-Salem Police Department officers searched his person and located a piece of notebook paper folded up, containing 2.6 grams of heroin. Prior to an interview with officers, Mr. Boyd waived his Miranda rights and agreed to speak with the officers. During the interview, Boyd admitted that he possessed a Taurus .380 caliber handgun and fired one shot in the air to protect his girlfriend during the fight at the Nova Lounge on April 7, 2020. Boyd stated he thought under the circumstances he could fire a warning shot. He further stated he knew he was wrong in possessing the weapon and knew that he was not eligible to have such a firearm. A .380 caliber shell casing was retrieved among shell casings located at the scene of the shooting. The information set out was the basis for Boyd's entrance of a plea of guilty. The underlying Factual Basis was in place at the time of the Defendant's change of plea

on October 22, 2020. Based on the Defendant's entry of plea, and underlying facts, a Presentence Report ("PSR"), prepared by a U.S. Probation Officer, was drafted and was accepted by both parties without objection.

REASONS FOR GRANTING THE PETITION

The Supreme Court has issued a number of decisions related to the sentencing procedure of the Trial Court in determining an appropriate judgment, considering the factors set forth by the United States Sentencing Commission, and the United States Sentencing Guidelines. The Petitioner was sentenced by a District Judge, after the Trial Court made some statements as to the reason for his variance sentence above the Guidelines. The Trial Court did not determine the significance or order of importance in terms of the resulting sentence. As a result, the Petitioner was not made aware of the circumstances that the Judge placed emphasis on, the course of reasoning by the Judge, nor how to conform his conduct in future matters.

Similar issues were addressed in the case of *Chavez-Meza v. United States*, 138 S. Ct. 1959, 201 L. Ed. 2d 359 (2018). In that case, the defendant, moving for a reduction in sentence by a post-conviction motion, which was denied a reduction based on his previous Guideline sentence. Here in this case, Boyd, was sentenced in an original sentence hearing in which the Judge did not demarcate the factors that he took into primary importance, and he did not put the Petitioner on notice as to the weighted reasons or logic for the sentence being imposed.

The Federal Sentencing Guidelines require a sentencing judge to identify the recommended Guidelines based on certain offender and offense characteristics. The judge may choose a penalty within that Guideline's range, or the judge may depart or vary from the Guidelines and select a sentence outside the range. *United States v. Booker*, 543 U.S. 220, 258-265, 125 S. Ct. 738, 160 L. Ed. 2d 621. The court must state in open court the reasons for the particular sentence. See U.S.S.G. § 3553(c).

The Supreme Court has ruled in previous cases that the judge must give an explanation but it need not be lengthy, especially where "a matter is...conceptionally simple...and the record makes sure the sentencing judge considers the evidence and arguments." *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007). This ruling implies that the Trial Court will rank or weigh issues of importance. Logically, some reasons are more important than others.

The Petitioner in this occasion pled guilty to Possession of a Firearm by a Convicted Felon, under a set of circumstances in which a number of activities had occurred. The underlying circumstances were that the defendant had been fearful of other violent factors, that the defendant had a history of concerns of threats to either himself or his family, enough so that he fired a "warning shot" in order to display his concern about ongoing threats and violence.

By pleading guilty to the underlying charges, the defendant assumed that the Trial Court would take into account any number of aggravating and mitigating circumstances which were presented to the Court through his attorney, the

Presentence Report and the defendant's allocution at sentencing. The judge expressed his concern about the defendant's prior record, the defendant's possession of a weapon after previous convictions, and the dangerousness of the event to the public at large, and other factors which detail some of the underlying circumstances. Nevertheless, the Trial Court did not indicate which factors were the most important, the ones that he took into the greatest account, and perhaps more importantly, the reason why he declined to consider the defendant's mitigating facts and circumstances. The trial judge declined to explain particular effects of how there would be an aggravation or variance based on the defendant's conduct. Also, the Trial Court failed to explain how the mitigating factors weighed against the aggravating factors.

