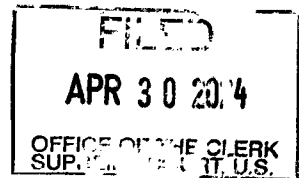


23-7431
No. _____

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

AVERY LANS- PETITIONER

vs.

UNITED STATES OF AMERICA-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Mr. Avery Lans # 42340-066

FCI-Butner Low/ P.O. Box 999

Butner, NC 27509

QUESTION(S) PRESENTED

QUESTON NUMBER ONE:

Did the Eleventh Circuit abused its discretion by the affirmance of Petitioner's 240-month federal sentence when the district court failed to announce that it would have imposed the same sentence as an alternative variant sentence in light of all the 3553 factors; failed calculate the alternative Guideline range; and failed to properly justify the chosen alternative sentence, thus, did render his two hundred-and-forty-month federal sentence "substantively and procedurally unreasonable" in violation of the U.S. Supreme Court's Ruling in Gall v. United States, 552 U.S. 38, 46 (2007) ?

LIST OF PARTIES

[x] 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 judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	5
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE WRIT.....	7
CONCLUSION.....	18

INDEX OF APPENDICES

APPENDIX A- Opinion of the U.S. Court of Appeals

APPENDIX B- Opinion denying Panel Rehearing or Rehearing En Banc

APPENDIX C-Sentencing Transcripts at page 1, 54-56, 65-71, before
the Honorable Roy B. Dalton, Jr. held on December 5, 2022

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Gall v. U.S., 552 U.S. 38, 169 L. Ed. 2d 445 (2007).....	6,7,8,11,12,13 14,15
U.S. v. Rosales-Bruno, 789 F.3d 1249, 1256 (11 th Cir. 2015)..	9
U.S. v. Riley, 995 F.3d 1272, 1279 (11 th Cir. 2021).....	9
U.S. v. Croteau, 819 F.3d 1293, 1310 (11 th Cir. 2016).....	9,11,
U.S. v. Keene, 470 F.3d 1347 (11 th Cir. 2006).....	10,12
Molina-Martinez v. U.S., 578 U.S. 189, 194 L. Ed. 2d 444 (2016)....	12
U.S. v. Savillon-Matute, 636 F.3d 119, 123-124 (4 th Cir. 2011).....	12
Ex Parte Garland, 71 U.S. 333, 18 L. Ed. 366 (1866).....	12, 13
U.S. v. Booker, 543 U.S. 220, 249-252 (2005).....	13
U.S. v. Smalley, 517 F.3d 208, 214-215 (3d Cir. 2008).....	14
Koon v. U.S., 518 U.S. 81, 116 S. Ct. 2035, 2045 (1996).....	16
U.S. v. Terry, 142 F.3d 702, 707 (4 th Cir. 1998).....	16
U.S. v. Zapete-Garcia, 447 F.3d 57, 60 (1 st Cir. 2006).....	17
U.S. v. Rayyan, 885 F.3d 436, 440 (6 th Cir. 2018).....	17
U.S. v. Robinson, 898 F.2d 1111, 1115 (6 th Cir. 1990).....	17

STATUTES AND RULES	PAGE NUMBER
Supreme Court Rule 10.....	7

OTHER	PAGE NUMBER
U.S.S.G. 2D1.1 (c) (5).....	8, 9
U.S.S.G. 2D1.1 (c) (4).....	10
U.S.S.G. 2D1.1 (b) (12).....	10
U.S.S.G. Ch. 5, Pt. A.....	10

**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the 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 B to the petition and is

☐ reported at _____; or,

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

or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ____ 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 _____ court
appears at Appendix _____ to the petition and is

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 2, 2024

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 02/06/2024

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) in Application No. ____ A_____.

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

☐ For cases from **state courts**:

The date in which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PAGE NUMBER

Fifth Amendment of the U.S. Constitution.....12

18 U.S.C. 3553 (a).....7,8,9,12

STATEMENT OF THE CASE

On June 03, 2022, a Criminal Complaint was issued by the Court (Doc. # 1), and an Arrest Warrant was returned executed on June 03, 2022 (Doc. # 11). On June 15, 2022, a Grand Jury handed down an single count Indictment charging Mr. Lans and Mr. Wayne Ellsworth Stout, Jr. with Conspiracy to Distribute Controlled Substance (Doc. # 22), and Jury Trial commenced on September 26, 2022 (Doc. # 90). On October 03, 2022, the Jury returned a Guilty Verdict as to Count 1, Conspiracy to Distribute Controlled Substance (Doc. # 99). On December 05, 2022, the Honorable Roy B. Dalton, Jr. sentenced Mr. Lans to 240 months of imprisonment followed by 5 years of Supervised Release (Doc. # 133 and 136). On December 06, 2022, a timely Notice of Appeal was filed (Doc. # 140), and the Eleventh Circuit Court of Appeals affirmed his conviction on January 04, 2024. A Panel Rehearing or Rehearing En Banc was filed and was denied on February 6, 2024. Mr. Lans, respectfully requests that this Honorable U.S. Supreme Court GRANT his Pro Se Petition for Writ of Certiorari since the Eleventh Circuit abusing its discretion by the affirmance of Mr. Lans' 240-month federal sentence when the district court failed to announce an alternative sentence in accordance with Gall v. United States, 552 U.S. 38, 46 (2007), in which renders the sentence "procedurally or substantively unreasonable" in the matter

herein.

