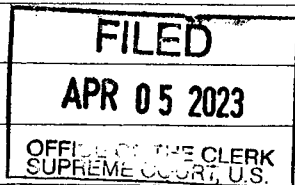


ORIGINAL

No.
22-7659



IN THE

SUPREME COURT OF THE UNITED STATES

DARRIEN D. JOHNSON - PETITIONER, Pro Se

VS.

UNITED STATES OF AMERICA - RESPONDENT(S)

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

DARRIEN D. JOHNSON 67264-509

Federal Correctional Inst. - Williamsburg

P.O. Box 340

Salter's, South Carolina 29590

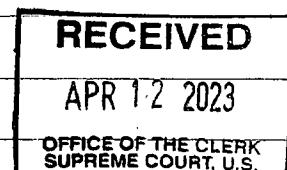


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APPENDIX A - On January 6, 2023, Johnson's appeal to the 5th Circuit was denied. (No. 22-30386).

QUESTION(S) PRESENTED

- 1) Whether the District Court abused its Discretion when it Deviated upward from the correctly calculated guideline range of 57-71 months and imposed a 120-month sentence?¹⁰
- 2) Was Johnson's Trial Counsel Ineffective during plea and Final Sentencing?¹¹

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties do not appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the Court whose judgement is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review
judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to
the petition and is

☐ reported at _____; or,

☒ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the
petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

☒ A timely petition for Court of Appeals by the 5th Circuit Court of Appeals on the following date: January 4, 2023.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION

6th Amend. U.S. Const. 10

STATEMENT OF THE CASE

COMES NOW, Darrien D. Johnson, herein after ("Johnson") before this Honorable Supreme Court of the United States, the highest Court establishing the law governing all Circuits. Johnson, who was convicted out of the Western District of Louisiana, Shreveport Division, in violation of 18 U.S.C. § 922(g)(1), challenged his imposed 120-month sentence where the district court sentenced him 49 months greater than the high-end of the 51 to 71 months guideline sentencing range. Consequently, Johnson was sentenced to the statutory-maximum penalty as if he was convicted by jury trial. In addition, the district court enhanced Johnson for drugs he was never charged with as indicated in this case. (No terminated counts ensued in herein case-matter).

On May 12, 2021, troopers with the Louisiana State Police stopped a vehicle in which Johnson was a passenger. ROA. 77. After the vehicle stopped, according to police report, a foot pursuit ensued where Johnson was said to have carried a Saiga rifle and a backpack containing a Berretta pistol. ROA. 77. During the foot chase, Johnson allegedly tossed the rifle and backpack with a pistol inside onto the ground. ROA. 77. Troopers arrested Johnson.

On September 23, 2021, a federal grand jury issued a single count indictment charging Johnson with possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1). ROA. 7, R.E. Tab 2. On February 7, 2022, Johnson pled guilty to the single count indictment. ROA. 21. Following the entry of guilty plea, the district court ordered the preparation of a presentence investigation report (PSR). ROA. 21.

When the PSR was released to the parties, it proposed a base offense level of 14 pursuant to U.S.S.G. § 2K2.1(a)(6)(A) because Johnson had a prior felony conviction at the time of the commission of the offense. ROA. 145.

The PSR recommended a 2-offense level increase because Johnson possessed a stolen firearm. ROA. 145. It also recommended a 4 offense level increase because, according to the PSR, Johnson possessed the firearm in connection with another felony offense, i.e., possession with intent to distribute Schedule I and II controlled dangerous substance. ROA. 145.

The PSR also assigned a two offense level increase because Johnson discarded the loaded firearms in a residential area. ROA. 146. Finally, the PSR recommended a 3 offense level decrease for timely acceptance of responsibility under U.S.S.G. § 3E1.1(a) and (b). ROA. 146. Under this scenario, Johnson's total offense level equaled 19. ROA. 110.

With regard to his criminal history, the PSR revealed that Johnson had accumulated 19 criminal history points, only 16 of which were countable. ROA. 154. The PSR added two more criminal history points for a grand total of 18, placing him in Criminal History category VI. ROA. 154. The intersection of total offense level 18 and criminal history category VI resulted in an advisory Guideline range of 57-71 months. ROA. 161. The PSR identified, what it considered the inadequacy of Johnson's criminal history as a possible basis for a departure from the advisory guideline range under U.S.S.G. § 4A1.3. ROA. 163. Neither the Government nor Johnson's counsel filed objections to the PSR. ROA. 164-65.

At sentencing, the district court adopted the PSR's report and imposed an above guideline 120-month sentence and a three year term of supervised release. ROA. 164-65. On June 8, 2022, Johnson filed an NOTICE OF APPEAL to the United States Court of Appeals for the Fifth Circuit. Unfortunately for Johnson, his direct appeal was denied.

REASONS FOR GRANTING THE PETITION

Issue No. 1

Did the district court abuse its discretion when it deviated upward from the correctly calculated guideline range of 57 to 71 months and imposed a 120-month sentence.

A. The Standard of Review

This Court reviews sentences inside and outside the advisory Guidelines range for reasonableness under the abuse of discretion standard of review. Gall v. United States, 128 S.Ct. 586, 597 (2007). This review occurs in two stages. United States v. Mondragon-Santiago, 564 F.3d 357, 360 (5th Cir. 2009). First, the court must ensure that the district court did not err procedurally in imposing its sentence. Id. If the sentence is procedurally proper, the court engages in a substantive review based on the totality of the circumstances. Id.

"In reviewing a non-Guidelines sentence for substantive unreasonableness, the Court will consider the totality of the circumstances, including the extent of any variance from the guidelines range, to determine whether, as a matter of substance, the sentencing factors in section 3553(a) support the sentence (internal quotation marks and citations omitted)." United States v. Gerezano-Roxales, 692 F.3d 393, 400-01 (5th Cir. 2012). A sentencing court does not abuse its discretion when the reasons for doing so advance the objectives of 18 U.S.C. § 3553(a) and are justified by the facts. United States v. Zuniga-Peralta, 442 F.3d 345, 347 (5th Cir. 2006).

B. Discussion

This case like every case where a term of imprisonment is imposed, must ultimately account for Congress' command under 18 U.S.C. § 3553(a) that a sentence should be "sufficient, but not greater than necessary" to achieve the goals set forth in the statute. In the district court below, Johnson faced a statutory sentencing range of zero to ten years. His advisory guideline range was 51 to 71 months. At sentencing, the district court departed upward and imposed a 120-month term of imprisonment.

1. Procedural Error.

Upward departures based on the inadequacy of a defendant's criminal history category are governed by USSG § 4A1.3. This section provides in pertinent part:

§ 4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) UPWARD DEPARTURES. —

(1) STANDARD FOR UPWARD DEPARTURE. — IF reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure is warranted.

To the extent the district court in this case chose to impose a sentence that was an upward departure under U.S.S.G. § 4A1.3, it was bound to follow the procedural requirements required in the

Sentencing Guidelines. See United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc) (finding that a district court commits error when it fails to comply with the procedural requirements of § 4A1.3). Imposing a departure under U.S.S.G. § 4A1.3 requires the district court to consider each intermediate criminal history category before settling on an appropriate sentence. United States v. Lambert, 984 F.2d 658, 662-63 (5th Cir. 1993) (en banc). It also requires the district court to state the reasons for its departure. *Id.*

Based on the plain text of the guideline, the central focus of a departure point under § 4A1.3 is the defendant's criminal history category. Johnson scored a criminal history category of VI based on his accumulation of 18 criminal history points. To be sure, this is a disconcertingly high number and arguably deserves some level of additional scrutiny under § 4A1.3. But, in this particular case, the district court procedurally erred when it did not give any explanation for the large upward departure it rendered.

While it is clear that the district court was concerned about Mr. Johnson's criminal history, the record does not explain why the sentencing record in the district court moved six offense levels down the sentencing chart. It did not give any intermediate sentencing range was inadequate. Based on the limited record, there is simply not enough evidence in this record to justify the departure imposed in this case. Accordingly, the district court committed procedural error and abused its discretion.

2. Substantive Unreasonableness.

A sentence is substantively unreasonable where it does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors. United States v. Cocks, 589 F.3d 173, 186

(5th Cir. 2009). Furthermore, an above-guideline sentence is not entitled to a presumption of reasonableness. Gall v. United States, 552 U.S. 38, 51, 128 S.Ct. 586, 597 (2007).

This appeal asserts that regardless of whether the district court's above guideline sentence was a Guideline based departure or a Statutorily based variance, its 120-month sentence was substantively unreasonable. Johnson contends that a within-guideline sentence was substantively sufficient, but not greater than necessary, to satisfy Congress' sentencing goals. As shown more fully below, the 120-month term of imprisonment imposed by the district court arose as a result of its erroneous balancing of the §3553(a) factors. The district court did not mention the advisory guideline or explain why it did not provide an appropriate sentence. Nor did it even attempt to not reasonably address the real conduct of defendant, or how its above guideline sentence more appropriately achieved the goals of §3553(a).

Given that the advisory guideline range was correctly calculated, the district court's explanation for its statutory maximum sentence reveals little more than the fact that it was simply dissatisfied with Johnson's criminal history / range. Johnson's felony criminal history was fully accounted for by the Guidelines' criminal history scoring provisions. There is nothing shocking about his record that meaningfully separates him from any other offender in Criminal History Category VI. While no reasonable person would dispute the fact that Johnson's prior record is serious, his countable convictions do not distinguish him from the average or typical offender in Criminal History Category VI.

Furthermore, there is nothing in this record that justifies the imposition of the statutory maximum term of imprisonment. As a result, the district court erred when it weighed the significance of these factors. The district

court's reasons for an above guideline sentence do not advance the objectives set forth in 18 U.S.C. § 3553(a) and are not justified by the facts of the case.

See, United States v. Zuniga-Peralta, 442 F.3d 345, 347-48 (5th Cir. 2006).

Accordingly, the district court abused its discretion when it imposed a substantively unreasonable above guideline sentence.

Issue No. 2

Johnson Was Denied Effective Assistance of Counsel As Guaranteed By The Sixth Amendment Of The U.S. Constitution. Strickland v. Washington, 466 U.S. 688 (1984).

The Counsel failed to properly explain the U.S.S.G.'s and inform Johnson of his sentencing exposure. Johnson pled guilty believing that, through the advice of his counsel that his sentence would not exceed 57-71 months. Contrary, Johnson had received the statutory maximum sentence as if he went to trial, convicted by jury and not given any acceptance of responsibility for his plea entry.

A criminal defendant has a constitutional right to know how much time he's facing to make an informed decision to plead guilty or go to trial. And counsel is ineffective for failing to provide Johnson with such legal knowledge; Strickland v. Washington, 466 U.S. 688 (1984); Baker v. Barbo, 177 F.3d 149 (3rd Cir. 1999); United States v. Ridgeway, (5th Cir. 2003) (Counsel must advise defendant about sentencing exposure prior to trial); Teague v. Scott, 60 F.3d 1167 (5th Cir. 1995); Trasso v. Maggio, 731 F.2d 288 (5th Cir. 1984). Had Johnson known that his term of imprisonment would have resulted in the statutory maximum penalty, he would have prepared for trial and had his guilt proven by jury.

In addition, Counsel failed to properly pursue plea negotiations and advise Johnson relative to such. Johnson pled guilty to 1-Cart gun charge and not risk receiving more time by going to trial and being convicted by jury. Counsel did not effectively and/or diligently pursue plea negotiations with the US Attorney nor convey any actual proposed plea agreements proffered by the U.S. Attorney's office. Moreover, Counsel failed to give Johnson the legal advice and knowledge needed to make an informed decision relative to pleading guilty and receiving the statutory maximum or go to trial and receive the same.

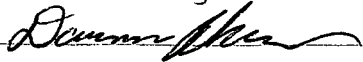
Certainly, Johnson would have went to trial, thus, receiving the same he received by pleading guilty; he would have been informed to (1) the applicable sentencing exposure, (2) the ability of the Government to offer evidence of uncharged crimes to enhance him, (3) the District Court's power to make evidentiary findings based on diminished burden of proof, and (4) the Court's authority to manipulate the USSG's and sentence him. At the very least, Johnson would have been far more amenable to a strategy calling for more vigorous plea negotiations had counsel provided him with adequate and effective legal advice. United States v. Price, 237 F. Supp. 2d 1 (D.D.C. 2002); cf. Williams v. State, 605 A.2d 103 (Md 1992) Crim. Law Key 641.13(s).

Lastly, Counsel failed to object to drug enhancement where Johnson was never charged nor convicted for. Nor, was the drugs ever mentioned during the course of the federal proceedings until final sentencing. Johnson is requesting that either; 1) his case be remanded, vacated and set-aside for resentencing, 2) his case be remanded back to the 5th Cir. for further considerations, or 3) any other relief the Court deems proper and just.

For the foregoing reasons, certiorari should be GRANTED in this case.

Dated April 5, 2023

Respectfully Submitted,



Darrien D. Johnson

Pursuant to 28 U.S.C. §1746, I declare under the penalty of perjury
that the foregoing is true and correct.