A judge has the legal authority to impose a sentence outside the range either because he/she "departs" from the range (as is permitted by certain Guideline rules) or because he/she chooses to "vary" from the Guidelines by not applying them at all. *United States v. Booker*, 543 U.S. 220, 258-265, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

"Confidence in a judge's use of reason underlines the public's trust in the judicial institution. A public statement of those reasons helps provide the public with assurance that creates that trust." *Rita* at 356, 127 S. Ct. 2456. The clarity and weight of explanation is the heart of Boyd's appeal and petition.

Of further concern to the Petitioner is that the defendant was not put on notice as to the underlying circumstances and weight the trial judge put on these

elements. In many trial situations, the trial judge in sentencing may be “ruminating” without a serious discourse as to the factors engaged in sentencing. The Petitioner, in trying to address his own conduct and to consider the important details of the judge’s sentencing policy, does not know which element the court relied upon, which element the court weighed more heavily, and which elements were discarded entirely. This is especially concerning to Boyd, where elements of mental health, family fear and concerns, and means to avoid further violence would be a primary concern in future activities. The Petitioner does not require a lengthy explanation, but Petitioner does request a weighted or definitive discussion of what elements the Trial Court actually took into account and how much. This is especially noted where the Trial Court has decided to “go outside of the heartland of the Guidelines” and vary the case upward. See *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007), *Kimbrough v. United States*, 552 U.S. 85, 109, 128 S. Ct. 558, 169 L. Ed 2d 481 (2007).

This concerns cases heard at initial sentencing, and not just matters that are heard on resentencing, or a limited review of aspects of a sentenced case.

In most cases, the sentencing posture and determination of the Trial Court is the underlying reason for the charges and the result. The Trial Court is invested with the power to make the appropriate decision, not only to give public trust, but to give the defendant a clear understanding of the circumstances for his prosecution, conviction and resulting sentence. A Trial Court’s statement is virtually everything the defendant is entitled to in order to determine whether he is being treated fairly,

whether the punishment is in keeping with the underlying charges, and to detail his future conduct to act accordingly. A defendant is not given further opportunity to question the judge, nor does he know the underlying definitive circumstances surrounding the judge's decision. The judge is not required to give a comprehensive statement, but the judge should be required to give a weighted discussion of what matters were most important to him and how that influenced his decision.

In this occasion, for Mr. Boyd, the District Judge touched on a number of topics that the Trial Court was taking into account. Nevertheless, the defendant was not given information as to how the judge arrived at these decisions, or what was the ranked importance of the judge's concerns and determinative factors.

United States Sentencing Guidelines Section 3553(a) gives a series of concerns that the court may adopt. Nevertheless, the court is not ordinarily required to provide listed factors that were taken into consideration at the time of sentencing. While the court may discuss certain issues, the Petitioner is not given true notice of what were the most important issues and how they factored into the judge's decision. Of equal importance, the Petitioner is not given notice of mitigating factors and how they did not impact on the court's decision. At the least under these circumstances, the case should be returned to the District Court for a more complete explanation. See *Molina-Martinez v. United States*, 578 U.S. ____, 136 S. Ct. 1338, 1348, 194 L. Ed. 2d 444 (2016).

The emphasis of previous decisions, including *Chavez-Meza*, dealt with the understanding of the appellate courts of the underlying concerns of the judge. While

the estimates or ranking of factors of the appellate court are not required, or many times even considered in that there is a general discussion, the defendant himself is at a loss for what the underlying circumstances may be. Again, this requires a decision such that “the court at the time of sentencing, should state in open court the reasons for its imposition of a particular sentence.” See U.S.S.G. § 3553(c). Of note for the petition, a ranking or weighing of factors should be explained.

CONCLUSION

Based on the foregoing, the Petitioner asks that this Court return this case to the District Court for further findings and determinations of the factors used in sentencing, as stated by the Trial Court in a weighted or ranked fashion.

Respectfully submitted,

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