NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

LAMAR K. GARVIN

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

QUESTION PRESENTED

I. Whether the Fourth Circuit erred by affirming the District Court's imposing an unreasonable sentence under the totality of the circumstances, and whether Mr. Garvin's sentence should be reversed and remanded?

NO.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 25, 2022. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

A. STATEMENT OF THE CASE.

Beginning in September 2012, Mr. Garvin and others committed a series of robberies of jewelry stores in Maryland and Virginia.

On August 20, 2013, Mr. Garvin was charged in a two count Indictment with Attempted Interference with Commerce by Robbery, in violation of 18 U.S.C. Sec. 1951, and Use and Carry of a Firearm in Relation to a Felony Crime of Violence, in violation of 18 U.S.C. Sec. 924(c).

On January 21, 2014, Mr. Garvin was named in a seven count Superseding Indictment, charging him with several jewelry store robberies. Mr. Garvin was charged with: attempted Hobbs Act Robbery, in violation of 18 U.S.C. Sec. 1951(Count I); three counts of Hobbs Act Robbery, in violation of 18 U.S.C. Sec. 1951 (Counts III, V and VI); two counts of use and carrying a firearm in Relation to a Felony Crime of Violence, in violation of 18 U.S.C. Sec. 924(c)(Counts II and IV); and one count of conspiracy to commit a Hobbs Act Robbery, in violation of 18 U.S.C. Sec. 1951 (Count VII).

The case was set for trial on May 12, 2014. On the day of trial, after jury selection and after the Government's opening statement, Mr. Garvin changed his plea to guilty on all seven counts. A formal written Plea Agreement was not entered into by the parties.

After a Presentence Report was prepared, the District Court

(the Honorable John A. Gibney, Jr.) sentenced Mr. Garvin to 30 years and one day of incarceration, including: one (1) day on Counts 1, 3, and 5-7, to be served concurrently; five (5) years on Count 2, to be served consecutively; and twenty-five (25) years on Count 4, to be served consecutively.

In 2016, Mr. Garvin moved to vacate his sentence under 28 U.S.C. Sec. 2255. In his 2255 Motion, Mr. Garvin argued, *inter alia*, that his 924(c) conviction on Count II was no longer lawful pursuant to *Johnson v. United States*, 576 U.S. 591 (2015). The District Court denied Mr. Garvin's 2255 Motion.

Mr. Garvin appealed the District Court's denial of the 2255 Motion to this Court. Following the Fourth Circuit's decision in *United States v. Taylor*, 979 F.3d 203, 210 (4th Cir. 2020) (attempted Hobbs Act robbery not necessarily a "crime of violence" under Sec. 924(c)(3)(A)), this Court vacated Mr. Garvin's conviction on Count II, and remanded the matter to the District Court for resentencing.

Based upon the removal of Count II, the Probation Office recalculated Mr. Garvin's advisory guideline range. The new Guideline Range for Counts 1, 3, 5-7, was 87-108 months.

Count 4 carried an additional seven (7) years (84 months), to run consecutive to any other time imposed by the District Court. The total Guideline Range was 171 to 192 months of incarceration. Neither the Government nor the Defense had an objection to this

recalculated Sentencing Guideline and statutory analysis. (JA 52; 60.)

Prior to re-sentencing, the Government set forth its Sentencing Position and a Motion for Upward Departure. The Defense filed a Position on Sentencing and a Motion for a Downward Variance

On July 26, 2021, the District Court re-sentenced Mr. Garvin, as follows: Counts 1, 3, 5, 6, and 7, 87 months each, to run concurrently; and Count 4, 84 months to run consecutively to Counts 1, 3, and 5-7, for a total of 171 months.

On July 29, 2021, Mr. Garvin filed a timely Notice of Appeal.

SUMMARY OF ARGUMENT

The District Court abused its discretion by not granting Mr. Garvin's Motion for a Variance Sentence, based upon factors justifying a variance sentence under the Guideline Range, including but not limited his age (56), lack of prior criminal record (Criminal History Category I), and the duress and pressure Mr. Garvin was put under to commit these crimes by a drug dealer.

ARGUMENT

I. MR. GARVIN PRESENTED COMPELLING FACTORS JUSTIFYING A VARIANCE SENTENCE.

A. The Standard Of Review.

The Fourth Circuit reviews all sentences for "reasonableness" by applying the "deferential abuse-of-discretion standard." *United States v. McCain*, 974 F.3d 506, 515 (4th Cir. 2020). Once the Court

ensures that the district court committed no significant procedural errors, *see Gall v. United States*, 552 U.S. 38, 51 (2007), the Court then proceeds to substantive reasonableness by considering "the totality of the circumstances." *Id.*

B. The Totality Of The Circumstances Establish That The District Court Abused Its Discretion By Not Granting Mr. Garvin A Variance Sentence.

