

No. _____

In the
Supreme Court of the United States

JOHNELL LEWIS BRITTON, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether district courts are required to articulate fact-specific reasons for imposing non-guidelines sentences?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Johnell Lewis Britton, Sr. was the defendant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff in the district court, the appellee in the court below, and is the Respondent here.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Britton*, No. 6:20-CR-00051, U.S. District Court for the Western District of Texas. Judgment imposed November 17, 2021.
2. *United States v. Britton*, No. 21-51146, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 25, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Johnell Lewis Britton, Sr. respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Fifth Circuit appears at Appendix 1a-2a to the petition and is reported at 2022 U.S. App. LEXIS 29712 and 2022 WL 14368929.

JURISDICTION

The Fifth Circuit rendered judgment on October 25, 2022. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 18, United States Code § 3553(c) provides, in relevant part:

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 . . . (2) is not of the kind, or is outside the [guidelines range], the specific reason for the imposition of a sentence different from that described.

STATEMENT

Johnell Lewis Britton, Sr. was charged as a felon in possession of a firearm. App., *infra*, at 1a. Britton pled guilty to the charge. 5th Cir. R. 326.

The presentence investigation report (“PSR”) calculated the Total Offense Level to be 20, by starting with the base offense level of 20 under USSG § 2K2.1, and making no adjustments. 5th Cir. R. 411 (PSR ¶¶ 15-24). Initially, the PSR had included an adjustment of three levels for acceptance of responsibility, but after the Government objected, the PSR was amended to remove the reduction for acceptance of responsibility. 5th Cir. R. 405 (PSR Addendum).

Britton’s criminal history score of eight placed him in criminal history category IV. 5th Cir. R. 413 (PSR ¶ 32). With a Total Offense Level of 20 and a criminal history category of IV, the advisory guidelines sentencing range stated in the PSR was 51 months to 63 months. 5th Cir. R. 417 (PSR ¶ 55).

Probation did not identify any factors that would warrant a departure or a variance from the applicable sentencing guideline range. 5th Cir. R. 419-20 (PSR ¶ 70-71).

At Britton's sentencing hearing, his trial counsel argued Britton should be given credit for acceptance of responsibility and if given credit, the proper offense level was 18, and thus the guideline sentencing range should be 41 to 51 months. 5th Cir. R. 391-94. The Government responded that Britton should not receive credit for acceptance of responsibility, and therefore, the guideline range should be 51 to 63 months. 5th Cir. R. 392-94.

The district court inquired as to the Government's position with regard to a sentence within or outside the guideline range, but the Government did not respond to this inquiry. 5th Cir. R. 392-93. Instead, the Government explained why the probation officer recommended Britton not receive credit for acceptance of responsibility. 5th Cir. R. 393. The court nonetheless granted Britton's request that he be given credit for acceptance of responsibility, making the guideline range 41 to 51 months. 5th Cir. R. 394.

The court then announced that, relying on 18 U.S.C. § 3553, it would impose an upward departure and/or variance with respect to the sentence, sentencing Britton to 63 months imprisonment.¹ 5th Cir. R. 394-95. As the only explanation provided, the court provided a checklist-recitation of language from § 3553(a)(2)(A-C) verbatim: “Note, to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence from future criminal conduct and to protect the public from further crimes of this defendant.” 5th Cir. R. 395. The court gave no explanation whatsoever as to why these factors applied to Britton or the facts of his case. *See* 5th Cir. R. 394-95.

On appeal, Britton argued his sentence was procedurally erroneous because the district court did not provide fact-specific reasons for imposing an above-guidelines sentence. App., *infra*, at 1a-2a. Because Britton did not object on this basis before the district court, the Fifth Circuit reviewed the issue for plain error. App., *infra*, at 2a. The Fifth Circuit did not explicitly address whether the district court provided fact-

¹ The district court also imposed a \$100 special assessment, 3 years supervised release, and a fine of \$1,000. 5th Cir. R. 395.

specific reasons for the above-guidelines sentence. *See App., infra*, at 2a. Instead, the Fifth Circuit concluded that Britton failed to meet his burden to show procedural error because the district court “considered the parties’ arguments and relevant information before determining that specific sentencing factors warranted an above-guidelines sentence.” *App., infra*, at 2a.

REASONS TO GRANT THE PETITION

The Fifth Circuit’s decision that Britton did not show clear or obvious procedural error with respect to the sentencing court’s failure to provide fact-specific reasons for an above-guidelines sentence conflicts with this Court’s precedent as well as the precedent of several other Courts of Appeals.

The Fifth Circuit erred by holding Britton failed to show procedural error after the trial court failed to provide fact-specific reasons for an above-guidelines sentence.

This Court’s precedent provides that when a district court decides an outside-guidelines sentence is warranted, the district court must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variance. *Gall v. United States*, 552 U.S. 38, 50 (2007). A major departure should be supported by a more significant justification than a minor one. *Id.* The district

court “must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Id.* Failure to adequately explain the chosen sentence constitutes significant procedural error. *Id.* at 51 (the appellate court “must first ensure that the district court committed no significant procedural error, such as . . . failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.”).

Similarly, section 3553(c) states that the district court, “at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is outside the [guidelines range], the specific reason for the imposition of a sentence different from that described.” 18 U.S.C. § 3553(c).

Several circuit courts of appeals have vacated district court sentences and remanded for resentencing where the district court did not adequately explain a deviation from the guidelines sentencing range. *See United States v. Carrasquillo-Sanchez*, 9 F.4th 56, 62 (1st Cir. 2021) (imposition of upward variance without adequate explanation vacated and remanded on plain error review); *United States v. Montero-Montero*,

817 F.3d 35, 37 (1st Cir. 2016) (same); *United States v. Ortiz-Rodriguez*, 789 F.3d 15, 20 (1st Cir. 2015) (“the District Court’s reference to the section 3553 factors and contextualizing comments about gun crime in Puerto Rico do not explain why an upward variance of this magnitude was warranted”); *United States v. Brown*, 973 F.3d 667, 710-11 (7th Cir. 2020) (imposition of upward variance without adequate explanation vacated and remanded on plain error review); *United States v. Blackie*, 548 F.3d 395, 402-03 (6th Cir. 2008) (same); *United States v. Cousins*, 469 F.3d 572, 578 (6th Cir. 2006) (“the district judge failed to provide his reasoning for the variance or to explain how the two months [upward variance was] related to his stated goal of protecting the public”). *See also United States v. Santiago*, 853 Fed. Appx. 424, 426-29 (11th Cir. 2021) (finding plain error where district court did not explain reasons for variance); *United States v. Chan*, 677 Fed. Appx. 730, 733-34 (2nd Cir. 2017) (upward variance without explanation vacated and remanded on plain error review).

The First Circuit Court of Appeals has held that generic references to § 3553(a) factors do not support the imposition of an upward departure or variance. *United States v. Rivera-Berrios*, 968 F.3d 130, 137 (1st Cir.

2021) (vacating and remanding after holding that the district court’s reference to § 3553(a) factors was too “generic” and “unmoored from any individual characteristics of either the offender or the offense of conviction”). This is because the court’s reasons for deviation should typically be rooted either in the nature and circumstances of the offense or the characteristics of the offender. *Id.* (quotations omitted); *see also Ortiz-Rodriguez*, 789 F.3d at 19 (“the section 3553(a) factors must be assessed in case-specific terms”). The First Circuit requires that district courts provide a “sufficiently particularized [and] compelling explanation” when they are subject to a significant upward variance. *Carrasquillo-Sanchez*, 9 F.4th at 62 (citations omitted).

Some circuit courts of appeals have held that a defendant’s substantial rights have been affected when a district court failed to explain its reasons for a variance. *Carrasquillo-Sanchez*, 9 F.4th at 62 (imposition of upward variance without adequate explanation affected defendant’s substantial rights); *Montero-Montero*, 817 F.3d at 37 (1st Cir. 2016) (same); *Brown*, 973 F.3d at 710-11 (upward variance without explanation harmful because defendant may consequently be unable to benefit from future legal developments). Other circuit courts of appeals

have held that the issuance of outside-guidelines sentences without explanation impacted defendants' substantial rights because it implicated defendants' rights to meaningful appellate review. *Blackie*, 548 F.3d 395, 402-03 (6th Cir. 2008). *See also Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907-9 (2018) ("The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Rule 52(b).").

In this case, the district court did not adequately explain its upward departure or variance. Instead, it generically referred to some § 3553(a) factors without any explanation of why those factors applied to Britton, why those factors applied to Britton's offense, or how the departure/variance would address the listed § 3553(a) factors. The district court did not provide reasons rooted either in the nature and circumstances of the offense or the characteristics of the offender.

It is unclear whether Britton was sentenced based on an invalid premise or whether the court's justification supports the degree of variance, because it is not clear upon what facts the district court based its upward variance. The Government identified no aggravating circumstances. Although the district court conclusorily noted the

variance was based on reasons listed in § 3553(a)(2)(A-C), the court did not note any facts supporting those reasons or explain how its variance would address these reasons. It is impossible to meaningfully review the variance because it is not clear what facts it is based upon. Indeed, the Fifth Circuit did not articulate the district court's reasons for the above-guidelines sentence in its opinion. *See App., infra*, at 2a.

The district court's imposition of an upward variance without explanation affected Britton's substantial rights. There is a reasonable probability Britton's sentence would have been different but for the district court's error. Assuming the district court had fact- and case-specific reasons for the substantial variance, if Britton had notice of the district court's reasons for the variance, he would have had the opportunity to object and argue against those reasons. Without such notice, his opportunity was lost. Britton was prejudiced because the district court's failure to explain its reasons for the variance prevented Britton from refuting or objecting to the court's underlying findings supporting the variance. If the district court had taken the time to articulate the reasons for its sentence, the district court may have

ultimately sentenced Britton within guidelines or imposed a lesser upward variance.

Alternatively, the district court may have articulated an improper ground for its sentence requiring reversal, which would also have impacted the outcome in district court.

Finally, in most cases (as here) where all other prongs of the plain error standard of review are satisfied, a court of appeals must exercise its discretion to remand. *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1909 (2018). This is because usually an obvious error that affects substantial rights will also satisfy the fourth prong of plain-error review. *Rosales-Mireles*, 138 S.Ct. at 1911 (“In the ordinary case, as here, the failure to correct a plain Guidelines error that affects a defendant’s substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings.”). Moreover, this Court has specifically stated that a court’s justification for a particular sentence must be sufficient “to allow for meaningful appellate review *and to promote the perception of fair sentencing.*” *Gall*, 552 U.S. at 50.

The district court inadequately explained why it did what it did, and this error affected Britton’s substantial rights. Similarly, because

the absence of a meaningfully explanatory statement undermines understanding of, trust in, and respect for the court and its proceedings, the error seriously affects the fairness, integrity and public reputation of judicial proceedings. Consequently, Britton met his burden to show procedural error and this case should be remanded to the district court for resentencing. The Fifth Circuit's conclusion to the contrary should be reversed.

CONCLUSION

Petitioner respectfully asks that this Court grant this petition and set the case for a decision on the merits.

Respectfully submitted,

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