

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

JAVON MONTREAL KING
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 22-60627

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court erred, considering Mr. King's youth and background, when it sentenced him to the statutory maximum of 120 months' imprisonment.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
I. OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT.....	2
III. STATUTE INVOLVED	3
IV. STATEMENT OF THE CASE	4
A. Basis for federal jurisdiction in the court of first instance.....	4
B. Statement of material facts.....	4
1. Javon's arrest.....	4
2. Javon's history, as recited in the PSR	5
3. Javon's Indictment, guilty plea, and sentencing	6
V. ARGUMENT	9
A. Introduction	9
B. Review on certiorari should be granted in this case.....	9
C. Standards for determining substantive reasonableness of a sentence	9

D. Javon's history and circumstances warranted a sentence below the statutory maximum of 120 months	11
VI. CONCLUSION.....	16
CERTIFICATE OF SERVICE	17
(Appendices 1 and 2)	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases:</u>	
<i>United States v. Churchwell</i> , 807 F.3d 107 (5th Cir. 2015)	9, 10
<i>United States v. Johnson</i> , 445 F.3d 793 (5th Cir. 2006)	10
<i>United States v. Mares</i> , 402 F.3d 511 (5th Cir. 2005)	10
<u>Statutes:</u>	
18 U.S.C. § 922	1, 6, 7
18 U.S.C. § 3231	4
18 U.S.C. § 3553	3, 8, 10, 11
28 U.S.C. § 1254	2
<u>Rules:</u>	
Rule 10, Supreme Court Rules.....	9
Rule 13.1, Supreme Court Rules.....	2
Rule 29.5, Supreme Court Rules.....	17

I. OPINIONS BELOW

On September 8, 2012, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. King with felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court case number is 1:21cr101-TBM-RPM. Mr. King accepted responsibility for his actions by pleading guilty to the charge on April 4, 2022. The sentencing hearing followed on November 2, 2022. The district court sentenced Mr. King to serve 120 months in prison, which was the maximum sentence allowed under the statute. The court entered a Final Judgment on November 9, 2022. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. King filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on November 21, 2022. The Fifth Circuit case number is 22-60627. The Fifth Circuit affirmed the district court's rulings via an Opinion filed on June 23, 2023. It filed a Judgment on the same day. The Fifth Circuit's Opinion and Judgment are attached hereto as composite Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on June 23, 2022. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. STATUTE INVOLVED

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. 18 U.S.C. § 3553(a).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. King for being a felon in possession of a firearm. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. King arose from the laws of the United States of America.

B. Statement of material facts.

1. Javon's arrest.

On December 10, 2020, Moss Point Police officers identified a vehicle traveling on Main Street as one involved in a drive-by shooting at a residence three days earlier. They approached the vehicle after it stopped at a convenience store. Javon King was the passenger in that vehicle. Officers arrested Javon and conducted a search of the vehicle. The search uncovered two firearms, one in the center console and one behind the driver's seat.

After waiving his *Miranda* rights, Javon admitted that the two firearms belonged to him and someone named "Chris." When asked about the drive-by shooting that occurred on December 7, 2020, Javon stated that he and "Chris" had bought drugs from someone named "E" at the residence. Upon discovering that the drugs were "bad" (meaning fake), "Chris" insisted they go back to the house to get

their money back. The confrontation led to “Chris” and “E” shooting at each other.

Javon insisted that he did not fire a weapon.

On December 18, 2020, an ATF agent inspected the two firearms. The agent determined that they were manufactured in Florida and had previously been reported stolen.

2. Javon’s history, as recited in the PSR.

Javon first entered the juvenile justice system on September 8, 2015, when he was adjudicated for commercial burglary. He was sentenced to a term of probation, the length of which was based on Javon’s completion of a drug court program. He only completed one phase of that program before he absconded. He was later adjudicated for escaping a youth detention facility, and the Youth Court ultimately terminated his probation shortly before his eighteenth birthday.

Javon was convicted of several misdemeanors at age 18 and 19 before being convicted of a felony – Transfer of a Controlled Substance – at age 20. The factual basis of that conviction was the transfer of less than two grams of cocaine to a confidential informant. Javon was placed on house arrest in October 2019 and ultimately released on probation in May 2022.

The PSR’s recitation of Javon’s personal history is brief but presents the case of a child whose mental health and education were rather severely neglected. Javon stated that he was diagnosed with ADHD when he was nine or ten years old.

He was prescribed Adderall but stopped taking it at age 11 because “it hurt his appetite.” The impact of that decision on his education was profound. Javon did not complete the seventh grade until he was 16, approximately four years later than he should have. He left school at 17, while he was in the process of repeating the eighth grade. The school Javon attended did not even respond to the Probation Office’s request for his records. Javon stated that he failed to complete GED preparatory classes, wrongly labeling himself as “just a troublemaker” and citing “attitude issues” as his reason for failing to complete the course.

Javon’s mother, who raised him, advised the Probation Office that Javon “may have been diagnosed as bi-polar during his rearing; however, she was not sure and could not recall additional details.” Javon has a history of self-medication that supports this statement from his mother. Javon began using marijuana at 16 and was a consistent user. When he was shot and injured at age 18 (Javon has a colostomy bag), he began abusing the pain medication he received to aid in his recovery. Javon reported that he used Percocet and Oxycodone to manage pain and “Xanax to help him ease his mind.”