Mr. Garvin's crimes were very serious. The Defense conceded that point at sentencing. Indeed, Mr. Garvin acknowledged that he should receive "significant punishment for his actions."

However, there were factors in the Record that supported a Variance Sentence for Mr. Garvin. The District Court imposed the low end of the Advisory Sentencing Guideline range of 171 months. Mr. Garvin sought an entirely reasonable variance sentence of 124 months. A careful review of sentencing factors shows that Mr. Garvin's proposed 47 month reduced variance sentence: (1)required him to serve the 924(c) mandatory sentence of 84 months, *plus an additional 30 months*; (2) achieved the goals under 18 U.S.C. Sec. 3553(a); and (3) reasonably and fairly applied the Sec. 3553(a) factors.

a. The Applicable Legal Standard For Sentencing.

It is essential to remind ourselves about the proper legal standard for sentencing. Sentencing courts enjoy greater latitude to impose alternative sentences that are also reasonable so long as they are tied to the Sec. 3553(a) factors. *See Gall v. United*

States, 552 U.S. 38, 59 (2007) ("the Guidelines are not mandatory, thus the 'range of choice dictated by the facts of the case' is significantly broadened. Moreover, the Guidelines are only one of the factors to consider when imposing a sentence, and Sec. 3553(a)(3) directs the [sentencing] judge to consider sentences *other than imprisonment*.") (Emphasis added.)

Further, pursuant to 18 U.S.C. Sec. 3553(a)(2), the sentencing court must impose a sentence that is minimally sufficient to achieve the goals of sentencing based on all of the Sec. 3553(a) factors present in the case. This "parsimony provision" serves as the "overarching instruction" of the statute. *See Kimbrough v. United States*, 552 U.S. 85, 111 (2007). *See also* Sec. 3553(a) ("[t]he court shall impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection"). (Emphasis added.)

b. <u>The History And Characteristics Of Mr. Garvin</u>.

Pursuant to 18 U.S.C. Sec. 3553(a)(1), and *United States v. Booker*, 543 U.S. 220, 245 (2005), the Court should begin its analysis of sentencing by considering the history and characteristics of Mr. Garvin. *See Rita v. United States*, 551 U.S. 338, 364-365 (2007) (Stevens, J., concurring) ("Matters such as age, education, mental or emotional condition ... employment history ... family ties ... are not ordinarily considered under the Guidelines. They are, however, matters that Sec. 3553(a) authorizes

the sentencing judge to consider.") (Citations omitted.)

Mr. Garvin is 56 years old. Yet, outside of the instant matter, he has a *de minimis* prior criminal record, consisting mostly of traffic infractions. In fact, he had a criminal history of zero, for a Criminal History Category of I. Accordingly, it is unusual that a first time felony offender, at age 56, should receive a 171 month (14 year) sentence.

Mr. Garvin was gainfully employed for many years, in the lawn care business, and buying and selling cars and homes. He responsibly raised his children.

c. <u>The Nature And Circumstances Of The Offense</u>.

As noted in the first sentencing hearing, a clerk from one of the robberies wrote the Court and stated that Mr. Garvin did not have a weapon on his person when he entered the store. When one of the co-defendants dropped a gun, Mr. Garvin picked up the gun put it in his pocket so it could not be used. Even the District Court acknowledged that Mr. Garvin had acted, in some sense, as a Good Samaritan.

Further, there is important information in the record about the pressure and coercion Mr. Garvin was placed under to commit these crimes. A drug dealer forced him to participate in these crimes, upon threats to Mr. Garvin's family. As Mr. Garvin explained, "I didn't rob no one for my own free will. This happened because a guy threatened my family."

Acting under such threats or duress has on numerous occasions reasonably resulted in a downward departure-variance sentence. *See, i.e., United States v. Nicholson,* 611 F.3d 191, 206 (4th Cir. 2010) (downward departure justified when defendant possessed firearm for self-defense against threats to his life); *United States v. Cheape,* 887 F. 477, 480 (3rd Cir. 1989) (downward departure justified on grounds that defendant had been coerced into participating in bank robbery); *United States v. Amor,* 24 F.3d 432, 438-39 (2d Cir. 1994) (downward departure justified because firearms offense committed one day after defendant's car was shot, defendant feared potential violence); *United States v. Zaragoza-Moreira,* 780 F.3d 971, 981 (9th Cir. 2015) (downward departure justified where defendant into brining drugs across border).

The District Court acknowledged the duress Mr. Garvin was under. "... I appreciate you drawing it to my attention, because this is not the first time I have had situations like this come in front of me where people commit crimes because, actually, they are under duress ... I think I understand that this Tata kind of putting the squeeze on you and making you do these robberies. "

Despite the District Court's observations, the Court unreasonably and inexplicably did not grant a variance sentence.

d. The Need For The Sentence Imposed To Reflect The Seriousness Of The Offense, To Afford Adequate Deterrence, And To Protect The Public.

At age 56, and with a projected release date at age 59 or 60

(under Mr. Garvin's proposed 124 month sentence; he has been incarcerated since November 4, 2013, Mr. Garvin is a unlikely recidivist as he turns into his sixties.

First, he has little to no prior criminal record. Second, as the Sentencing Commission has found, older defendants are less likely to commit new crimes, after periods of incarceration. "Among offenders released younger than age 21, 67.6 percent were rearrested compared to 13.4 percent of those released 65 or older. The pattern is consistent across age groups, as age increases recidivism by any measure declined." *The Effects of Aging on Recidivism Among Federal Offenders*, U.S. Sentencing Commission.

After serving 124 months, the public will not have to be protected from Mr. Garvin, as he enters his sixties. A 124 month sentence will sufficiently assure deterrence.

e. The Kind Of Sentences Available And The Sentencing Range Established By The Sentencing Guidelines.

While the Advisory Sentencing Guidelines called for a sentencing range of 171 to 192 months, the Guideline Range Sentence was not and is not mandatory. *See United States v. Booker*, 543 U.S. 220 (2005).

Having said that, proposed an eminently reasonable sentencing proposal of 124 months, taking into consideration his age, lack or prior record, and the pressure the District Court acknowledged Mr. Garvin was under from a drug dealer to commit these crimes.

Under the totality of circumstances, a variance of 47 months

was reasonable, necessary and appropriate.

f. The Need To Avoid Unwarranted Sentencing Disparities Among Similarly Situated Defendants.

One of the factors of the Sentencing Guidelines is to avoid disparity in sentences imposed for similar criminal offenses committed by similar defendants. *See U.S.S.G. Manual*, Chp. 1, Pt. A. (Nov. 2018).

Mr. Garvin proposed a 124 month sentence. According to the Sentencing Commission's Annual Report for 2015, the average sentence fora person convicted with a Criminal History Category of I was 42 months. The average sentence for a defendant who commits robbery was 79 months. *Id.*

Accordingly, a sentence of 124 months would be far above these averages. The sentence imposed of 171 months is disproportionate under the totality of circumstances of Mr. Garvin's case.

II. CONCLUSION

WHEREFORE, Mr. Garvin respectfully requests that the Court grant certiorari, reverse and vacate the sentencing decision of the District Court and the Fourth Circuit's affirmance of that decision, and remand this case for resentencing to the District Court, consistent with Mr. Garvin's request for a variance sentence of 124 months.

Respectfully submitted,

/S/

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4388

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LAMAR KEITH GARVIN,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. John A. Gibney, Jr., Senior District Judge. (3:13-cr-00141-JAG-1)

Submitted: May 12, 2022 Decided: May 25, 2022

Before THACKER and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Peter L. Goldman, SABOURA, GOLDMAN & COLOMBO, P.C., Alexandria, Virginia, for Appellant. Jessica D. Aber, United States Attorney, Jacqueline R. Bechara, Assistant United States Attorney, Mary Frances Richardson, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

PER CURIAM:

In 2014, Lamar Keith Garvin was sentenced to 30 years in prison plus one day after pleading guilty, without a plea agreement, to attempted Hobbs Act robbery (Count 1), in violation of 18 U.S.C. § 1951, and using and carrying a firearm during and in relation to a crime of violence (Count 2), in violation of 18 U.S.C. § 924(c); three counts of substantive Hobbs Act robbery (Counts 3, 5, and 6), in violation of 18 U.S.C. § 1951; brandishing a firearm during and in relation to a crime of violence (Count 4), in violation of 18 U.S.C. § 924(c); and conspiracy to commit Hobbs Act robbery (Count 7), in violation of 18 U.S.C. § 1951. This court affirmed the district court's judgment. *See United States v. Garvin*, 606 F. App'x 701 (4th Cir. 2015) (No. 14-4665).

Garvin then filed a motion under 28 U.S.C. § 2255, alleging that trial counsel was ineffective and that his § 924(c) convictions were invalid in light of *Johnson v. United States*, 576 U.S. 591, 602 (2015) (holding that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e), is unconstitutionally vague). The district court denied habeas relief and Garvin timely appealed. This court affirmed the district court's habeas order, in part, as to the ineffective assistance of counsel claims on which this court granted a partial certificate of appealability; dismissed, in part, as to the claims on which this court denied a certificate of appealability; and reversed the district court's denial of Garvin's motion to vacate, in part, as to Garvin's challenge to Count 2, vacated the § 924(c) conviction on Count 2, and remanded the matter for resentencing. *United States v. Garvin*, 844 F. App'x 644 (4th Cir. 2021) (No. 19-6617).

On remand, Garvin's Sentencing Guidelines range was recalculated at 87 to 108 months for Counts 1, 3, and 5-7, and 84 months for Count 4, to run consecutively. Garvin filed a motion for a downward variant sentence and the Government filed a motion for an upward variant sentence, both of which were denied by the district court. After adopting the recalculated Guidelines range, the district court resentenced Garvin to 171 months in prison and Garvin has again appealed to this court. On appeal, Garvin asserts that the district court abused its discretion when it denied his motion for a downward variant sentence. According to Garvin, he presented the district court with factors justifying a downward variance and, thus, Garvin argues that the imposed 171-month sentence is disproportionate under the totality of circumstances. Finding no error, we affirm.

We "'review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.'" *United States v. Torres-Reyes*, 952 F.3d 147, 151 (4th Cir. 2020) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)) (alteration omitted). "First, we ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *United States v. Fowler*, 948 F.3d 663, 668 (4th Cir. 2020) (internal quotation marks omitted)).

"If the sentence is procedurally sound, [we] should then consider the substantive reasonableness of the sentence, taking into account the totality of the circumstances."

United States v. Provance, 944 F.3d 213, 218 (4th Cir. 2019) (internal quotation marks omitted). A sentence must be "sufficient, but not greater than necessary," to accomplish the § 3553(a) sentencing goals. 18 U.S.C. § 3553(a). "That said, district courts have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors." *United States v. Nance*, 957 F.3d 204, 215 (4th Cir.) (internal quotation marks omitted), *cert. denied*, 141 S. Ct. 687 (2020). Moreover, a sentence within a properly calculated Guidelines range is presumptively substantively reasonable. *United States v. Gillespie*, 27 F.4th 934, 945 (4th Cir. 2022). That "presumption can only be rebutted by showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors." *United States v. Gutierrez*, 963 F.3d 320, 344 (4th Cir.), *cert. denied*, 141 S. Ct. 419 (2020).

We discern no procedural sentencing error by the district court. *See Provance*, 944 F.3d at 218. The district court correctly noted that Garvin's Guidelines range for Count 4 was a consecutive 84-month sentence, and that the recommended Guidelines range for the remaining counts was 87 to 108 months in prison. The court also expressly recognized that, other than the statutory mandatory minimum sentence applicable to Count 4, the Guidelines range for the other counts was advisory. The record establishes that the court engaged with the parties at sentencing, thoroughly explained its reasoning for imposing the chosen sentence in light of the § 3553(a) factors, and that it addressed the parties' arguments. And, when it imposed Garvin's supervised release, the district court expressly incorporated and detailed the Guidelines' standard conditions, as well as the three special conditions it later included in the written criminal judgment. *See United States v. Rogers*,

961 F.3d 291, 296-99 (4th Cir. 2020). We therefore conclude that Garvin's sentence is procedurally reasonable.

As Garvin's 171-month sentence is at the bottom of the applicable Guidelines range, which was 171 to 192 months in prison, Garvin's sentence is therefore presumptively reasonable. *See Gillespie*, 27 F.4th at 945. It is thus incumbent upon Garvin to rebut the presumption of reasonableness by showing that the 171-month sentence "is unreasonable when measured against the . . . § 3553(a) factors." *Gutierrez*, 963 F.3d at 344. Garvin has not met this burden.

Indeed, although Garvin challenges the appropriateness of the district court's reliance on the § 3553(a) factors the court discussed at sentencing, Garvin's arguments in support of his assertion that the district court abused its discretion when it imposed the 171-month sentence and denied his motion for a downward variance amount to little more than Garvin's disagreement with the district court's rationale for the imposed sentence. Contrary to the arguments Garvin makes on appeal, the record establishes that the district court thoroughly considered Garvin's arguments in support of a downward variant sentence, but disagreed with them, and—after expressly considering the § 3553(a) factors—provided the parties with a well-reasoned and thorough rationale for the sentence imposed. Because Garvin has failed to rebut the presumption of reasonableness we afford his within-Guidelines sentence, Garvin's sentence shall not be disturbed. *See Gall*, 552 U.S. at 51 (holding that mere disagreement with the sentence imposed "is insufficient to justify reversal of the district court"); *see also United States v. Friend*, 2 F.4th 369, 382 (4th Cir.) (holding that a district court does "not abuse its discretion by placing significant

weight on the seriousness of defendant's offense" and refusing to "reverse a sentence . . ., even if the sentence would not have been the choice of [this c]ourt"), *cert. denied*, 142 S. Ct. 724 (2021).

Accordingly, we affirm the amended criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: May 25, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4388
(3:13-cr-00141-JAG-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LAMAR KEITH GARVIN

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK