

NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

JOSEPH K. ABERANT

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 affirming the District Court's abuse of discretion by its failure to give Mr. Aberant a variance sentence and a shorter period of incarceration based upon his advanced age and significant medical conditions and challenges.

RULE 14.1(b) STATEMENT

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

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OPINION BELOW

The December 28, 2023 opinion of the United States Court of Appeals for the Fourth Circuit is an Unpublished, *Per Curium* opinion, affirming the decision of the United States District Court for the Eastern District of North Carolina. A copy of the Fourth Circuit's *Per Curium* decision is attached hereto in Appendix I.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 23, 2023. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS

There are no constitutional provisions cited in the Petition for a Writ of Certiorari.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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STATEMENT OF THE CASE/STATEMENT OF FACTS

A. THE RECORD BEFORE THE DISTRICT COURT.

On July 17, 2017, Mr. Aberant entered a guilty plea (without a written Plea Agreement) to Possession with of a Firearm by a Convicted Felon, in violation of 18 U.S.C. Sec. 922(g)(1), and 924, (Count I), Possession of Ammunition by a Convicted Felon, in violation of 18 U.S.C. Sec. 922(g)(1), and 924 (Count II), and Making a False and Fictitious Statement to a Firearms Dealer During Acquisition of a Firearm (Count IV), in violation of 18 U.S.C.

Sec. 922(a)(6), 924(a)(2), and 2. Mr. Aberant entered his guilty plea before the Honorable Terrence W. Boyle.

The pertinent facts are as follows. Mr. Aberant lived with his wife, Marie Elizabeth Aberant (the co-defendant), his daughter, Nicole Cicalese, and her boyfriend, Alex Ortiz. On August 10, 2016, a dispute emerged about Nicole's and Alex's failure to help with household bills.

On August 11, 2016, Mr. Aberant, with his wife's assistance, obtained a rifle and ammunition. At home, after Aberant told his daughter he was evicting her from the home, he chased her, grabbed her, and smashed her cell phone. She suffered injuries. When Ortiz arrived at the house, he saw what Aberant had done to Nicole. Ortiz confronted Aberant. Aberant fired two shots at Ortiz, from the rifle purchased that day. Aberant followed Ortiz outside, shot him seven more times, and then Aberant drove away.

Aberant led the police on a chase before he was arrested. Ortiz survived the shootings.

1. Mr. Aberant's First Sentencing.

Judge Boyle sentenced Mr. Aberant on October 17, 2017. Mr. Aberant asked for a variance sentence below the United States Sentencing Guidelines ("USSG") range. The Government asked for a sentence of 327 months, the high end of the Guidelines range (262-327 months). The District Court sentenced Mr. Aberant to 200 months, a 62 month downward variance.

On appeal to the Fourth Circuit, the Court affirmed the guideline range at 262-337 months, but remanded the case to the District Court for re-sentencing because the district court "did not expressly address the motion for downward variance" or adequately explain the basis for the sentence. *United States v. Aberant*, 741 Fed. App'x 905, 910 (4th Cir. 2018).

2. Mr. Aberant's Second Sentencing.

On September 27, 2019, Judge Boyle re-sentenced Mr. Aberant. The Government read victim statements (Cicalese and Ortiz) into the record. The Government reviewed Aberant's criminal history.

Judge Boyle, stating that Aberant was a "violent and dangerous person", and after reviewing his criminal history, sentenced Mr. Aberant to 262 months of incarceration, a 62 month increase of his initial sentence.

On Mr. Aberant's second appeal to the Fourth Circuit, the Court found that there was a presumption of judicial vindictiveness and that the District Court had not rebutted it because it had not explained its reasons for imposing a higher sentence than its initial sentence of Mr. Aberant. See *United States v. Aberant*, 19-4786, 2021 WL 5401474, at *1 (4th Cir. Nov. 18, 2021). The Fourth Circuit ordered that a new district court judge would sentence Mr. Aberant.

3. Mr. Aberant's Third Sentencing.

On November 14, 2022, the Honorable Louise Wood Flanagan

conducted a sentencing hearing of Mr. Aberant. The Government reviewed the history of the case, the underlying facts of the case, Mr. Aberant's criminal history, and requested that the District Court sentence Mr. Aberant toward the high end of the USSG range - 327 months.

Mr. Aberant asked for 120 months of imprisonment. The court acknowledged that it had reviewed Mr. Aberant's extensive health issues. The District Court sentenced Mr. Aberant to 291 months.

