

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

MICHAEL DEVELL SMITH
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 21-60422

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court ordered an unreasonable 24-month sentence considering the facts of this case and the Guidelines sentence range of 12 to 18 months in prison.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

This case involves a supervised release revocation proceeding. The case arises out of an underlying conviction entered by the United States District Court for the Southern District of Mississippi for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court case number is 3:06cr134-HTW-JCS. The district court ordered Mr. Smith to serve 60 months in prison followed by three years of supervised release. It entered an underlying Judgment reflecting this sentence on June 13, 2007.

After Mr. Smith's release from prison, the prosecution filed the subject petition to revoke supervised release in district court. The specifics of the alleged supervised release violations are set forth below. After a hearing on the issue on March 4, 2021, the district ruled that Mr. Smith violated conditions of supervised release. It ordered him to serve an above-Guidelines sentence of 24 months in prison followed by three months of supervised release.¹ It entered a Revocation Judgment reflecting this sentence on April 30, 2021. A copy of the Revocation Judgment is attached hereto as Appendix 1.

Mr. Smith appealed the Revocation Judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit case number is 21-60422. On

¹ The word "Guidelines" and the phrase "Sentencing Guidelines" are both references to the United States Sentencing Guidelines.

November 19, 2021, the Fifth Circuit entered an Order affirming the district court's rulings. It entered a Judgment on the same day. The Fifth Circuit's Order and Judgment are attached hereto as composite Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on November 19, 2021. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Order as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. STATUTE INVOLVED

The provisions of 18 U.S.C. § 3553(a) are at issue. In relevant part, this statute states:

(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--

* * * * *

(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;

* * * * *

(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.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Revocation Judgment entered in federal court because Mr. Smith purportedly violated conditions of supervised release. Regarding the underlying criminal conviction that this revocation proceeding is based upon, the court of first instance was the United States District Court for the Southern District of Mississippi. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the underlying criminal charge levied against Mr. Smith arose from the laws of the United States of America.

B. Statement of material facts.

This supervised release revocation proceeding involves two admitted supervised release violations – using cocaine and being indicted for selling cocaine. Mr. Smith accepted full responsibility for his actions by admitting both violations. Also, he took responsibility for the cocaine sale charge by pleading guilty to it in Mississippi state court.

The defense acknowledges that the subject Petition for Warrant was issued on July 23, 2014, and authorities did not arrest Mr. Smith until January 4, 2020. During this time, Mr. Smith admittedly did not report to his probation officer. However, as he testified at the revocation hearing, this was a very trying time in his

life. He testified, “I lost my mother and my daughter, like, back to back, so I started smoking spice and drinking real bad. And I started selling cocaine, because the spice was costing about 100 to \$150 a day.” He went on to explain, “[s]o I make no excuse. I should have just seen a man for my mental health situation, but I started smoking spice trying to sleep and doing stuff I had no business.”

All parties at the revocation hearing agreed that the sentence range under the Sentencing Guidelines was 12 to 18 months in prison, and that the statutory maximum prison term was 24 months. The prosecution did not contend that there were any aggravating circumstances. The defense requested a sentence within the Guidelines range. Instead, the district court ordered the statutory maximum sentence of 24 months in prison, to be served consecutive to the Mississippi state court conviction for sale of cocaine.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” This case presents a sentencing issue that the Court should exercise its discretion to review. The district court ordered unreasonable long revocation sentence, to be served consecutive to the Mississippi state court conviction for the same conduct. Certiorari should be granted to correct this error.

B. The district ordered a substantively unreasonable sentence.

An above-Guidelines sentence is substantively unreasonable if it “(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *United States v. Churchwell*, 807 F.3d 107, 123 (5th Cir. 2015) (emphasis added; citation omitted). Mr. Smith’s sentence is substantively unreasonable under the third test – the district court erred in balancing the sentencing factors under 18 U.S.C. § 3553(a). In fact, the court’s only mention of § 3553 was that it “reviewed all of the appropriate factors to be considered in imposing a sentence pursuant to 18 U.S.C. § 3553(a)[.]”

This Court considers “the totality of the circumstances” when it analyzes substantive reasonableness. *United States v. Gerezano-Rosales*, 692 F.3d 393, 398

(5th Cir. 2012) (citations omitted). The starting point for the totality of the circumstances analysis is 18 U.S.C. § 3553, titled “Imposition of a sentence.” Under § 3553(a), “[t]he court shall impose a sentence sufficient, but not greater than necessary” to meet the ends of justice. Section 3553(a) requires judges to consider several factors when they craft appropriate punishments for offenses.²

The primary factors are:

- “the nature and circumstances of the offense” (§ 3553(a)(1));
- “the history and characteristics of the defendant” (*id.*);
- “to afford adequate deterrence to criminal conduct” (§ 3553(a)(2)(B));
- “to protect the public from further crimes of the defendant” (§ 3553(a)(2)(C));
- “to provide a defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” (§ 3553(a)(2)(D));
- “the applicable guidelines or policy statements issued by the Sentencing Commission” (§ 3553(a)(4)(B)); and

² The § 3553(a) factors that a court can consider when imposing a supervised release revocation sentence are limited by 18 U.S.C. § 3583(e). Under § 3583(e), the only § 3553(a) factors that a court can consider during a revocation proceeding are “the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)[.]”

