

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 2023

CARLOS EDWIN SMITH, JR.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHEN SENTENCING A DEFENDANT PURSUANT TO 18 U.S.C. § 3553(a) DOES A DISTRICT COURT FULLY “CONSIDER THE FACTORS SET FORTH IN 18 U.S.C. § 3553(a)” IF IT QUESTIONS THE RELEVANCY OF ADVERSE CHILDHOOD EXPERIENCES IN ADULT SENTENCING PROCEEDINGS?

LIST OF PARTIES

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Affirming the District Court's Sentence Imposed on Petitioner.

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The Petitioner, Carlos Edwin Smith, Jr., respectfully requests that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Fourth Circuit issued on May 22, 2023, affirming the District Court's sentence.

OPINIONS BELOW

A Panel of the Fourth Circuit Court of Appeals affirmed Petitioner's sentence by Opinion filed May 22, 2023, a copy of which appears as Appendix A.

JURISDICTION

This petition is filed within 90 days of the decision of the Court of Appeals and is therefore timely. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a) provides in pertinent part the following:

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;

STATEMENT OF THE CASE

On May 24, 2021, a Federal Grand Jury for the Middle District of North Carolina returned a single count indictment against Petitioner, charging him with possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). Petitioner entered a plea of guilty to the indictment on April 5, 2022 pursuant to a plea agreement that had been filed on March 30, 2022.

Petitioner's presentence investigation report was filed on June 29, 2022. Petitioner's guideline range, as set forth in the presentence investigation report, was 84 to 105 months. A sentencing hearing took place on July 11, 2022. The court imposed a sentence of 105 months to be followed by a term of supervised release of three years.

STATEMENT OF THE FACTS

On October 13, 2015, in Guilford County Superior Court, the Petitioner was convicted of the felony offenses of common law robbery, first degree burglary, assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon. The offenses dated from both April 27, 2014, and June 7, 2015.

On January 26, 2021, Greensboro Police Officer Elston, was traveling westbound on E. Market Street, when he reported that he could hear shots being fired. As he approached Shaw Street, a dark colored vehicle, coming from his right, ran through the stop sign and almost collided with his patrol vehicle. Elston turned on his blue lights and pursued the vehicle. The vehicle accelerated and reached speeds of 100 miles per hour while traveling on E. Market Street. The vehicle hit a wet patch in the road, which caused it to cross the center line and strike trees, traffic signs and a black metal fence on the opposite side of the road, coming to a stop in the roadway after rolling over several times. Elston approached the vehicle and observed a person he later identified to be the Petitioner, getting up from the ground next to the vehicle. Petitioner fled down a side street but was pursued and ultimately arrested by Elston. Another officer responding to the crash scene discovered a Springfield Armory XD9 9-millimeter semiautomatic handgun located on the roadway near the vehicle. The 9-millimeter handgun was later determined to be manufactured outside the state of North Carolina and therefore had traveled in interstate commerce.

REASONS FOR GRANTING THE WRIT

On June 30, 2022, prior to his sentencing hearing, Petitioner filed a Sentencing Memorandum with the Court. In this pleading Petitioner noted that he had endured numerous adverse childhood experiences. He contended these were significant to the Court's determination of the appropriate sentence.

At the beginning of the sentencing hearing the Court invited defense counsel to address what he contended was the appropriate sentence. Before addressing those factors counsel first inquired if the Court had reviewed his Sentencing Memorandum relating to adverse childhood experiences. The Court indicated that it had. The Court then proceeded to delineate its opinion regarding how it viewed adverse childhood experiences. The Court stated as follows:

I had some pretty lengthy – well, at least one lengthy sentencing hearing with some actual testimony from maybe one or two psychologists about those adverse childhood experiences that you wrote about in the pleading. You're certainly welcome to address whatever you choose to address or want to address in terms of the sentencing.

I'll say one thing, and I'm curious to hear your response to it. I think adverse childhood circumstances, there's two things about them that strike me.

One, I think that they could play a tremendous role in the criminal justice system to the extent they guide particularly juvenile – or individuals in addressing juvenile offenders and recognizing how that scale, 4 out of 10, 6 out of 10, how that scale might suggest resources should be allocated to try to break the cycle that is predicted by those – the scoring under those adverse childhood circumstances.

The older an individual gets, and, particularly, as they move into adulthood, the tougher it becomes, I think, to decide how those circumstances should factor into fashioning a sentence.

And I say that in two specific ways. One, in terms of the 3553 (a) factors, unless there's some plan in place to suggest these – that whatever age we're talking about, that these adverse circumstances can be addressed and treated, it seems to me there's – the argument could flip such that an individual who has a significant number of adverse circumstances poses a higher risk to the community in terms of continuing to commit crimes. And, therefore, specific deterrence and protection of the public take on a heightened effect in terms of fashioning the sentence.

And then, second, the adverse childhood experiences factor – I kind of lost my train of thought on how exactly I was going to say this. The heightened need with respect to the two factors. But then, there comes a point in time where the individual decision-making – there's got to be some – no, I'll say it this way. This is the way I intended to say it.

Sadly though it may be, these adverse childhood experiences are a common thing among criminal defendants, without a doubt. And you know the facts as well as I do, such that, ultimately, if adverse childhood experiences become a mitigating factor, they're going to apply in about every case, and we're going to – the sentencing guidelines are going to become almost obsolete because we would be varying downward in every case to accommodate those things. And I'm not sure that's what Congress or *Booker/Blakely* intended.