On May 17, 2021, Mr. Aberant had filed a Motion for Compassionate Release ("MCR"), which further detailed his extensive health issues and challenges. The District Court denied the MCR on July 14, 2021.

Mr. Aberant filed a timely Notice of Appeal on November 17, 2022, with the Fourth Circuit.

SUMMARY OF ARGUMENT

The Fourth Circuit erred because the District Court abused its discretion by failing to give Mr. Aberant a lower sentence in light of his advanced age and significant health issues and challenges.

ARGUMENT

I. THE FOURTH CIRCUIT ERRED BECAUSE THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT TAKING INTO CONSIDERATION MR. ABERANT'S HEALTH ISSUES.

A. The Standard Of Review.

The Fourth Circuit 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 the 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.*

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

Mr. Aberant's crimes were very serious. The Defense conceded that point at sentencing. However, under the totality of circumstances, it is clear that Mr. Aberant'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. Mr. Aberant's Significant Medical Issues And Challenges.

Mr. Aberant was born on April 20, 1957. He is 66 years old. Joseph K. Aberant is a very ill man. He suffers from a myriad of serious health issues:

- * hepatitis C;
- * chronic obstructive pulmonary disease (COPD);
- * hypertension;
- * dysthymic disorder;
- * gastro-esophageal reflux disease (GERD) without esophagitis;
- * myocardial infarction;
- * chronic pain;
- * venous thrombosis and embolism;
- * shingles;
- * insomnia;
- * coronary heart disease;
- * blood clots in his legs;
- * back related issues;

- * digestive problems;
- * diminished functioning of his pancreas and liver.

Mr. Aberant takes at least ten (10) prescribed medications to address his various health issues. In addition, Mr. Aberant takes a series of medications to deal with tachycardia (a major depressive disorder), anxiety and panic attacks.

c. Mr. Aberant's Sentence Should Not Be A Death Sentence.

It is very troubling that Mr. Aberant was initially sentenced to 200 months (16.66 years), later sentenced to 262 months, then subject of a remand based upon "vindictive sentencing", and eventually sentenced to 291 months (24.25 years), or an *increase of 8 years over the original sentence.*

Based on the current sentence of 291 months, Mr. Aberant will be released from federal prison at around age 84, with credit for time served.

Given Mr. Aberant's advanced age and significant medical issues, it is unmistakable that Mr. Aberant will die in federal prison. In reality, his current sentence is a death sentence. He will not leave federal prison alive.

Under the totality of these circumstances, Mr. Aberant's current sentence was arbitrary and capricious. The district court barely took into account Mr. Aberant's advanced age and significant health issues. See USSG Sec. 5H1.4 (Physical Condition), as justification for downward departure.

Following *United States v. Booker*, 543 U.S. 220, 258-259 (2005), courts have discretion to depart from the Guidelines upon a finding of a mitigating circumstance "of a kind not adequately taken into consideration" by the USSG. See USSG, Sec. 5K2.0 (quoting 18 U.S.C. Sec. 3553(b)). Depending on the circumstances, a downward departure may be justified. See, i.e., *United States v. Helton*, 782 F.3d 148, 152-53 (4th Cir. 2015) (downward departure on imprisonment justified because based on defendant's age, mental health and lack of criminal record).

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study of human failings that sometimes mitigate, sometimes magnify, the crimes and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). Underlying this tradition is the principle that "the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 246 (1949). See also *Wasman v. United States*, 468 U.S. 559, 564 (1984) ("...the punishment will suit not merely the offense but the individual defendant").

With this well-established doctrine in mind, what did the district court say about Mr. Aberant's health at sentencing? "There's some health issues that have developed in the years that have gone by ... I also want to note the defendant's ill health ... I do find there is some merit in the arguments as based on the

defendant's current health...."

First, the court gave scant attention to Mr. Aberant's significant and numerous health issues. Second, the court significantly understated the number and seriousness of the health issues Mr. Aberant faces. Third, the Court failed to make any analysis in the record correlating the health issues to the sentence.

Instead, the district court *substantially increased the period of incarceration for Mr. Aberant, even greater than the sentence imposed by the "vindictive court" that this Court ordered replaced!*

Accordingly, the district court abused its discretion by ignoring the impact on the sentence of Mr. Aberant's health that should have been considered. To conclude, this is a strange case. The more this Court instructs the district court to sentence Mr. Aberant properly, the district court flouts those instructions and increases Mr. Aberant's sentence. This cannot stand.

