

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2022

MICHAEL K. HOWARD

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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QUESTION PRESENTED

I. Whether the Fourth Circuit erred by ruling that Mr. Howard waived his right to appeal whether the District Court erred by not applying Acceptance of Responsibility under United States Sentencing Guidelines Sec. 3E1.1, and whether the District Court abused its discretion by failing to give Mr. Howard less than 112 months of incarceration at sentencing.

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RULE 14.1(b) STATEMENT

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

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OPINION 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 April 4, 2023. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

A. THE RECORD BEFORE THE DISTRICT COURT.

On November 4, 2021, Mr. Howard entered a guilty plea to Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. Sec. 841(a)(1) and (b)(1)(c). Mr. Howard entered his guilty plea before Magistrate Judge Robert J. Krask, after signing a written Consent form to have the plea heard before a magistrate judge.

Prior to the plea hearing, Mr. Howard had signed a written Plea Agreement. In the Statement of Facts, which Mr. Howard also signed, he admitted to selling cocaine in three controlled purchases in May and June 2019.

The Government filed a Sentencing Memorandum. The Government objected to the Presentence Report recommendation that Mr. Howard not receive a three point Offense Level reduction for Acceptance of Responsibility under United States Sentence Guideline ("USSG") Sec. 3E1.1.¹ The United States recommended a sentence "at the low end of the advisory sentencing guidelines, or lower depending on additional factors determined by the Court."

Mr. Howard has an extensive criminal record, and according to

¹ The Presentence Report recommended that Mr. Howard not receive acceptance of responsibility because of a post-plea positive drug test for marijuana.

the Government, qualified as a Career Offender under the Guidelines.² The Government determined that, with the three point reduction for acceptance of responsibility, the advisory USSG range was 188-235 months.

Mr. Howard, through counsel, filed a Sentencing Memorandum. The defense agreed with the Government that there should be a three point reduction for Acceptance of Responsibility, and that the advisory USSG range should be 151-188 months, as opposed to the PSR's recommendation of 210-240 months.

The defense presented several letters of support for Mr. Howard.

Mr. Howard was sentenced on June 13, 2022, before the Honorable Raymond A. Jackson. The Court, citing *United States v. Kidd*, 12 F.3d 30, 34 (4th Cir. 1993) (court has discretion to award acceptance of responsibility under USSG Sec. 3E1.1), declined to give Mr. Howard the three Offense level reduction for acceptance of responsibility. The Court, while acknowledging the record (i.e., character letters), determined that two post-plea positive drug tests for marijuana indicated that Mr. Howard had violated his bond conditions, associated with "some other felon" to get the marijuana, and therefore acceptance of responsibility was not warranted.

² See Presentence Report, Para. 65.

The Court found that Mr. Howard was had a Criminal History of VI, an Offense Level of 32, and an Advisory USSG range of 210-240 months.

The Court did grant the Government's Motion under USSG Sec. 5K1.1. That lowered the Offense Level to 27, for a USSG range of 130 to 162 months.

Mr. Howard's mother, Delia Harrell, testified on behalf of Mr. Howard. She described potential employment opportunity for Mr. Howard.

The Government then allocuted, asking for a sentence "below the Guidelines range." The Government cited the seriousness of the offense, and Mr. Howard's extensive prior criminal record. Other co-defendants got 16 years, and 10 years, and their conduct involved violence. Mr. Howard's conduct did not involve violence. The Government concluded that "something less than 10 years would probably be suitable to avoid an unwarranted sentencing disparity based on the violent nature of his co-conspirators' crimes versus his."

The defense noted that Mr. Howard had struggled all of his life with drug use, including marijuana. But now he was working - two jobs. He seemed to be getting his life on track. The defense requested a sentence in the 8 year range.

The Court reviewed the charges, the offense conduct, and his

history with drug abuse. The Court noted, with amazement, Mr. Howard's prior record of 37 convictions. The Court gave Mr. Howard a variance sentence of 112 months, and supervised release for three years.

Mr. Howard filed a timely Notice of Appeal on June 23, 2022.

On appeal, Mr. Howard filed an Opening Brief challenging the District Court's failure to apply a three Offense Level reduction to his United States Sentencing Guideline calculation, and the District Court's failure to sentence him below 112 months of incarceration.

The Government filed a Motion to Dismiss the appeal, arguing that Mr. Howard's written Plea Agreement contained a waiver provision of the right to appeal. Mr. Howard filed an Opposition to the Government's Motion to Dismiss, citing the "extraordinary circumstances" of the issues he raised on appeal.

On April 4, 2023, the Fourth Circuit issued an Order granting the Government's Motion to Dismiss Mr. Howard's appeal, stating that "Howard knowingly and voluntarily waived his right to appeal and that the issues Howard seeks to raise on appeal fall squarely within the scope of his waiver of appellate rights."

SUMMARY OF ARGUMENT

The District Court was clearly erroneous by not granting Mr. Howard acceptance of responsibility and a three (3) offense level

point reduction in the USSG calculation. The District Court abused its discretion by not sentencing Mr. Howard to 84 months, or less, based upon the positive steps Mr. Howard had already undertaken in his life.

ARGUMENT

I. EXTRAORDINARY CIRCUMSTANCES ALLOW FOR THE APPEAL.

The Government's entire argument rests on Mr. Howard's waiver of appeal in his Plea Agreement. However, as the Government conceded, "extraordinary circumstances" can allow an appeal to proceed even where a waiver of a plea is included in a Plea Agreement. See *United States v. Lemaster*, 403 F.3d 216, 221-22 (4th Cir. 2005), (Government Motion, p. 7).

Such circumstances exist in the record of this case and appeal. At the heart of Mr. Howard's appeal is his argument that the trial court erred by denying him a three (3) Offense Level reduction for Acceptance of Responsibility ("AOR"). (Appellant's Brief, p. 6-7.)

The "extraordinary circumstances" are that *the Government supported and advocated for the AOR reduction as did Mr. Howard!* (Appellant's Brief, p. 6.) The District Court denied the AOR reduction based on a finding that Mr. Howard had associated with "some other felon" to obtain marijuana, even though there was absolutely no evidence in the record that Mr. Howard had done so. (Appellant's Brief, p. 6-7.)

Now, the Government argues that the Plea Agreement precludes Mr. Howard raising this issue on direct appeal. The Government's argument collides with itself. On one hand, the Government argued to the trial court that the AOR had been earned by Mr. Howard, and should be applied. On the other hand, the Government argues that this important issue cannot be raised in this appeal. The Government cannot have it both ways.

Further, the terms of the Plea Agreement did in fact inform Mr. Howard of his right to challenge his sentence. Under "Sentencing Guidelines, Recommendations, and Roles", the Plea Agreement states "...the Court, after considering the factors set forth in 18 U.S.C. Sec. 3553(a), may impose a sentence above or below the advisory sentencing range, *subject only to review by higher courts for reasonableness.*" (Emphasis added.)

Under the Rule of Lenity, any ambiguity as to the above language must be construed in favor of Mr. Howard. See generally *United States v. Batchelder*, 442 U.S. 114, 121 (1979). Moreover, the Government's likely statements to Mr. Howard and his counsel prior to the entry of the plea, that the Government supported the AOR, implicate the Government's contractual obligations under *Santobello v. New York*, 404 U.S. 257, 262 (1971).

**II. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT
APPLYING ACCEPTANCE OF RESPONSIBILITY TO MR. HOWARD.**

A. The Standard Of Review.

This Court 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 this 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.*

A district court's decision not to reduce the offense level for acceptance of responsibility will not be disturbed unless clearly erroneous. *See United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993), *United States v. Curtis*, 934 F.2d 553, 557 (4th Cir. 1991).

**B. The Court's Analysis Of Acceptance Of Responsibility
Was Clearly Erroneous.**

It is not disputed in the record that Mr. Howard: (1) entered a plea in this case; was granted relief under USSG Sec. 5K1.1; and accepted responsibility for his conduct.

However, the District Court denied Mr. Howard the three level reduction for Acceptance of Responsibility despite the fact that both the Government and the Defense agreed that it should have been awarded.

The Court asserted that it denied Acceptance of Responsibility

because it determined that two post-plea positive drug tests for marijuana indicated that Mr. Howard had violated his bond conditions, associated with "some other felon" to get the marijuana, and therefore acceptance of responsibility was not warranted.

The District Court misconstrued the record. First, there is no evidence in the record that Mr. Howard obtained marijuana from "some other felon", or from any other criminal source or activity. In fact, marijuana possession and use is available and legal under certain circumstances in Virginia, although admittedly likely a violation of Mr. Howard's conditions of release. Second, Mr. Howard had acknowledged his lifetime struggle with marijuana. Third, related to that, Mr. Howard voluntarily informed the Pretrial Services he had used marijuana prior to each test.

Where both the Government and the defense agreed that Mr. Howard deserved Acceptance of Responsibility and the three offense level point reduction, Mr. Howard's Offense Level should have been 24, and with criminal history of VI, the USSG range should have been 100-125 months.

C. The Totality Of The Circumstances Establish That The District Court Abused Its Discretion By Not Granting Mr. Howard A Lower Sentence.

Mr. Howard's crimes were very serious. The Defense conceded that point at sentencing. However, under the totality of circumstances, the district court imposed a Variance Sentence for

Mr. Howard. With the three point reduction for Acceptance of Responsibility, it is clear that Mr. Howard's sentence should have been lower, as recommended by the defense.

a. The Applicable Legal Standard For Sentencing.

It is essential to consider 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. The History And Characteristics Of Mr. Howard.

From the time of his plea and through sentencing, Mr. Howard took many positive steps to turn his life around:

- * Mr. Howard entered a timely plea in the case, saving the Government from expending resources to prepare for trial;

- * Mr. Howard received a motion under USSG Sec. 5K1.1;

- * He was employed;

- * He has a strong support structure of family and friends;

- * In the face of his marijuana use, Mr. Howard requested drug counseling services from Pretrial Services and was referred for substance abuse evaluation with The Counseling Center in Hampton, Virginia.

At sentencing, before the District Court, Mr. Howard knew he would be punished and incarcerated. However, a proper USSG range of 100-125 months, combined with a variance sentence the district court properly imposed, should have resulted in a sentence of 84 months, or less. Indeed, the United States recommended a sentence "at the low end of the advisory sentencing guidelines, or lower depending on additional factors determined by the Court."

III. CONCLUSION

WHEREFORE, Mr. Howard respectfully requests that this Court grant certiorari, reverse the decision of the Fourth Circuit, and direct that the appeal to the Fourth Circuit be allowed to proceed.

Respectfully submitted,

/s/ 

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APPENDIX I

FILED: April 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4361
(2:21-cr-00124-RAJ-RJK-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL KENNETH HOWARD,

Defendant - Appellant.

O R D E R

Michael Kenneth Howard seeks to appeal the sentence imposed following his guilty plea to possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a). The Government has moved to dismiss the appeal as barred by Howard's waiver of the right to appeal included in the plea agreement. Upon review of the record, we conclude that Howard knowingly and voluntarily waived his right to appeal and that the issues Howard seeks to raise on appeal fall squarely within the scope of his waiver of appellate rights. Accordingly, we grant the Government's motion to dismiss.

Entered at the direction of the panel: Judge Niemeyer, Judge Heytens, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: April 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4361
(2:21-cr-00124-RAJ-RJK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL KENNETH HOWARD

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

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