

No. _____

In the Supreme Court of the United States

JERRY DON SOUTH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CHAD VAN CLEAVE
Attorney at Law
P.O. Box 1703
Georgetown, Texas 78627
Tel.: (512) 497-0604
Fax: (512) 852-4755
Attorney for Defendant-Appellant

QUESTIONS PRESENTED FOR REVIEW

- 1) Must District Courts actually comply with the requirements of 18 U.S.C. § 3553 (c) to state, in open court, the reasons for the sentence imposed?
- 2) Whether a circuit split should be resolved regarding the application of 3553(c) to reasonableness challenges of defendants' sentences.

Parties to the Proceeding and Compliance with Rule 14(b)

The parties concerned are included in the caption of this matter, and there are no corporate parties.

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Opinions Below

The Fifth Circuit Court of Appeals unpublished decision is attached as [App. A]. The Judgment of the District Court is attached as [App. B].

Jurisdiction

The Fifth Circuit Court of Appeals' jurisdiction was invoked from the denial by the United States District Court for the Western District of Texas, under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The Court of Appeals' decision was entered on November 9, 2022 [App. A]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

This case concerns the district court's failure to meet its statutory obligation to "state in open court the reasons for" imposing the specific sentence. 18 U.S.C. § 3553 (c). This, of course, has Constitutional Due Process implications, because lack of compliance with this statute deprives a criminal defendant of his rights to proper notice and hearing.

Statement of the Case

Mr. South was charged in a one-count Indictment filed on August 25, 2021, with possessing with intent to deliver 5 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). (ROA. 22- 50041.22).

On October 13, 2021, Mr. South pleaded guilty to the possession with intent to deliver charge, with no plea agreement. (ROA.22-50041.59-74). Sentencing was held on January 12, 2022. (ROA.22- 50041.75-88). Mr. South was sentenced to 262 months confinement in the BOP, to run consecutive to sentences imposed in a list of pending state charges. (ROA.22- 50041.85-86).

Written Judgment was entered on January 19, 2022. (ROAD 22-50041.44-49). Mr. South timely filed a Notice of Appeal on January 14, 2022. (ROAD 22-50041.39-40).

The Fifth Circuit Court of Appeals decided the case on November 9, 2022. In that decision, the Court held that Mr. South was not entitled to the relief he sought, and asserted that Mr. South did “not put forward any reason to think that his sentence would have been different if the district court had explained its decision to impose a concurrent sentence. Thus, he has not demonstrated that the district court’s failure to do so burdened his substantial rights.” See *U.S. v. Jerry Don South*, No. 22-50041, 2022. [App. A].

What follows is this timely petition for a Writ of Certiorari.

Reasons for Granting the Writ

A sentence cannot be determined to be reasonable if a sentencing court does not comply with 18 U.S.C. § 3553 (c) fully; however, conflicting decisions within the 5th Circuit are creating unnecessary confusion on this issue that only the US Supreme Court can rectify properly.

Mr. South was sentenced to 262 months confinement in the BOP, to run consecutive to any sentences imposed in a list of pending state charges. (ROA.22-50041.85-86). Many sentencing judges in the 5th Circuit, including the judge in Mr. South's case, have a consistent history of not complying with 18 U.S.C. § 3553 (c). 18 U.S.C. § 3553(c) specifically requires that “[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence...” We feel that it is in the interest of justice for the Court to grant certiorari so that sentencing judges are reminded of their duty to comply with 18 U.S.C. § 3553 (c). As a reminder, 18 U.S.C. § 3553 (c) requires a sentencing judge to give the reasons for his sentence. Such sentences that do not comply with this statute are unreasonable.

The purpose of these requirements is, among others, to give the Defendant an opportunity to object to the specific reasons and then to enable

the Courts of Appeals to engage in meaningful review of the particular reasons given. See *United States v. Mondragon-Santiago*, 564 F.3d 357, 360 (5th Cir. 2009) (“The district court must adequately explain the sentence ‘to allow for meaningful appellate review and to promote the perception of fair sentencing.’” (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007))).

The U.S. Supreme Court in *Holguin-Hernandez* easily affirmed a defendant’s right to preserve issues such 18 U.S.C. § 3553(c) for appeal. That said, we previously stated, that *Pre-Holguin-Hernandez*, this Court considered the mere lack of compliance with 18 U.S.C. § 3553(c) an exercise for which remand would have been an empty formality. But since *Holguin-Hernandez* and its companion cases, this is no longer the case. The statement of reasons required by § 3553(c) now represents an indispensable necessity to appellate review of the reasonableness of the sentence. The preservation of the error on the reasonableness of the sentence, post-*Holguin-Hernandez* necessarily includes preservation of the issue on the lack of compliance with § 3553(c). The appellate review of the reasonableness of the defendant’s sentence necessarily depends upon proper application of the law. To find otherwise, would be to slight the intent of *Holguin-Hernandez*. See *United States v. Holguin-Hernandez*, 140 S. Ct. 762 (2020).

This Court should make it clear that District Courts must actually comply with the statutes that govern the imposition of criminal sentences, without a specific request by a criminal defendant that they do so. Doing so would fully comply with past Supreme Court decisions and would allow judicial resources to be more efficiently applied ironically likely necessitating less appeals.

Even pre-*Holguin-Hernandez* courts affirmed the importance of stating reasons for their sentences. See *Holguin-Hernandez*. In *Zuniga-Peralta* the court stated, “I would hope that sentencing judges would make a habit of giving written and specific factual reasons for any sentence above or below a properly calculated Guideline range.” See *U.S. v. Zuniga-Peralta*, 442 F.3d 345 (5th Cir. 2006).

That said, there are cases within the 5th Circuit which further affirms that 18 U.S.C. § 3553 (c) applies to circumstances like South’s. For example, in *Davalos* the court said, “[b]ecause the district court orally stated its reasons for imposing the particular sentence it did, the dictates of 18 U.S.C. § 3553(c) were satisfied.” See *United States v. Davalos*, No. 18-50784 (5th Cir. Apr. 20, 2020).

In addition, *Martinez* affirms § 3553 (c) importance and its application. *Martinez* states, “[s]ection 3553(c) requires the district court to state the reasons for a particular sentence in open court at sentencing and the "specific reason" for a nonguidelines sentence if one is imposed. § 3553(c); See *United*

States v. Key, 599 F.3d 469, 474 (5th Cir. 2010). The explanation for the sentence must be sufficient "to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50." See *United States v. Martinez*, No. 21-20414 (5th Cir. Aug. 8, 2022).

However, like South's case, there are other cases in the 5th Circuit that refuse to apply § 3553(c) properly. For example, *Monk* dealt with an unpreserved error like South's. In *Monk* the court stated, "Monk has failed to establish that the error affected his substantial rights." See *United States v. Monk*, No. 21-51130 (5th Cir. July 21, 2022).

These differing opinions, regarding the application of 3553(c) within the 5th Circuit, alone create an uncertainty that only SCOTUS can rectify. However, cases in other circuits have ruled contrary to finding in cases like *Monk* or have applied different standards of review. Therefore, only Supreme Court review can ensure the interests of justice and judicial economy are properly satisfied. See *Monk*.

The failure of district courts to comply with the 3553(c) requirements is, of course, *per se*, a violation of a defendant's rights to notice and hearing under the Due Process Clause of the U.S. Constitution, and therefore, *per se*, a deprivation of his substantial rights.

Authority outside of the 5th Circuit is inconsistent on the reasonableness of sentence that does not comply with 3553(c). This difference of authority creates a circuit split that the Supreme Court must address, in order to affirm that 18 U.S.C. § 3553 (c) is consistently applied, in a uniform manner in all circuits.

The differing standards applied to 3553 (c) create an uncertainty that only the Supreme Court can address. For example, a month before *Holguin-Hernandez* was decided, the 6th Circuit in *Hatcher* mandated plain-error review where the defendant had objected "to the court's upward variance," but never objected to "any specific procedural deficiencies at the sentencing hearing." See *United States v. Hatcher*, 947 F.3d 383 (6th Cir. 2020), See *Holguin-Hernandez*.

As the Court knows, a plain error that affects a defendant's substantial rights may be considered for review, even though it was not previously brought to the court's attention. Mr. South's substantial rights were affected when the court did not comply with 18 U.S.C. § 3553(c).

However, after *Holguin-Hernandez* the 11th Circuit applied the de novo standard. "Aguilar-Gil's central argument on appeal is that his sentence is

procedurally unreasonable because it did not comply with § 3553(c)(1). We review de novo whether the district court complied with § 3553(c)(1) regardless of whether the defendant objected below. See *United States v. Cabezas-Montano*, 949 F.3d 567, 608 n.39 (11th Cir. 2020). See also *United States v. Aguilar-Gil*, No. 19-14117 (11th Cir. July 2, 2020). See also *Holguin-Hernandez*.

In addition, the 11th Circuit has also held that “[a] sentence is procedurally unreasonable if the district court fails to adequately explain the sentence, including any variance from the guidelines range. See *United States v. Shaw*, 560 F.3d 1230, 1237 (11th Cir. 2009). The court is required "at the time of sentencing . . . to state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). If the sentence is within the guidelines range and exceeds 24 months, the court must state "the reason for imposing a sentence at a particular point within the range." Id. § 3553(c)(1). And if the sentence is outside the guidelines range, the court must not only state "the specific reason[s]" for the variance in open court but must also state those reasons "with specificity in a statement of reasons form." Id. § 3553(c)(2)." See *United States v. Oudomsine*, No. 22-10924 (11th Cir. Jan. 18, 2023).

Next, the 2nd Circuit recognizes that “[u]nder 18 U.S.C. § 3553(c), “the sentencing judge in every case is required to 'state in open court the reasons for its imposition of the particular sentence,' and must do so 'at the time of sentencing.” *United States v. Pruitt*, 813 F.3d 90, 92 (2d Cir. 2016) (quoting 18 U.S.C. § 3553(c)). The district court satisfied that requirement by explaining in open court that the seriousness of Alryashi's offense motivated the sentence imposed.” See *United States v. Alryashi*, No. 20-840-cr (2d Cir. Mar. 26, 2021).

Lastly, the 9th Circuit also recognizes the importance of this, when it states, “a district court must explain a sentence sufficiently to permit meaningful appellate review.” See *United States v. Murillo-Ramos*, No. 21-10068 (9th Cir. Mar. 25, 2022).

CONCLUSION

This case presents an opportunity for this Court to settle a circuit split regarding whether district courts must actually comply with the requirements of 18 U.S.C. § 3553 (c). In addition, it provides the court an opportunity to ensure that justice is properly applied to post conviction appellate actions; as well, as to ensure that judicial economy is promoted within all districts by applying consistent application of 18 U.S.C. § 3553 (c).

FOR THESE REASONS, Petitioner Jerry Don South, requests of this Court that his Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

By: /s/ Chad Van Cleave
Chad Van Cleave
Counsel of Record for Mr. South
P.O. 1703
Georgetown, Texas 78627
(512) 497-0604