II. CONCLUSION

WHEREFORE, Mr. Aberant respectfully requests that the Court grant certiorari and reverse and vacate the decision of the Fourth Circuit, affirming the sentence of the District Court, and remand this case for resentencing to the District Court, consistent with Mr. Aberant's request for a variance sentence of 120 months, or less.

Respectfully submitted,


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APPENDIX I

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 22-4657

UNITED STATES OF AMERICA,**Plaintiff - Appellee,****v.****JOSEPH KELVIN ABERANT,****Defendant - Appellant.**

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:17-cr-00025-FL-1)

Submitted: December 15, 2023**Decided: December 28, 2023**

Before KING and HARRIS, Circuit Judges, and MOTZ, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Peter L. Goldman, SABOURA, GOLDMAN & COLOMBO, PC, Alexandria, Virginia, for Appellant. Michael F. Easley, Jr., United States Attorney, David A. Bragdon, Assistant United States Attorney, Lucy Partain Brown, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In 2017, Joseph Kelvin Aberant pled guilty, without a written plea agreement, to two counts of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1); and making a false and fictitious statement to a firearms dealer during the acquisition of a firearm and aiding and abetting the same, in violation of 18 U.S.C. §§ 2, 922(a)(6). The district court originally sentenced Aberant to 200 months' imprisonment, below the bottom of his Sentencing Guidelines range of 262 to 327 months' imprisonment. We vacated that sentence and remanded for resentencing because the court failed to expressly address Aberant's motion for a downward variance and explain its reasons for imposing the selected sentence. *United States v. Aberant*, 741 F. App'x 905 (4th Cir. 2018). On remand, the district court sentenced Aberant to 262 months' imprisonment. Because the court offered no valid reasons for imposing this harsher sentence, we concluded that the Government could not rebut the presumption of vindictiveness, vacated the sentence, and remanded for resentencing before a different judge. *United States v. Aberant*, No. 19-4786, 2021 WL 5401474 (4th Cir. Nov. 18, 2021). A new judge sentenced Aberant to 291 months' imprisonment. On appeal, Aberant argues that this within-Guidelines sentence is substantively unreasonable because the district court did not adequately account for his advanced age and poor health. We affirm.

We review a criminal sentence for reasonableness "under a deferential abuse-of-discretion standard." *United States v. Williams*, 5 F.4th 500, 505 (4th Cir. 2021). "Substantive-reasonableness review requires us to consider the totality of the circumstances to determine whether the sentencing court abused its discretion in

concluding that the sentence it chose satisfied the standards set forth in [18 U.S.C.] § 3553(a).” *United States v. Reed*, 58 F.4th 816, 820 (4th Cir. 2023) (internal quotation marks omitted). “This review is highly deferential” and “should not be overly searching, because it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.” *United States v. Smith*, 75 F.4th 459, 466 (4th Cir. 2023) (internal quotation marks omitted). Indeed, “[a]ny sentence that is within or below a properly calculated Guidelines range is presumptively [substantively] reasonable,” and “[s]uch a presumption can only be rebutted by showing that the sentence is unreasonable when measured against the . . . § 3553(a) factors.” *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014).

We conclude that Aberant has not rebutted the presumption that his within-Guidelines sentence is substantively reasonable.* The district court carefully crafted a sentence reflecting the violent nature of the offense and Aberant’s violent criminal history, both of which demonstrated the need to protect the public from Aberant. Moreover, given that Aberant had not been deterred by his prior sentences and spent his life disrespecting the law, the court reasonably concluded that a lengthy sentence was appropriate. But the court did not ignore Aberant’s poor health or advanced age. To the contrary, the court requested a revised presentence report to reflect Aberant’s current health issues, among other changes, and chose a sentence three years below the top of the Guidelines range to

* We have confirmed that Aberant’s sentence is procedurally reasonable. *See United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019) (“[W]e are required to analyze procedural reasonableness before turning to substantive reasonableness.”).

account for those mitigating circumstances, even though Aberant's advanced age and poor health had not hindered him from committing the offenses. In imposing the harsher sentence, the court also emphasized that Aberant attempted to minimize his culpability and blame the victims for his violent behavior. On this record, we conclude that the district court acted within its discretion in selecting Aberant's sentence, and we decline Aberant's invitation to reweigh the § 3553(a) factors.

Accordingly, we affirm the district court's judgment and deny Aberant's motion to substitute counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: December 28, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4657
(5:17-cr-00025-FL-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSEPH KELVIN ABERANT

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK