

No. _____

In The
Supreme Court of the United States

ICE TEE HUDSON,

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

J. Edward Yeager, Jr.
Counsel of Record
ATTORNEY AT LAW
P. O. Box 1656
Cornelius, NC 28031
(704) 490-1518 – Telephone
(866) 805-6191 – Facsimile
yeager@ncappeals.net

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

- A. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY DENYING MR. HUDSON'S MERITORIOUS ARGUMENT THAT THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY IMPOSING A SENTENCE WHICH BOTH EXCEEDED THE ADVISORY GUIDELINE RANGE BUT ALSO RAN CONSECUTIVE TO CHARGES WHICH WERE PROSECUTED IN STATE COURT.

LIST OF PARTIES

ICE TEE HUDSON, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED FOR REVIEW..... i

LIST OF PARTIES ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINION BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE..... 6

REASONS FOR GRANTING THE WRIT 9

CONCLUSION..... 11

APPENDIX:

 Unpublished Opinion
 U.S. Court of Appeals for the Fourth Circuit
 entered December 20, 2021..... Appendix A

TABLE OF AUTHORITIES

Page(s):

Cases:

United States v. Booker,
543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005) 10

United States v. Gary,
954 F.3d 194 (4th Cir. 2020) 8

United States v. Gary,
___ U.S. ___, 141 S. Ct. 2090, 210 L.Ed.2d 121 (2021) 8

United States v. Ice Tee Hudson,
2021 WL 6067230, No. 19-4544 (4th Cir., 20 December 2021) 1

Statutes:

18 U.S.C. § 922(g)(1) 7

18 U.S.C. § 3553 1, 10

18 U.S.C. § 3553(a) 8

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 8

28 U.S.C. § 2101 1

Sentencing Guidelines:

U.S.S.G. § 4A1.3 8

U.S.S.G. § 5K2.23 9

Rules:

Fed. R. App. P. 32.1 1

U.S. Sup. Ct. R. 13(1) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ice Tee Hudson respectfully prays for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The decision of the Fourth Circuit Court of Appeals affirming the judgment entered against Mr. Hudson is reported at *United States v. Ice Tee Hudson*, 2021 WL 6067230, No. 19-4544 (4th Cir., 20 December 2021). (App A). Pursuant to Federal Rules of Appellate Procedure 32.1, the decision is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued an unpublished decision on December 20, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 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;

(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.¹

(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.

(b) Application of Guidelines in Imposing a Sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and
(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of Reasons for Imposing a Sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence Procedure for an Order of Notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited Authority To Impose a Sentence Below a Statutory Minimum. — Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United

States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

STATEMENT OF THE CASE

The Defendant-Appellant, Ice Tee Hudson, was arrested on April 22, 2014, when an officer in Monroe, North Carolina responded to a domestic disturbance call at which Mr. Hudson was accused of threatening others with a firearm. The officers located a 9mm rifle which had been stolen from a Federal Firearm Licensee in South Carolina. An ATF agent later found social media posts which included Mr. Hudson, the rifle, and another stolen firearm.

The Grand Jury returned a one-count Bill of Indictment on April 22, 2015 bringing a charge of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). On July 16, 2015, Mr. Hudson pled guilty without a written plea agreement to Magistrate Judge David Cayer. Judge Frank Whitney conducted a sentencing hearing on December 3, 2015. Judge Whitney found that Armed Career Criminal status applied and imposed a sentence of 188 months which he ordered to run consecutive to sentences being served in related State court cases.

Mr. Hudson entered notice of appeal on December 30, 2015. During the pendency of the appeal, the government filed a Motion to Remand noting that Mr. Hudson's prior convictions no longer qualified him for treatment under the Armed Career Criminal Act. This Court issued an order on September 28, 2016 granting the motion and remanding the matter to the district court for resentencing.

The case came back before Judge Whitney on June 24, 2019. The probation office prepared both a Supplement to the Presentence Report and a Revised Supplement to the Presentence Investigation Report which noted a guideline imprisonment range of 57 months to 71 months. During the hearing, Judge Whitney received agreement from the parties "that the appropriate offense level is 19, defendant's criminal history category is V, for a new guideline range of 57 to 71 months

Prior to the sentencing hearing, Mr. Hudson filed objections to the presentence report and a request for a downward departure. The court specifically addressed Mr. Hudson's contention that the federal sentence should be imposed

concurrent rather than consecutive to state-mandated prison time. The court denied that request. The court also rejected Mr. Hudson's motion for a downward departure

Instead, the court granted the government's motion for an upward departure pursuant to sentencing guideline 4A1.3. After stating the section 3553(a) factors the court imposed a sentence of 108 months consecutive to the state prison time. The court imposed the sentence on June 24, 2019 and the written judgment was entered on July 18, 2019. Mr. Hudson entered notice of appeal on July 22, 2019.

Mr. Hudson filed a brief and Joint Appendix with the Fourth Circuit Court of Appeals on November 18, 2019. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. Mr. Hudson's brief stated two issues for consideration: (1) whether the trial court erred in accepting Mr. Hudson's guilty plea when it was not affirmatively shown that he knew that he was not allowed to possess a firearm; and (2) whether the trial court committed reversible error in granting the government's motion for an upward variance. The Court initially directed supplemental briefs be filed; however, the Court subsequently granted the government's motion to suspend the briefing schedule while the government pursued an appeal of *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020). The proceedings were then delayed significantly until the Supreme Court released a decision in *United States v. Gary*, ___ U.S. ___, 141 S. Ct. 2090, 210 L.Ed.2d 121 (2021). The Fourth Circuit issued an unpublished decision on December 20, 2021 affirming the district court's judgment. (App A).

REASONS FOR GRANTING THE WRIT

Petitioner asserts that the Writ should be issued because the district court erred in its sentencing decision. Judge Whitney conducted a sentencing hearing on December 3, 2015 and imposed a sentence of 188 months which he directed was to run consecutive to Mr. Hudson's completion of state terms of imprisonment on related criminal matters. After the government agreed to take the Armed Career Criminal status off the table, the court conducted a new sentencing hearing on June 24, 2019 and entered a sentence of 108 months. That 108-month sentence was fifty percent higher than the high end of the advisory guideline range and the court again directed that the sentence be served consecutive to state sentences despite the fact that those entire terms of imprisonment had been discharged.

Mr. Hudson asked the district court to consider the effect of a sentence which would have been served concurrently with the state sentences and to grant a downward departure pursuant to U.S.S.G. § 5K2.23. Because the court had directed a consecutive sentence in the 2015 processing, Mr. Hudson had only actually begun serving his federal sentence in January 2018 despite having been incarcerated for years. The government argued that the court should impose a consecutive sentence "because this was different conduct." The district court adopted the government's reasoning. "I have not been convinced to change my original opinion that these should be consecutive." The district court's decision to impose a sentence as consecutive or concurrent is, of course, reviewed on an abuse of discretion standard but this court should note that the consequence of the district

court's ruling was adding an additional almost four years to Mr. Hudson's time in prison.

The more significant concern is that the court also decided to upwardly depart at the request of the government because of the severity of Mr. Hudson's criminal history. This departure was significant given that the parties had agreed that a guideline range of 57 to 71 months applied. The court's reasoning resulted in a sentence almost twice as long as the low end of the guideline range and fifty percent higher than the high end.

The district court followed the three-step process in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005) and then noted the sentencing factors it considered most important, namely: (1) the nature and circumstances of the offense; (2) Mr. Hudson's criminal history; (3) providing just punishment and promoting respect for the law; and (4) protecting the public from further crimes of the defendant. *See*, 18 U.S.C. § 3553. The court was clear with respect to each factor the degree to which Mr. Hudson's history of "violence" or "violent behavior" played a role in the court upwardly departing his sentence.

But the court also knew that Mr. Hudson had been jailed for years on the state charges. The overall effect of upwardly departing **and** delaying the start of the sentence was to impose a draconian extension of Mr. Hudson's time in prison far beyond the guideline range.

The Circuit Court concluded that the district court did not abuse its discretion by upwardly departing or varying and that the sentence was

substantively reasonable. The Circuit Court agreed with the district court's reasoning that Mr. Hudson's particularized criminal history was not represented by the guidelines. However, allowing the sentence to stand directly raises a question of what weight should be given the guidelines. All parties agreed to a guideline range of 57 to 71 months. The range was derived from a careful review of Mr. Hudson's criminal history as well as the specifics of his conviction. The district court's sentence of 108 months both exceeded the guideline range but when combined with the decision regarding the starting point had the effect of imposing a sentence far beyond that suggested by the guidelines. Mr. Hudson respectfully asserts that the court's reasoning was insufficient to support the overall length of his sentence and that the sentence was substantively unreasonable. Given the lengthy sentence Mr. Hudson received, he respectfully requests that this judgment be vacated.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

/S/ J. Edward Yeager, Jr.
J. Edward Yeager, Jr.
P. O. Box 1656
Cornelius, NC 28031
Telephone: 704-490-1518
Facsimile: 866-805-6191
yeager@ncappeals.net

Counsel for Petitioner