- “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (§ 3553(a)(6)).

Each of these factors is considered below.

1. The nature and circumstances of the offense under § 3553(a)(1).

Mr. Smith admittedly has a problem with drug addiction, and he wants continuing help to overcome it. In fact, he sought help from Region 8 Mental Health Services and has been clean and sober, with their help, since 2017.

Mr. Smith admitted that he used cocaine and he admitted to selling cocaine. The only reason he sold cocaine was to support his own addiction to drugs. Also, he was sentenced in Mississippi state court for one of the same incidents at issue in the federal proceeding – sale of cocaine. These facts about the nature and circumstances of Mr. Smith’s offenses indicate that the district court erred by ordering an above-Guidelines sentence.

2. The history and characteristics of the defendant under § 3553(a)(1).

The subject supervised release violations center around the use and abuse of drugs. However, as stated above, he sought help from Region 8 Mental Health Services to overcome this problem and has been sober since 2017, about four years ago.

Another of Mr. Smith's positive aspects is his work history. He worked pouring concrete for J&M Construction. He worked there both before his underlying conviction and after his release from prison. This indicates his willingness to work as a productive member of mainstream society.

3. Adequate deterrence to criminal conduct under § 3553(a)(2)(B) and protection of the public from further crimes of the defendant under § 3553(a)(2)(C).

“[T]he Guidelines Manual states that ‘the revoking court should not sentence the defendant with an aim to punish the offense that constitutes the supervised release violation’ but that ‘the district court is instead punishing the defendant’s breach of the court’s trust.’” *United States v. Pinner*, 655 F. App’x 205, 207 (5th Cir. 2016) (citation omitted). So regardless of what Mr. Smith did to violate the conditions of his supervised release, a within-Guidelines sentence, which accounts for deterrence and protection of the public, would have been sufficient to meet the goals of sentencing.

4. The need for educational or vocational training, medical care, or other correctional treatment under § 3553(a)(2)(D).

The only treatment that Mr. Smith needs is continuing help to remain sober. Alcohol and drug treatment does not require an above-Guidelines sentence. Further, a district court is barred “from imposing or lengthening a prison term because the court thinks an offender will benefit from a prison treatment program.” *Tapia v. United States*, 564 U.S. 319, 334 (2011).

5. The applicable guidelines or policy statements issued by the Sentencing Commission under § 3553(a)(4)(B).

Mr. Smith's sentence range under the United States Sentencing Guidelines was 12 to 18 months in prison. The Sentencing Guidelines are adopted by the Sentencing Commission. The stated purpose of the Sentencing Commission "is to establish sentencing policies and practices for the federal criminal justice system that will assure the *ends of justice* by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." Sentencing Guidelines, Ch. 1, Pt. A.1.1 (emphasis added). Also, the Guidelines are meant to "combat crime through an effective, *fair* sentencing system." *Id.* at Ch. 1, Pt. A.1.3 (emphasis added). As recognized by this Court in *Gall*, the Sentencing Guidelines are "the product of careful study based on extensive empirical evidence derived from review of thousands of individual sentencing decisions." *Gall v. United States*, 552 U.S. 38, 46 (2007).

A sentence within Mr. Smith's 12-to-18-month Guidelines range would meet the ends of justice and provide a fair sentence. The district court erred by concluding otherwise.

6. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct under § 3553(a)(4)(B).

The Sentencing Guidelines envision punishments that should be ordered for defendants with similar records who have been found guilty of similar conduct.

The above-Guidelines statutory maximum sentence ordered by the district court is outside of the range envisioned by the Sentencing Commission. From this, we can infer that the sentence also represents disparately harsh treatment of Mr. Smith in the sentencing process.

7. Conclusion: § 3553(a) analysis.

The individual § 3553(a) factors support a finding that Mr. Smith should have been sentenced within the 12-to-18-month Guidelines sentencing range. Viewing these factors in total, as well as viewing all of the circumstances in this case, provides further support for this conclusion. Mr. Smith therefore asks this Court to grant certiorari, then vacate his sentence as substantively unreasonable, and remand the case to the district court for resentencing within the Guidelines range. *See United States v. Goldsmith*, 192 Fed. App'x 261, 268 (5th Cir. 2006) (vacating the sentence because it represented “clear error in judgment in balancing the sentencing factors”) (citation omitted).

VI. CONCLUSION

Based on the arguments presented above, Mr. Smith asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted February 2, 2022, by:



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CERTIFICATE OF SERVICE

I, Jacinta A. Hall, appointed under the Criminal Justice Act, certify that
today, February 2, 2022, pursuant to Rule 29.5 of the Supreme Court Rules, a copy
of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis
was served on Counsel for the United States by Federal Express, No. 7759 3559
2300, addressed to:

The Honorable Elizabeth Barchas Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



Jacinta A. Hall
Assistant Federal Public Defender