I think – and I make that observation simply to say, that's why, from my perspective, how those adverse childhood experiences would affect the 3553 (a) factors is the most critical part of the analysis. It's not so much identifying that they're there; we can do that without the assistance of a psychologist.

It's more of, well, how do they affect these factors? They don't affect necessarily the seriousness of the offense. They don't necessarily reflect the need to promote the law. They arguably affect deterrence and protection of the public, so – and then, finally, in terms of educational and vocational training, and there's no question ACEs affect those, but that's almost – that is a separate consideration from the length of the sentence.

So how do these ACEs affect the Court's calculus as to the factors?

The Court would go on to hear arguments from the attorneys for both the Government and the Petitioner as to the appropriate sentence. The Court

ultimately sentenced the Petitioner to a term of 105 months which was the high end of his guideline range.

Petitioner asserts that the Court failed to fully consider all of the § 3553(a) factors in rendering its decision.

§ 3553(a) Factors

As part of a District Court's duty to sentence a Defendant, the Court is required to consider the factors under 18 U.S.C. § 3553 (a). *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007) The first factor under 18 U.S.C. § 3553(a) for the Court to consider includes "... the history and characteristics of the Defendant"; *Id.*

In his sentencing hearing, Petitioner emphasized many factors from his history which he argued qualified as adverse childhood experiences. Specifically, the pre-sentence report notes the Petitioner suffered physical abuse as a child, he witnessed violence toward his Grandmother, he had multiple family members that were incarcerated and there was substance abuse in the home that he grew up in. Additionally, he experienced what was effectively parental separation, he grew up in poverty and while not noted in the pre-sentence report, defense counsel also argued that he would have experienced both discrimination and racism in his life. It was these adverse childhood experiences which are part of Petitioner's history and therefore a factor for the Court to consider under 18 U.S.C. § 3553(a). Counsel argued that this sentencing factor under 18 U.S.C. §3553(a), characterized as adverse childhood experiences formed the basis for a lesser sentence.

The Court's preliminary comments on how it viewed adverse childhood experiences reveal that the Court would not properly consider Petitioner's history in formulating an appropriate sentence. The Court first noted that while it viewed adverse childhood experiences as important in juvenile matters, "the older an individual gets, and, particularly, as they move into adulthood, the tougher it becomes, I think, to decide how those circumstances should factor into fashioning a sentence." The Court specifically noted that adverse childhood experiences could be considered as an aggravating factor "...the argument could flip such that an individual who has had a significant number of adverse circumstances poses a higher risk to the community in terms of continuing to commit crimes."

Additionally, the Court went on to note that he considered adverse childhood experiences to be so common that they effectively became meaningless. "Sadly though it may be, these adverse child experiences are a common thing among criminal defendants, without a doubt. And you know the facts as well as I do, such that, ultimately, if adverse childhood experiences become a mitigating factor, they're going to apply in about every case, and we're going to – the sentencing guidelines are going to become almost obsolete because we would be varying downward in every case to accommodate those things." Here the Court's comments indicate its unwillingness to properly consider the Defendant's history, a factor under 18 U.S.C. § 3553(a), in determining the appropriate sentence.

Finally, and most importantly, the Court indicated that it did not consider the Defendant's history as a factor to be considered under 18 U.S.C. §3553(a) but

something that should be considered as to how it impacts the factors set out 18 U.S.C. § 3553(a). The Court distinguished adverse childhood experiences as something that it did not consider to be in and of itself a factor to be considered under 18 U.S.C. § 3553(a).

I think – and I make that observation simply to say, that's why, from my perspective, how those adverse childhood experiences would affect the 3553(a) factors is the most critical part of the analysis. It's not so much identifying that they're there; we can do that without the assistance of a psychologist.

It's more of, well, how do they affect these factors? They don't affect necessarily the seriousness of the offense. They don't necessarily reflect the need to promote the law. They arguably affect deterrence and protection of the public, so – and then, finally, in terms of educational and vocational training, and there's no question ACEs affect those, but that's almost – that is a separate consideration from the length of the sentence.

So how do these ACEs affect the Court's calculus as to the factors?

Here, the Court is addressing the Defendant's history, in terms of his adverse childhood experiences, as something to be considered but not as a factor under 18 U.S.C. §3553 (a). The Court wants to know how adverse childhood experiences affect the factors under 18 U.S.C. § 3553(a). Accordingly, the Court does not consider them as factors under 18 U.S.C. § 3553(a) in and of themselves. The Court cannot have properly considered the Defendant's history, characterized as adverse childhood experiences, if it did not consider it a factor under 18 U.S.C. § 3553(a). When a Court fails to properly consider a factor under 18 U.S.C. § 3553, the Defendant has demonstrated procedural unreasonableness and is entitled to a new sentencing hearing. *United States v. Thompson*, 595 F.3rd 544 (4th Circuit 2010).

CONCLUSION

For reasons stated above, this Court should grant Petitioner's petition for writ of certiorari and review the opinion of the panel of the Fourth Circuit Court of Appeals to determine the extent that a district court is required to fully consider the factors under 18 U.S.C. § 3553(a) in sentencing Petitioner.

Respectfully submitted this the 8th day of August, 2023.

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