3. Javon’s Indictment, guilty plea, and sentencing.

On September 8, 2021, a grand jury indicted Javon on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Javon

entered an open guilty plea on April 22, 2022. He admitted to the facts proffered by the Government, which included possession of two firearms.

At the first sentencing hearing on August 11, 2022, Javon raised multiple objections to the PSR. Those objections related to the factual bases for the PSR's sentencing guidelines calculations, which resulted in multiple sentencing enhancements. The district court granted a continuance to allow both sides and the court to research and prepare argument.

At the continued sentencing hearing on November 2, 2022, counsel for Javon advised the district court that he had researched the issues and reviewed both the Probation Office's addendum to the PSR and the Government's memorandum. After discussing the case with counsel, Javon opted to withdraw his objections and proceed to sentencing.

The district court adopted the PSR and calculated the guidelines, giving Javon a three-point reduction for acceptance of responsibility. The final guidelines calculation was an offense level of 27, with a criminal history category of V, placing Javon's guideline range at 120-150 months. The district court determined that, because the statutory maximum for violation of 18 U.S.C. § 922(g)(1) is ten years, the guidelines range was capped at 120 months.

When the district court asked for argument on a variance, defense counsel argued that Javon was young – 23 years old – and still immature. He also argued

that the criminal justice system had previously failed in its duty to provide Javon with opportunities for rehabilitation services since his first contact with the system at age 15. Counsel encouraged the district court to impose a sentence that would “protect the public, of course, but to give Javon the ability to program within our Bureau of Prisons and to come up with a plan” so that he could then successfully move into the structure and resources provided through supervised release.

The district court reviewed its reasons for imposing the sentence, utilizing the sentencing factors set forth in 18 U.S.C. § 3553(a). The district court made a single reference to Javon’s history when it noted he had not completed the eighth grade. The district court also commented on defense counsel’s argument, stating that “Mr. Weber, on your behalf, has argued that the system has not allowed an opportunity for you to be rehabilitated. That may be the case. It’s possible that that’s the case.” The district court decided, however, to impose the statutory maximum sentence of 120 months was appropriate.

V. ARGUMENT

A. Introduction.

The district court ordered a substantively unreasonable sentence when it imposed the statutory maximum in this case. Although the statutory maximum falls within the recommended Guideline sentence, the district court committed plain error by failing to adequately consider and weigh Javon’s history, including his medical and educational neglect. Therefore, this Court should vacate the district court’s 120-month prison sentence as substantively unreasonable.

B. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” Javon’s issue involves an essential component of our criminal justice system – sentencing those found guilty of crimes. Granting certiorari will provide valuable guidance on analyzing this important issue.

C. Standards for determining substantive reasonableness of a sentence.

Federal courts within the Fifth Circuit review the substantive reasonableness of a sentence by looking at “the totality of the circumstances.” *United States v. Churchwell*, 807 F.3d 107, 123 (5th Cir. 2015). A sentence is substantively unreasonable if it “(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor,

or (3) represents a clear error of judgment in balancing the sentencing factors.” *Churchwell*, 807 F.3d at 123 (citation omitted). Because the sentence imposed fell within the guideline range, it is entitled to a presumption of reasonableness. *See United States v. Johnson*, 445 F.3d 793, 798 (5th Cir. 2006) (citing *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005)).

The starting point for the totality of the circumstances analysis is 18 U.S.C. § 3553. Under § 3553(a), “[t]he court shall impose a sentence sufficient, but not greater than necessary” to meet the ends of justice. Section 3553(a) requires judges to consider multiple factors when they craft appropriate punishments for offenses. The primary factors are:

- “the nature and circumstances of the offense” (§ 3553(a)(1));
- “the history and characteristics of the defendant” (id.);
- “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” (§ 3553(a)(2)(A));
- “to afford adequate deterrence to criminal conduct” (§ 3553(a)(2)(B));
- “to protect the public from further crimes of the defendant” (§ 3553(a)(2)(C));
- “to provide a defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” (§ 3553(a)(2)(D));

- “the kinds of sentences available” (§ 3553(a)(3));
- “the sentencing range established for … the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines” (§ 3553(a)(4)(A)); and
- “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (§ 3553(a)(6)).

In this case, the district court committed plain error by failing to account for Javon’s history and circumstances – a factor that should have received significant weight.

D. Javon’s history and circumstances warranted a sentence below the statutory maximum of 120 months.

The district court did not consider Javon’s history and characteristics in evaluating his sentence, even though the PSR and defense counsel’s arguments presented mitigating evidence. This failure to recognize and consider the mitigating circumstances that underlie Javon’s entire history with the justice system is a plain error that affected his substantial rights.

The substance of the PSR’s section on Javon’s personal history is sparse but illuminating. Although Javon did not report any history of abuse or neglect and described a “normal” childhood, the Probation Officer’s discussion of Javon’s mental/emotional health and educational history reveal Javon’s limited insight into

the reality of his formative years and the impact they have had on his ability to live a productive life.

At the age of nine or ten, Javon was diagnosed with ADHD. He briefly took Adderall to control his symptoms, but by age eleven, he had stopped taking medication because it impacted his appetite. The DSM-5 criteria for diagnosing ADHD includes a long list of behaviors that present as inattention, forgetfulness, a lack of focus, hyperactivity, and impulsivity that impact a child's development and functioning. Its impact on a child's ability to perform schoolwork is profound. Adderall, the drug prescribed to Javon, carries a long list of side effects, including the loss of appetite that Javon described to the Probation Officer.

Considering this information, Javon's educational history makes sense. A child who is not treated for ADHD is not, as the district court characterized Javon, merely a dropout. He is a medically and educationally neglected child. The fact that Javon did not pass the seventh grade until he was sixteen is indicative of the failure of multiple systems designed to care for and protect children. Notably, the school did not even respond to the Probation Officer's requests for Javon's records.

An untreated ADHD diagnosis also explains Javon's criminal history, poor memory, and lack of employment history. His criminal history, in particular, reflects the impulsivity associated with untreated ADHD.

The PSR contains additional information that points to neglect. In one sentence, the PSR speaks volumes: “The defendant’s mother advised that King may have been diagnosed as bi-polar during his rearing; however, she was not sure and could not recall additional details.” This information cuts two ways. The criteria for a pediatric bi-polar diagnosis includes agitation and irritability, self-destructive behavior, grandiosity, and engaging in highly risky behavior. An untreated bi-polar diagnosis would explain the impulsivity that marks Javon’s criminal history. If, however, his mother was mistaken, her inability to recall whether her child was diagnosed with a mental disorder provides insight into Javon’s upbringing. Either way, the PSR contains significant evidence that the district court failed to consider.

Javon’s history of self-medication is also telling. At age 18, he sustained a gunshot wound that resulted in injuries that require him to use a colostomy bag. He became dependent on his pain medication and told the Probation Officer that he abused Oxycodone, Percocet, and Xanax. Oxycodone and Percocet controlled his pain, and Xanax helped him “ease his mind.”

In just a few paragraphs, the PSR lays bare several mental health concerns for which Javon has never received proper treatment, but which have had an outsized impact on Javon’s life. The district court failed to consider any of them, instead attributing Javon’s history solely to some inherent criminal mindset.

The district court's general comments near the end of the sentencing hearing also demonstrate that it did not consider Javon's history and characteristics. After commenting on Javon's criminal history, the district court stated,

I also find that a three-year term of supervised release can promote rehabilitation in you, Mr. King. You are a talented individual. There's really no reason that with your talents that you have been given in this life that you should be continuing to engage in criminal conduct and not using that talents that you have been given in this world to better your community, to support your family, and to support yourself.

These comments are disconnected from the rest of the hearing, which included no discussion of Javon's skills or plans and appear to be boilerplate language.

The district court then said, "On the other hand, I do recognize that Mr. Weber, on your behalf, has argued that the system has not allowed an opportunity for you to be rehabilitated. That may be the case. It's possible that that's the case."

In fact, that is the case. Javon's criminal history shows that he has not received rehabilitative services. The juvenile court system discharged him as he approached age 18 rather than try to provide him with the treatment he clearly needed. Except for his 2020 conviction for transfer of a controlled substance, Javon was subject only to fines and was never offered rehabilitation services.

Finally, the district court demonstrated its lack of understanding regarding the mitigating evidence in the PSR when it imposed Special Condition 6 as part of Javon's terms of supervised release. The district court ordered Javon to receive a mental health assessment and any recommended treatment upon his release. The

district court imposed that term “due to the defendant’s history of violent conduct” and “to provide the probation office with the necessary tools to assist the defendant in obtaining treatment and to assist with his successful reintegration into society.”

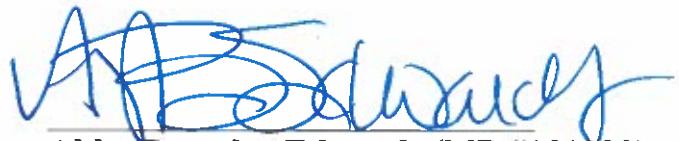
The district failed to acknowledge Javon’s history of mental health concerns and diagnoses.

The district court’s failure to address any of the mitigating evidence is plain error, as the history and characteristics of the defendant is one of the first factors to be considered in sentencing. Had the district court recognized this mitigating evidence and applied it to the analysis, particularly in its consideration of Javon’s criminal history score and his need for treatment and services, a sentence below the statutory maximum would have served to provide just punishment and to serve as an adequate deterrent.

VI. CONCLUSION

Based on the arguments presented above, Mr. King asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted September 19, 2023, by:



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CERTIFICATE OF SERVICE

I, Abby Brumley Edwards, appointed under the Criminal Justice Act, certify
that today, September 19, 2023, pursuant to Rule 29.5 of the Supreme Court Rules,
a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma
Pauperis was served on Counsel for the United States by Federal Express, No.
773460486340, addressed to:

The Honorable Elizabeth B. Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



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First Assistant