

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

TRAVARIS DEVON BISHOP
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. 21-60639

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court ordered a substantively unreasonable statutory maximum sentence of 120 months in prison, when the Guidelines range was only 30 to 37 months.

PARTIES TO THE PROCEEDING

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

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I. OPINIONS BELOW

On August 11, 2020, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Bishop with 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 3:20cr107-HTW-FKB. Mr. Bishop accepted responsibility for his actions by pleading guilty to the charge.

The district court sentenced Mr. Bishop to serve 120 months in prison, even though the Guidelines range was only 30 to 37 months. The court entered a Final Judgment on August 13, 2021. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Bishop filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on August 13, 2021. The Fifth Circuit case number is 21-60639. The Fifth Circuit affirmed the district court's rulings via an Opinion filed on April 5, 2022. The Fifth Circuit filed a Judgment on the same day. The Fifth Circuit's Opinion 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 April 5, 2022. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, 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

(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;

* * * * *

(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 criminal conviction entered against Mr. Bishop for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Bishop arose from the laws of the United States of America.

B. Statement of material facts.

1. Mr. Bishop's background.

Mr. Bishop, an African American man, was born into a single-parent household in Vicksburg, Mississippi in 1984. His mother raised her four children on her own. His father did not pay child support.

At some point, the family moved to Jackson, Mississippi, where Mr. Bishop attended Jim Hill High School. Like many youths in inner-city Jackson, Mr. Bishop was influenced by “hanging with the wrong crowd,” and he dropped out of Jim Hill during the ninth grade.

Mr. Bishop's lack of formal education did not stop him from having a successful work history. He worked seasonally as a brick mason for several years. His employer described him as “a dedicated hard worker and very reliable.” He

stated that Mr. Bishop would be considered for rehire. Also, Mr. Bishop worked at Southern Tire Recycle in Richland, Mississippi for two and one-half to three and one-half years.

Mr. Bishop is in a long-term relationship with Shanice Thomas, which began about 15 years ago. They have five kids together. Ms. Thomas told Mr. Bishop's probation officer that Mr. Bishop gives her cash and helps pay the children's cellular telephone bills. Mr. Bishop and Ms. Thomas plan to live together again after Mr. Bishop's release from prison.

Mr. Bishop has a total of three prior felony convictions. Two are 17-year-old convictions for house burglary in 2004, when he was only 19 years old. Neither house was occupied at the time of the burglaries.

The only other prior felony conviction is for the non-violent crime of felon in possession of a firearm. He pled guilty to this crime and is currently paying his debt to society by serving a 10-year sentence in State of Mississippi custody on that conviction.

2. The sentencing hearing.

Both parties and the court agreed that the sentence range under the Sentencing Guidelines was 30 to 37 months in prison, and the statutory maximum prison term was 10 years. When the court asked defense counsel why Mr. Bishop should be sentenced under the Guidelines, counsel correctly argued that this case is

not outside of the heartland of felon in possession cases, and Mr. Bishop's criminal history is adequately reflected in the Guidelines sentence calculation. Counsel also pointed out that Mr. Bishop displayed no violence related to the crime, as he admitted that he had a gun when officers approached him.

Mr. Bishop entered into a Plea Agreement and a Plea Supplement in this case. In exchange for pleading guilty, the prosecution agreed to "recommend that the Court impose a sentence within the lower 50% of the applicable range under the United States Sentencing Guidelines[.]" At a Guidelines sentence range of 30 to 37 months in prison, the lower 50 percent of that range is 30 to 34 months.

The prosecutor stood by his 30 to 34-month sentence recommendation at the sentencing hearing. Apparently dissatisfied with this recommendation and the entire idea of the plea process, the district court asked the prosecutor: "Could you tell me what complications there are here that might be difficult to prove before a jury?" The prosecutor responded with a detailed answer addressing the significant efficiencies of the plea process as opposed to trial. The court then asked: "So how did you balance that *small inconvenience* against putting back on the streets earlier a person who poses a danger to the good citizens of Jackson?" (Emphasis added).

The court went on to relate its own personal investigation of the opinions of Jacksonians about crime and criminals. The court stated:

[I]t is an unfortunate consequence, one that I hear all of the time, because I am from Jackson, and I go to the black neighborhoods on a regular basis.

And so – I even have property over there. So I hear all of these stories about folk who are not prosecuted, who are only tapped on the wrist and returned as fast as possible, under what the prosecution thinks is a lengthy sentence. Whereas, the community has to confront these people in what they consider to be all too short of a period to be terrorized.

The court berated the prosecutor by asking: “Do you all ever go to the community that’s affected and ask the law-abiding citizens over there how they feel about somebody like this fellow here, and what it means to have him off the streets?” It then asked: “What do you think the reputation of the prosecution is in the community – the black community?” Then it commented, “[a]nd the prosecution contends that he should get a sentence under the guidelines so that he can get back out on the streets real fast[.]” It was as if the prosecutor was on trial and undergoing cross-examination by the court.

Along this line of thought, we note that this particular judge has arguably developed a reputation for cross-examination-like questioning. For example, another district judge in Southern District of Mississippi characterized questioning of a criminal defendant by the judge in this case as “cross-examination.” *See United States v. Donald Ray Quinn*, Criminal No. 3:92cr121-DPJ-FKB, in the United States District Court for the Southern District of Mississippi. The other judge stated:

I do want to say for the record – I meant to say it early on – that I obviously read the order of recusal and, Ms. Stewart, your motion to try to get some context of what was going on.

I started to read the first transcript. And as *I sort of got into what sounded like a cross-examination*, I decided to stop reading it. And this may be overly cautious, but I didn't want – *I didn't want there to be any suggestion that any bias for recusal by the prior judge might taint my review of the case so I elected not to read that*, I guess it was a 95-page transcript. I read your motion, but I tried to separate my thought process from that of the original judge. I did want to put that on the record.

Hearing Transcript, pp. 21-22 (emphasis added). The hearing transcript is available for this Court's review under docket entry number 31 in *Quinn*, Case No. 3:92cr121, in the Southern District of Mississippi.

In addition to attacking the prosecutor, the district court attacked Mr. Bishop's constitutionally protected right to bear children. In support of the 120-month sentence, the court commented, “[t]hen, there is his lack of credible, productive worth to the community. He’s a father of six children for whom he has refused to pay child support, and we can’t even say he has been a meaningful influence in their lives.” As further discussed below, not only was this an attack on Mr. Bishop's constitutional right to bear children, but it was also an untrue fact finding. As Ms. Thomas told the probation officer, Mr. Bishop gave her cash to care for the kids and helped pay their cellular telephone bills.

As stated above, the Guidelines sentence range was 30 to 37 months in prison, and the prosecution stood by its recommendation of a sentence in the lower 50 percent of that range. Nevertheless, the court ordered the statutory maximum penalty of 120 months in prison. And the court ordered this sentence to run

consecutive to the 10-year State of Mississippi prison term that Mr. Bishop was already serving. Defense counsel objected to the sentence as unreasonably long.

V. ARGUMENT

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

The issue in this case is whether the significantly above-Guidelines 120-month prison sentence ordered by the district court is unreasonable. The sentencing range under the Sentencing Guidelines was 30 to 37 months in prison. Considering this Guidelines range and considering the facts of Mr. Bishop's case, the 120-month sentence is unreasonably high.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” The Court should exercise its discretion and grant certiorari because this case involves a grossly unwarranted deviation from the Sentencing Guidelines. While the Guidelines are not mandatory, they provide researched and well-reasoned grounds for ordering sentences within a particular range for similarly situated defendants. Granting certiorari in this case will allow the Court an opportunity to provide guidance about necessary justification for deviating from the Guidelines.

Additionally, the district court's sentencing decision relied on improper factors. First, the court's reasoning treaded on Mr. Bishop's constitutionally protected right to bear children. Second, the decision improperly relied on the court's extrajudicial investigation and knowledge of purported facts. This provides additional reasons to grant certiorari.

B. The district court ordered a substantively unreasonable statutory maximum sentence of 120 months in prison, when the Guidelines range was only 30 to 37 months.

1. Legal tests to measure the substantive reasonableness of a 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. Bishop’s sentence is substantively unreasonable under the second and third factors. That is, the district court gave significant weight to irrelevant or improper factors, and the court erred in balancing the sentencing factors under 18 U.S.C. § 3553(a).

2. The district court gave significant weight to an irrelevant or improper sentencing factors.

a. Introduction.

The district court gave significant weight to two improper factors when it arrived at Mr. Bishop’s sentence. First, one of the sentencing factors relied on by the court improperly treaded on his constitutionally protected right to bear children. Second, the sentencing decision relied in significant part on the district

court's own extrajudicial investigation of the opinions of the citizens of Jackson about crime.

b. Sentencing factors relied on by the court improperly treaded on Mr. Bishop's constitutionally protected right to bear children.

In *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), this Court held: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." The district court's sentencing decision improperly treaded on this fundamental right.

Supporting its unreasonably high 120-month sentence, the court stated: "Then, there is his lack of credible, productive worth to the community. He's a father of six children for whom he has refused to pay child support, and we can't even say he has been a meaningful influence in their lives." The court commented, "[s]o he is manufacturing children that seemingly at some point are going to be on the coffers of the public without a father in the house and probably turn to crime themselves."

Under *Eisenstadt*, any governmental intrusion into child bearing issues is a violation of a person's constitutional right to privacy. Relying on Mr. Bishop's procreation history to upwardly vary at sentencing represents such a violation, and requires this Court to vacate the sentence as unreasonable.

Further, the district court's conclusion that Mr. Bishop did not financially support his children is simply untrue. The court stated, "[h]e's not married to [the children's mother] and he has no evidence that he supports [his children]." This fact finding is belied by the undisputed evidence that Ms. Thomas, the mother of Mr. Bishop's children, said that Mr. Bishop gave her cash to care for the kids and helped pay their cellular telephone bills. This provides further support for vacating the sentence.

c. The court based its sentence decision on the court's own extrajudicial investigation of the opinions of the citizens of Jackson about crime.

The defense did not ask the district judge to recuse himself from presiding over this case. However, the law pertaining to recusal indicates that the district judge improperly based its sentence decision on its own extrajudicial investigation of citizens' opinions about crime in Jackson.

The Fifth Circuit addressed the issue in *United States v. Lechuga*, 820 F. App'x 261 (5th Cir. 2020). The Court held that 28 U.S.C. § 455(b)(1) "requires a judge to recuse himself where he 'has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.'" *Id.* at 263 (emphasis added). "Generally, to warrant recusal under § 455(b)(1), the judge's 'bias or prejudice' or 'personal knowledge of disputed

evidentiary facts’ must stem from an *extrajudicial source*.” *Id.* (emphasis added; citations omitted).

At sentencing in Mr. Bishop’s case, the district court stated:

[I]t is an unfortunate consequence, one that I hear all of the time, because I am from Jackson, and I go to the black neighborhoods on a regular basis. And so – I even have property over there. So I hear all of these stories about folk who are not prosecuted, who are only tapped on the wrist and returned as fast as possible, under what the prosecution thinks is a lengthy sentence. Whereas, the community has to confront these people in what they consider to be all too short of a period to be terrorized.

(Emphasis added).

Clearly, the court relied on extrajudicial knowledge when it crafted Mr. Bishop’s sentence. This is true because the judge relied on personally derived knowledge about the purported opinions of Jacksonians toward crime. And those opinions unquestionably affected the court’s decision to order a statutory maximum sentence.

In summary, the district court at sentencing improperly relied on information obtained from extrajudicial sources. The court based its 120-month statutory maximum sentence on this information. This scenario justifies vacating the district court’s sentence as unreasonable.

3. The district court erred in balancing the sentencing factors under 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. The primary factors are:

- “the nature and circumstances of the offense” (§ 3553(a)(1));
- “the history and characteristics of the defendant” (*id.*);
- “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” (§ 3553(a)(2)(A));
- “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 kinds of sentences available” (§ 3553(a)(3));
- “the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines” (§ 3553(a)(4)(A)); and

- “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.

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

Mr. Bishop’s admitted crime does not present facts that are unusual or egregious. He possessed a firearm, which involved no violence at all. He did nothing aggressive toward the arresting officers, and never denied the charges. Further, he pled guilty to the crime and the prosecutor recommended a sentence within the lower 50 percent of the Guidelines sentence range, which was 30 to 37 months in prison. These facts support a ruling that the district court ordered an unreasonably high 120-month prison sentence.

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

Mr. Bishop dropped out of school during the ninth grade. However, his lack of formal education did not stop him from having a successful work history. He worked seasonally as a brick mason. PSR, ROA.242. His employer described him as “a dedicated hard worker and very reliable.” He stated that Mr. Bishop would be considered for rehire. Further, Mr. Bishop worked at Southern Tire Recycle in Richland, Mississippi for two and one-half to three and one-half years.

Mr. Bishop has been in a long-term relationship with Shanice Thomas for the last 15 years, and they have five kids together. Ms. Thomas reported that Mr. Bishop gives her cash and helps pay the children's cellular telephone bills. Mr. Bishop and Ms. Thomas plan to again live together after Mr. Bishop's release from prison. These facts are indicators of his stable and reliable nature

Mr. Bishop has a total of three prior felony convictions. One prior conviction is for the non-violent crime of felon in possession of a firearm. He pled guilty to this crime and is currently paying his debt to society by serving a 10-year sentence in State of Mississippi custody on that conviction. Mr. Bishop has two 17-year-old convictions for house burglary in 2004, when he was only 19 years old. PSR, ROA.233, 234. Neither house was occupied at the time of the burglaries. None of Mr. Bishop's prior felony convictions involve harm to another person or dealing drugs.

These facts support a conclusion that the district court should have ordered a within-Guidelines sentence based on Mr. Bishop's "history and characteristics."

c. Just punishment for the offense and adequate deterrence to criminal conduct under § 3553(a)(2)(A) and (B).

The subject statute carries no required minimum sentence, and a maximum sentence of 10 years in prison. 18 U.S.C. § 924(a)(2). In addition to the statute, we consider the Sentencing Guidelines, which 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).

Mr. Bishop’s Guidelines sentence range was 30 to 37 months in prison. A sentence within this range was adequate to meet the ends of justice and provide a fair sentence.

Further, even the prosecutor believed that a sentence within the lower 50 percent of the Guidelines range was appropriate, even though he district court berated the prosecutor for this recommendation. Under these facts, this Court should vacate the 120-month sentence as substantively unreasonable.

d. Protection of the public from further crimes of the defendant under § 3553(a)(2)(C).

Mr. Bishop has not been convicted on any crimes against a person, and his only drug-related conviction is a misdemeanor. These facts bode in favor of ruling that the district court erred by ordering a statutory maximum 120-month prison sentence.

Finally, we again must consider the prosecution’s recommendation for a sentence within the lower 50 percent of the 30-to-37-month Guidelines range.

Members of the very institution that is charged with seeing that justice is done obviously believed that the public would be adequately protected through a Guidelines sentence. This further supports a ruling that the subject sentence is unreasonably long.

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

Mr. Bishop is a skilled brick mason and has a job to return to after his prison sentence. He has no other need for medical care or correctional treatment. Accordingly, this factor indicates that a within-Guidelines sentence should have been ordered.

f. The kinds of sentences available under § 3553(a)(3).

This factor does not come into play in the subject analysis.

g. The Guidelines sentencing range under § 3553(a)(4)(A).

As this Court is aware, the Sentencing Commission goes to great lengths to study and provide guidance regarding what constitutes fair sentences for all federal crimes. As the prosecution agreed, a sentence within Sentencing Commission's recommended range would meet the § 3553(a) considerations in this case.

h. Conclusion: § 3553(a) analysis.

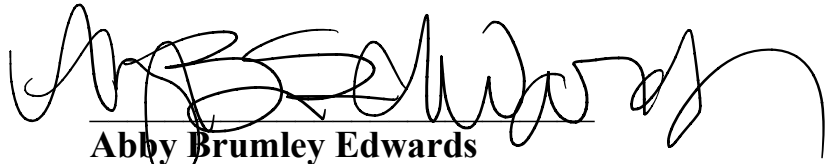
The § 3553(a) factors support a finding that Mr. Bishop should have been sentenced within the 30 to 37-month Guidelines range. Mr. Bishop therefore asks

this Court to grant certiorari, and ultimately vacate his sentence as substantively unreasonable.

VI. CONCLUSION

For all the reasons stated above, this Court should grant Mr. Bishop's Petition for Writ of Certiorari, then vacate the statutory maximum 120-month sentence ordered by the district court.

Submitted June 29, 2022, by:

A handwritten signature in black ink, appearing to read 'Abby Brumley Edwards', written over a horizontal line.

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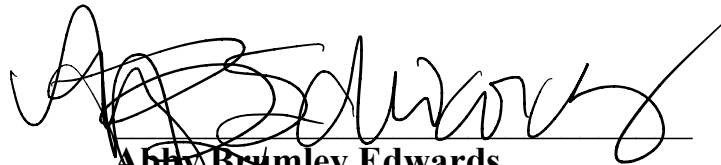
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Fifth Circuit Case No. 21-60639

CERTIFICATE OF SERVICE

I, Abby B. Edwards, appointed under the Criminal Justice Act, certify that today, June 29, 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. 777258497792, addressed to:

The Honorable Elizabeth B. 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.



Abby Bramley Edwards
Assistant Federal Public Defender