IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

JOSEPH PETER CLARKE,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Issue 1: Whether the appellate court erred affirming the district court's abuse of discretion in overruling petitioner's objections to the PSI Report guideline computations as to base offense level computation (drug versus robbery guideline); the counting of two prior offenses committed by petitioner as a juvenile; and, the counting of two simple possession of marijuana offenses, all of which increased petitioner's guideline total offense level, recognizing that the existing law does not support the objections and to preserve the issue for future possible litigation.

ISSUE 2: Whether the appellate court erred in affirming the district court's abuse of discretion denying petitioner's motion for a downward sentencing variance grounded upon 18 U.S.C. § 3553(a) as to: 1) Sentencing disparity among defendants; 2) Judicially recognized unfairness of the stash house robbery sting which targets minority and impoverished persons; 3)Unduly harsh application of guidelines in stash house robbery case; 4) Overstated criminal history where juvenile and marijuana prior convictions are scored; 5) Defendant accepts

responsibility after trial; and 6) Onerous prison conditions within the Bureau of Prisons due to Covid-19 pandemic and imposed an unreasonable 190 month sentence (Co-defendant received 120 month minimum mandatory sentence) rather than the 120 month minimum mandatory sentence argued for by petitioner.

- Prefix-

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The Petitioner, JOSEPH PETER CLARKE, respectfully prays that a writ of certiorari issue to review the judgment-order of the United States Court of Appeals for the Eleventh Circuit entered on December 1, 2021 Case No. 20-13665-EE; Southern District of Florida Case Number 13-cr-20334-RLR-CMA-2.

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OPINION BELOW

On December 1, 2021, the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's amended judgement and sentence, Case No. 13-cr-20334-CMA-2. A copy of the opinion-order is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the petitioner in the District Court and will be referred to by his name or as the petitioner. The respondent, the United States of America, will be referred to as the respondent. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The petitioner is incarcerated and is serving his sentence in the Federal Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court Below

This case began when on April 30, 2013 petitioner Joseph Peter Clarke, along with his co-defendant Bobby Jenkins were arrested on a criminal complaint filed on May 1, 2013; DE 1, charging them both with conspiring to

possess with intent to distribute 10-15 kilogram s or more of cocaine, in violation of 21, United States Code, Sections 841(a)(1) and 846., for conspiring to interfere with interstate commerce by robbery, in violation of 18 U.S.C. §1951(a); for firearm possession by a convicted felon, in violation of 18, United States Code, §922(g)(1); and for possessing a firearm in furtherance of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. §924(c)(1)(A) and 2.

On May 3, 2013 petitioner was ordered to be detained without bail until his jury trial, after a detention hearing; DE 7, and subsequent order; DE 11.

On May 10, 2013 the indictment was filed charging petitioner with, Count 1, conspiracy to commit a fictitious "Hobbs Act Robbery" of a drug storage house in violation of 18, U.S.C. §1951(b)(1) and (b)(3); Count 2, , conspire, confederate, and agree with each other to possess with intent to distribute a controlled substance, in violation of Title 21, U.S.C. §841(a)(1); a11 in violation of Title 21, U.S.C. §8; in that the defendants did agree and plan to take cocaine from individuals then believed to be engaged in narcotics trafficking. On August 2, 2013, the Government filed its notice of the petitioner's qualification for a sentencing enhancement under Title 18

U.S.C. §3559(c); DE 28. On October 11, 2013, following a jury trial petitioner and his co-defendant were found guilty on all counts; DE80, 84. Petitioner was sentenced to life imprisonment for Counts 1, 2, and 4, and a consecutive life term for Count 5; DE 110. Petitioner filed a direct appeal which was unsuccessful; DE 113, 115. Thereafter petitioner filed his Motion Under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody on February 2, 2016 in Case Number 1:16-cv-20387-CMA; CV-DE 1. After four years of litigation, on February 13, 2020 the district court entered Judgment in favor of petitioner against the government grounded upon the court's retroactive application of the intervening decisions in *United States v. Johnson*, 576 U.S. 591 (2015) and *United States v. Davis*, 589 U.S. ___ (2020); CV-DE 73, 74. Thereafter, on February 13, 2020 the district court set a hearing to re-sentence petitioner as all of his prior life sentences had been vacated and the district court was required to impose a new reasonable sentence pursuant to Title 18 U.S.C. §3553, as well as *United States vs. Booker*, 543 U.S. 220 (2005); DE 230. The United States Probation Office filed and updated Presentence Investigation Report (hereinafter referred to as the "PSI") on March 11, 2020; DE 237. Petitioner filed objections to the PSI on Aril 22,

2020; DE 241 challenging the application of U.S.S.G. § 2D1.1 (drug offenses) rather than U.S.S.G. §2B3.1 (robbery offenses) to establish the base offense level in PSI paragraphs 24, 25 and 26; PSI paragraphs 37 and 38 (the inclusion in criminal history scoring of prior convictions committed while a juvenile); and PSI paragraphs 42 and 43 (1 points each for simple possession of marijuana). On August 26, 2020 petitioner filed his motion for downward variance sentence submitting that a downward variance sentence was warranted due to: 1) Disparity in sentencing among defendants; 2) Extraordinary post-conviction rehabilitation (granted; not subject of appeal); 3) reverse stings targeting minority impoverished persons; 4) unduly harsh application of guidelines where the police unilaterally designated 15 kilograms of imaginary cocaine to be the subject of the fictitious robbery; 5) Overstated criminal history; 6) Acceptance of responsibility; and 7) The Impact of the Covid-19 virus on prison conditions; DE 262. On September 21, 2020, the district court held the resentencing hearing of petitioner (the several month period of delay was due to the Covid-19 restrictions on the court in South Florida in the year 2020) and re-sentenced petitioner to serve a term of 190 months as to both Counts 1 and 2 and 120 months as to Count 4 in the Bureau of

Prisons each sentence to be served concurrently with the other sentences; total sentence 190 months to be followed by a 3 year term of supervised release; DE 276, 278. The PSI, Paragraph 79 found a total offense level of 34, criminal history category VI yielding a guideline imprisonment range of 262-327 months; DE 237-24. The district court entered an order granting in part petitioner's motion for downward variance on September 21, 2020 grounded upon petitioner's extraordinary rehabilitation which imprisoned on this case (authority; *Pepper v. United States*, 562 U.S. 476 (2011)); DE 277.

At the resentencing hearing, the defense argued, for the record the objections to the PSI regarding the application of the robbery guidelines and the scoring of the juvenile and marijuana prior convictions; DE 288-9-10. The district court overruled and denied the guideline objections finding an advisory guideline range of 262-327 months; DE 288-34. The defense also argued that (as stated in the previously filed written motion for downward variance) that a downward variance sentence was required due to the particular facts and circumstances concerning petitioner and his case, the specific facts of the case and the codefendant's ultimate role and sentence. Specifically, petitioner requested the court to consider:

1) the sentencing disparity between petitioner and his codefendant who organized and managed the robbery in concert with the CI and ultimately received the 120 month minimum mandatory sentence (DE 288-10-12); 2) Judicially recognized unfairness of the stash house robbery sting which targets minority and impoverished persons (DE 288-14-15); 3) the unduly harsh application of guidelines in stash house robbery case (using the cocaine guidelines which were much higher than the robbery guidelines where there was no actual cocaine) (DE 288-15-16); 4) Overstated criminal history where juvenile and marijuana prior convictions are scored (DE 288-16); 5) Petitioner's acceptance of responsibility after trial (DE -16); and 6) The onerous prison conditions within the Bureau of Prisons due to Covid-19 pandemic (DE 288-17). Petitioner's motion requested a sentence between 121-151 months which would reflect the aforementioned downward variance points; DE 262-9. The district court ruled on the variance motion, duly considered and rejected the points of fact and arguments made (excepting the *Pepper*, extraordinary rehabilitation argument) and sentenced petitioner to a total sentence of 190 months which petitioner concedes is a downward variance sentence.

On September 28, 2020 petitioner filed his notice of appeal. DE 281. Petitioner's appeal was denied by the Eleventh Circuit Court of Appeals. This petition ensues.

Statement of the Facts

The facts and factual basis on appeal arise from the record of the filed transcript of the sentencing hearing; DE 288; references to the jury trial transcript, and the Presentence Investigation Report filed in the district court; DE 263 (to be filed separately with this court under seal). The evidence of petitioner's offense was as follows:

On April 30, 2013, at approximately 7:20 p.m., a special response team of ATF agents converged on the car in which co-defendant Bobby Jenkins and petitioner were seated. According to the agents testimony, Jenkins, in the front passenger seat, quickly dropped his loaded .40 caliber Sig Sauer pistol to the floor of the car, removed the gloves he had been wearing and dropped them as well. The according to the trial testimony Petitioner, seated in the back seat, dropped his semi-automatic rifle and gloves and got out of the car. The agents fired a rubber bullet at petitioner's leg. Co-defendant Jenkins emerged from the car following the agents' commands to put his hands up; DE 137-

166, 171-73. During a search of the vehicle following arrest, agents found the loaded semi-automatic rifle and gloves on the floorboard near petitioner's seat; DE138-18-21. A second loaded magazine for the rifle was recovered from under the front passenger seat; DE 138-26. Co-defendant Jenkins and petitioner were observed wearing dark clothing and sweatshirts. A black t-shirt, a white cloth, and a baseball cap were also recovered from the car; DE138-27-29. The ATF had begun investigating exclusively co-defendant Jenkins one month earlier, on March 27, 2013, when a confidential informant (hereinafter "CI") told ATF Task Force Officer Kenneth Veloz that co-defendant Jenkins was interested in committing a drug stash house robbery; DE 137-18. Agent Veloz, of his own imagination, invented a factual scenario - a home invasion robbery of 10-15 kilograms of cocaine Veloz decided the amount independently) from a drug dealer's stash house in order to induce co-defendant Jenkins to commit the imaginary robbery. On April 9, 2013, during a recorded telephone conversation co-defendant Jenkins assured Veloz that he understood and he and his people could do the job, obviously enticed by the prospect of making a lot of money. Trial exhibits E7, E8. Co-defendant Jenkins claimed that he and his cousin had done a robbery in the past. Jenkins

brought petitioner to the next meeting ten days later, and introduced him to Agent Veloz; Trial exhibits E13, E14. In response to Agent Veloz's statement that there would only be two people inside the house to protect the drugs and that at least one would be armed, petitioner concluded that "if it's just them two, it shouldn't really be no issue as far as getting in and getting out". On April 30, 2013, the CI picked up co-defendant Jenkins and petitioner, as previously arranged between the CI and co-defendant Jenkins, with their firearms; DE137-86-88. Co-defendant Jenkins told the CI that his assault rifle was an AR-15 and the petitioner stated that he had a Sig. The vehicle was an undercover vehicle which was audio and video equipped. No actual crimes robbery or drug trafficking crimes were committed. Co-defendant Jenkins and petitioner were arrested inside the vehicle and this prosecution ensued.

At the resentencing hearing on September 21, 2020 petitioner cited the following excerpts from the PSI in support of his factual basis to support the motion for downward variance: On March 27, 2013, an Alcohol Tobacco and Firearms (ATF) confidential informant (CI) provided law enforcement officials with information regarding an individual known as "Black." This individual was later identified as Bobby Jenkins. The CI advised his handlers

that Jenkins told him during a meeting at a local carwash that he was willing to commit a robbery for cocaine and boasted that he had recently robbed a man for $5,000.00. Thereafter, Jenkins and the CI spoke frequently on the phone between March 27, 2013 and April 8, 2013. On April 9, 2013 Jenkins met again with the CI as well as an undercover agent who proposed a robbery of a drug house with kilograms of cocaine and that he was looking for a crew to which Jenkins was receptive. During the week of Apri1 15, 2013, the CI and Jenkins had recorded conversations about setting up a second meeting to further discuss the plans to commit an armed home invasion robbery for cocaine. On April 19, 2013, the CI and Jenkins met again to discuss plans to commit an armed home invasion robbery, it was at that meeting that Defendant first appeared with Jenkins to meet the CI; DE 262-5-6; quoting PSI paragraphs 5-9. Thereafter, During the week of April 22, 2013, the CI and Jenkins (not petitioner) had additional recorded conversations about setting up a third meeting to discuss the plans to commit an armed home invasion robbery for cocaine, which third meeting occurred on April 24, 2013; DE 262-6; quoting PSI paragraphs 10-11). On April 30, 2013, Jenkins (not petitioner) made several phone calls to the CI regarding the robbery. Jenkins stated he had spoken to Clarke

multiple times regarding the robbery and that they agreed to be together prior to the CI picking them up. Once nearby, the CI contacted Jenkins on the phone, at which time Jenkins (not petitioner) provided the CI with directions to an apartment complex. Jenkins then guided the CI into the building where Jenkins was located. DE 262-6; quoting PSI paragraph 13. These points of fact clearly demonstrated at resentencing that the codefendant Jenkins was in control.

REASONS FOR GRANTING THE WRIT

Issue 1: Whether the appellate court erred affirming the district court's abuse of discretion in overruling petitioner's objections to the PSI Report guideline computations as to base offense level computation (drug versus robbery guideline); the counting of two prior offenses committed by petitioner as a juvenile; and, the counting of two simple possession of marijuana offenses, all of which increased petitioner's guideline total offense level, recognizing that the existing law does not support the objections and to preserve the issue for future possible litigation.

In Paragraphs 24, 25 and 26, of the PSI; petitioner objected to the application of U.S.S.G. §2D1.1 in these three paragraphs; DE 261. Petitioner acknowledged that

U.S.S.G. §3D1.3(a) currently requires the grouping application reflected in the report, however, should the law be changed in the future as to the application of the possession of cocaine guidelines to a Hobbs Act Robbery conviction, wherein, the robbery target is imaginary cocaine suggested to exist by the cooperative individual who organized the Hobbs Act Robbery, petitioner wished to preserve this issue. The alternative guideline for Hobbs Act Robbery (U.S.S.G. §2B3.1) carried a base offense level of 20 + 6 levels for use of firearm. Additionally, paragraphs 25, and 26 which each add +2 levels for threatened violence and firearm use are both included in the U.S.S.G. §2B3.1 guidelines for Hobbs Act Robbery Conspiracy. In view of the case facts, no victim related or property loss level increases, total offense level 26 which would lower the total offense level accordingly.

Paragraphs 37 and 38, petitioner objected to the assessment of points as petitioner was aged 15 years and 16 years when those offense were committed. The defense acknowledges that due to the length of the sentence and the adult court adjudications, the guidelines currently mandate this application, however, should the law be changed in the future to limit or eliminate juvenile criminal history, petitioner wishes to preserve this issue.

Paragraphs 42 and 43, petitioner objected to the assessment of 1 point for each conviction for possession of marijuana, as today, following the July 1, 2019 Florida Statute legalizing the possession of hemp plant, any case subsequent to August 9, 2019, the charge would not result in arrest or prosecution as announced by State Attorney Kathy Fernandez Rundle, and would result in a civil penalty very similar to the withheld adjudication and court costs imposed.

At resentencing the district court overruled the foregoing objections, DE 288-34.

ISSUE 2: Whether the appellate court erred in affirming the district court's abuse of discretion denying petitioner's motion for a downward sentencing variance grounded upon 18 U.S.C. § 3553(a) as to: 1) Sentencing disparity among defendants; 2) Judicially recognized unfairness of the stash house robbery sting which targets minority and impoverished persons; 3)Unduly harsh application of guidelines in stash house robbery case; 4) Overstated criminal history where juvenile and marijuana prior convictions are scored; 5) Defendant accepts responsibility after trial; and 6) Onerous prison conditions within the Bureau of Prisons due to Covid-19 pandemic and imposed an unreasonable 190 month sentence

(Co-defendant received 120 month minimum mandatory sentence) rather than the 120 month minimum mandatory sentence argued for by petitioner.

Petitioner submits that the proposed 121-151 month downward variance sentence argued for at the resentencing hearing is adequately and fully supported by the record evidence and citations presented and said proposed sentence is sufficient but not greater than necessary to accomplish all of the statutory purposes of 18 U.S.C. § 3553(a) and that the 190 month sentence imposed was an unreasonable one for this defendant is this case. *Gall v. United States*, 552 U.S. 38, 47 (2007). The district court is required to impose a sentence that is "sufficient, but not greater than necessary to comply with the purposes" listed in 18 U.S.C. §3553(a)(2), including the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, deter criminal conduct, protect the public from the defendant's future criminal conduct and provide the defendant with needed educational or vocational training or medical care; the proposed 120 month sentence will accomplish this as the court duly noted in acknowledging petitioner’s extraordinary rehabilitation efforts; 18 U.S.C. § 3553(a)(2). Although it has sometimes been asserted that

the phrase "sufficient, but not greater than necessary," establishes a "parsimony principle," this court considers that terminology "incomplete and inaccurate" because it emphasizes that the sentence must not be longer than necessary, while ignoring the parallel requirement that it must not be too short. *United States v. Irey*, 612 F.3d 1160, 1196-97 (11th Cir. 2010). In imposing a particular sentence, the sentencing court must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable guideline range, the pertinent policy statements of the Sentencing Commission, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. 18 U.S.C. §3553(a)(1), (3)-(7). The party challenging the sentence (petitioner) has the burden of establishing that the sentence was unreasonable. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005). The reasonableness of a lengthy prison sentence may be indicated when the sentence imposed was well below the statutory maximum sentence. *United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008). Furthermore, "The weight to be accorded any given §3553(a) factor is a matter committed to the sound discretion of the district court. *United States v. Williams*, 526 F.3d 1312,

1322 (11th Cir. 2008). This court will only reverse the district court if after considering the record the court is "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). As an initial matter, a sentence may be either procedurally or substantively unreasonable. *United States v. Hunt*, 459 F.3d 1180, 1182 n.3 (11th Cir. 2006). As the governing statute makes clear, the advisory guidelines range is but one of many considerations that a court must take into account in exercising its sentencing discretion. *United States v. Irey*, 612 F.3d 1160, 1217 (11th Cir. 2010) (en banc). This court has not directed to specify that any particular weight that should be given to the guidelines range, *Id.*, and has rejected "any across-the-board prescription regarding the appropriate deference to give the Guidelines." *United States v. Hunt*, 459 F.3d 1180, 1184 (11th Cir. 2006). This court holds that, subject to review for reasonableness, sentencing courts may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the

remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence. *Irey*, 612 F.3d at 1217. The Supreme Court has held that variances from the advisory guidelines range can sometimes be based on the sentencing judge's disagreement with whether a guideline properly reflects the § 3553(a) factors, a holding which suggests that the guidelines are not overly restrictive. *Kimbrough v. United States*, 552 U.S. 85, 105–09, (2007). This, in order to arrive at an appropriate sentence, the district court must consider all of the applicable §3553(a) factors. *United States v. Shaw*, 560 F.3d 1230, 1237 (11th Cir. 2009). The district court does not need to give all of the § 3553(a) factors equal weight. Instead, the sentencing court "is permitted to attach 'great weight' to one factor over others." *Id*. (quoting the Supreme Court in *Gall v. United States*, 552 U.S. 38, 57 (2007)). The decision about how much weight to assign a particular sentencing factor is committed to the sound discretion of the district court. *United States v. Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008). The abuse of discretion standard is not de novo review; it is, instead, deferential. Because of this distinction, when reviewing for an abuse of discretion this court will sometimes "affirm the district court even though we would

have gone the other way had it been our call." *Irey*, 612 F.3d at 1189. In *Ledford v. Peeples*, 605 F.3d 871, 922 (11th Cir. 2010) this court explained that when reviewing for an abuse of discretion "the relevant question is not whether we would have come to the same decision if deciding the issue in the first instance," but instead "whether the district court's decision was tenable, or, we might say, 'in the ballpark' of permissible outcomes". The Supreme Court further instructs that when reviewing an out-of-guidelines sentence for reasonableness, this court may: consider the extent of the deviation, and must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance. *Gall*, 552 U.S. at 51. The reason district courts have such wide discretion in making sentencing decisions is that the district courts have advantages over appellate courts when it comes to sentencing. One reason is that because the district court conducts sentence hearings, it is in a better position to make sentencing determinations. *Id*. As the Supreme Court has explained, "the sentencing judge is in a superior position to find facts and judge their import under §3553(a) in the individual case" because he "sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains

insights not conveyed by the record." *Id.* at 51. Another advantage that district courts enjoy when it comes to sentencing is that they have far greater sentencing experience than appellate judges, many of whom have never sentenced a single defendant for a single crime. Further, the Supreme Court has pointed out that district courts "see so many more Guidelines cases than appellate courts do." *Id.* at 52. In spite of the breadth of discretion given, district courts can and often do abuse their discretion by imposing sentences that are substantively unreasonable. In *Rita v. United States*, 551 U.S. 338, 354 (2007), the Supreme Court ruled that "In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable…Circuit courts exist to correct such mistakes when they occur."); see also *Irey*, 612 F.3d at 1165. A district court abuses its considerable discretion and imposes a substantively unreasonable sentence only when it "(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *Irey*, 612 F.3d at 1189. The case at bar presents such a case wherein this rarely happens, "it is only the rare sentence

that will be substantively unreasonable." *United States v. McQueen*, 727 F.3d 1144, 1156 (11th Cir. 2013). As the party challenging a sentence, petitioner has the burden of showing that the sentence is unreasonable in light of the entire record, the § 3553(a) factors in light of the substantial deference afforded sentencing courts. *United States v. Langston*, 590 F.3d 1226, 1236 (11th Cir. 2009). "A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *Irey*, 612 F.3d at 1189 (11th Cir. 2010) (en banc). This court will vacate a sentence for substantive unreasonableness only when "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Id.* at 1190. Again, as the party challenging the sentence bears the burden of showing that it is unreasonable in light of the record and the 18 U.S.C. §3553(a) factors. *United States v. Rosales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015).

This is case presents such an unreasonable sentence warranting reversal with directions to resentence petitioner within the submitted reasonable but not greater than necessary range of 121-151 argued for at sentencing; DE 288-34.

The court's consideration of the variance issues presented, in total, was subjectively unreasonable as defined by the foregoing citations of legal authority on this point. The district court overweighed petitioner's criminal history in while not considering codefendant Jenkins role as the organizer and leader of petitioner as to their joint conduct in the fictitious robbery finding the two defendants not similarly situated; however clearly codefendant Jenkins held a greater responsibility as he organized the entire venture with the CI as stated above and petitioner was brought in much later by Jenkins. Thus, 60 additional months for petitioner (190 total months imprisonment for petitioner against 120 total months imprison for Jenkins) cannot be justified applying the18 U.S.C. § 3553(a) factors to these case facts and individual defendants.

Further the judicially recognized unfairness of the stash house robbery sting which targets minority and impoverished persons supports a greater downward variance.

As cited in the written motion to the court, in an order denying a motion to dismiss, the Hon. Chief Judge Ruben Castillo ruled: "Since 2006, the Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF") has engaged in sting operations wherein undercover agents present individuals is this District with an opportunity to rob a fictitious drug stash house. See generally *United States v. Mayfeid*, 771 F.3d 417, 419-24 (7th Cir. 2014); *United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011). These two long-pending consolidated criminal cases, which are part of What is commonly referred to as the false stash house cases, have served to undermine legitimate law enforcement efforts in this country. It is undisputed that between 2006 and 2013, the defendants charged in this District (the Northern District of Illinois) in the ATF false stash house cases were 78.7 black, 9.6 percent Hispanic, and 11.7 percent white. During this same period, the District's adult population was approximately 18 percent black, 11 percent Hispanic, and 63 percent White. These numbers generate great disrespect for law enforcement efforts. Disrespect for the law simply cannot be tolerated during these difficult times. it is time for these false stash house cases to end and be relegated to the dark corridors of our past. To put it simply, our criminal

justice system should not tolerate false stash house cases in 2018." *United States v. Abraham Brown*, No. 12 CR 632; D.E. 439, DE 262-8-9. While the court there obviously wished very much to dismiss the indictment it could not as this method of law enforcement remains technically legal, clearly the court expressed concern with the unfairness of the practice due to the racial and economic components of the cases in that district. Petitioner submits that while discovery is not available regarding false stash house sting cases in this district, the facts herein, petitioner is African-American (Amended PSI, August 25, 2020, Page 3, Identifying Data)and was a low income worker (Amended PSI, August 25, 2020, Page 22, Paragraphs 71 and 79; day laborer and part-time barber from home) the obvious judicial concern with this method of law enforcement justifies a downward variance sentence in this case where the cocaine, the stash house and the suggested "Latin" drug dealers to be robbed were all imaginary, a downward variance sentence range of 121-151 months was justified under 18 U.S.C. §3553(a).

The unduly harsh application of guidelines in stash house robbery cases provided an additional basis for a downward variance due to the manner in which the ATF engineered the imaginary robbery by making up an imaginary

"10 to 15 birds" (kilograms of cocaine), petitioner was sentenced under U.S.S.G. §2D1.1 carrying a much higher sentence than the lower Hobbs Act Robbery guidelines §2B3.1 which carries a base offense level of 20 rather than the 10 level higher base offense level of 30. After the addition of +3 levels for the firearm and +2 levels for loss amount the total offense level is still 5 levels lower than the 2D1.1 base offense level (and the 10 year minimum mandatory sentence). Had the agents rather than the "10 to 15" birds imagined property other than cocaine to be prospectively stolen, petitioner's advisory guideline sentence range would be computed at a level 25, category VI of 110-137 months, years less than half of the 262-367 range of level 34, category VI for the imaginary cocaine. The specific applied advisory sentencing guidelines applied in this case were determined solely by the ATF agent Volez. Petitioner argues that this factual basis supported the requested downward variance sentence range of 121- 151 months which is justified under 18 U.S.C. §3553(a).

Petitioner's criminal history was overstated because the juvenile and simple possession of marijuana prior convictions were included in his criminal history score. Petitioner received 14 criminal history points, 6 points of which resulted from two offenses committed at ages 15 (a

robbery of clothing and money where nothing was taken); DE 261-16; (grand theft auto, arrested driving a reported stolen car; DE 261-12. Petitioner submits that these dated, scored juvenile prior convictions overly weigh his scorable criminal history and over-represent his culpability under the advisory guidelines. Petitioner argues that the assessment of 1 point for conviction for possession of marijuana, as today, following the July 1, 2019 Florida Statute legalizing the possession of hemp plant, any case subsequent to August 9, 2019, the charge would not result in arrest or prosecution as announced by State Attorney Kathy Fernandez Rundle, and would result in a civil penalty very similar to the withheld adjudication and court costs imposed. Petitioner argues that these scored priors over-represent his criminal history justifying a downward variance sentence range of 121-151 months; DE 261-12.

Petitioner's argues that his acceptance of responsibility after trial supports a downward variance sentence under the facts of this case. Defendant has accepted responsibility, in writing, for his conduct in this case. Petitioner went to trial in this case because at the time he faced a mandatory life sentence and needed to preserve legal issues for his appeal and collateral proceedings which were ultimately successful due resulting

in the vacating of his sentence and this re-sentencing hearing. Petitioner argues that this factual and procedural point justifies downward variance sentence in the range of 121-151 months.

Petitioner argues that the onerous prison conditions within the Bureau of Prisons due to Covid-19 pandemic render the 190 month sentence imposed unreasonable where the codefendant Jenkins was sentenced to a 120 month minimum mandatory sentence and will be release on November 21, 2021. Since March 13, 2020 all BOP inmates have been in individual quarantine and then lockdown. BOP, nationally, is currently in "Action Plan VII". Phase VII of BOP's COVID-19 Action Plan extends all measures from the steps taken in "Action Plan V". Phase V purports to significantly decrease inmate movement by requiring that incarcerated individuals at every institution be "secured in their assigned cells/quarters" Each and every day all inmates are to remain in their cell all day except for approximately one hour to one and one-half hours per day. In addition to the mental and physical harshness of his current confinement, prospective incarceration places petitioner at an increased risk for COVID-19. BOP's "action plan" does not change the reality that individuals remain in close quarters sharing living space, bathrooms, showers,

laundry, recreation areas, and computer and phone access. As of June 14, 2020, petitioner an at risk individual will be 6.71 times more likely to contract COVID-19 in custody than he will be out of custody. Another court had previously granted a "two for one" jail credit in *United States v. Maycock*, et. al. (04-cr-20193-CMA S.D.F.L.) recognizing that the conditions of confinement the defendant suffered while incarcerated in the Bahamas were more harsh and thus qualitatively different than the then existing conditions within the Bureau of Prisons. Due to the pandemic the Bureau of Prison that has now been forced to impose harsher conditions of imprisonment; DE 262-11-13. Petitioner argues that these extraordinary prison conditions justify a downward variance sentence range of 121-151 months under the facts, procedure and circumstances of petitioner's case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

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/s/ A. Wallace

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“APPENDIX “A”