Petitioner Lans, asserts that he now petitions this Honorable U.S. Supreme Court to GRANT his Pro Se Petition for a Writ of Certiorari to the sole Question Number One in the case herein.

REASONS FOR GRANTING THE PETITION

Petitioner Lans, acknowledges that a review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted by this court only for compelling reasons, see Supreme Court Rule 10.

In the instant case, Petitioner Lans, respectfully request that this Court **GRANT** his pro se Petition for a Writ of Certiorari as to Questions Number One as relevant to question # 1, Avery Lans' argues that the Eleventh Circuit abused its discretion by the affirmance of Appellant's 240-month federal sentence when the district court failed to announce that it would have imposed the same sentence as an alternative variant sentence in light of all the 3553 factors; failed to calculate the alternative Guideline range; and failed to properly justify the chosen alternative sentence in violation of U.S. Supreme Court precedents in Gall v. United States, 552 U.S. 38, 46 (2007). The district court and the Eleventh Circuit relied upon a prior murder conviction in which Mr. Lans had received a full pardon from the Governor to justify imposition of the same sentence if the case was

remanded to the district court and failed to adequately explain the rationale for its sentence for the alternative variant sentence in light of all the 3553 factors; failed to calculate the alternative Guideline range; and failed to properly justify the chosen alternative sentence on these points an abuse of discretion occurred, thus, rendering the 240-month federal sentence “substantively and procedurally unreasonable” in the case herein.

QUESTION NUMBER ONE:

Did the Eleventh Circuit abuse its discretion by the affirmance of Petitioner’s 240-month federal sentence when the district court failed to announce that it would have imposed the same sentence as an alternative variant sentence in light of all the 3553 factors; failed to calculate the alternative Guideline range; and failed to properly justify the chosen alternative sentence, thus, did render his two hundred-and forty-month federal sentence “substantively and procedurally unreasonable” in violation of the U.S. Supreme Court’s Ruling in Gall v. United States, 552 U.S. 38, 46 (2007) ?

Discussion

Petitioner Lans, contends that in the instant case the Eleventh Circuit Court of Appeals affirmed conviction and sentence by holding as follows:

We review the substantive reasonableness of sentence under

an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). The party challenging a sentence bears the burden of establishing that it is unreasonable “in light of the entire record, the 3553 (a) factors, and the substantial deference afforded sentencing courts. *United States v. Rosales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015). Section 3553 (a) mandates that the district court consider the nature and circumstances of the offense, the defendant’s history and characteristics, the purposes of sentencing, the kinds of sentences available, the guideline sentencing range, any pertinent policy statements, the need to avoid unwarranted sentencing disparities between similarly situated defendants, and the need to provide restitution to any victims. Sec. 3553 (a).

The district court does not have to give all the factors equal weight, and the determination of how much weight to assign to each factor is within its discretion. *Rosales-Bruno*, 789 F.3d at 1254. “[D]iscretion in weighing sentencing factors is particularly pronounced when it comes to weighing criminal history. *United States v. Riley*, 995 F.3d 1272, 1279 (11th Cir. 2021). District courts “have broad leeway in deciding how much weight to give to prior crimes,” and we have repeatedly affirmed the substantive reasonableness of major-upward-variance sentences for defendants with significant criminal histories. *Id.* (quoting *Rosales-Bruno*, 789 F.3d at 1254). And “[a] sentence imposed well

below the statutory maximum penalty is another indicator of reasonableness.” *United States v. Croteau*, 819 F.3d 1293, 1310 (11th Cir. 2016).

A defendant responsible for at least 5 Kilograms but less than 15 kilograms of cocaine has a base offense level of 30. U.S.S.G. 2D1.1 (c) (5). A defendant responsible for at least 15 kilograms but less than 50 Kilograms of cocaine has a based offense level of 32. *Id.* Section 2D1.1 (c) (4). The sentencing guidelines prescribe a two-level enhancement for a defendant who “maintained a premises for the purpose of manufacturing or distributing a controlled substance.” *Id.* Sec. 2D1.1 (b) (12). A defendant with a criminal history category of II and an offense level of 32 would have a guideline range of 135-168 months’ imprisonment. U.S.S.G. Ch. 5, Pt. A. A defendant with the same criminal history category and an offense level of 36 would have a guideline range of 210-262 months. *Id.*

We need not reach the question of whether the district court erred in calculating Lan’s guideline range because even assuming for the sake of argument there was error, it was harmless. Because the district court stated that its sentence would be the same under the guideline range that Lans contends is correct, we ask whether his 240-month sentence would be substantively reasonable under that range. *Keane*, 470 F.3d at 1348-50.

With the lower drug quantity and without the enhancement for maintaining a premises for distributing drugs, Lans's guideline range would be 135 to 168 months' imprisonment. A 240-month sentence would be a 72-month upward variance from that guideline range, but in light of Lan's criminal history and the substantial deference given to sentencing courts, it would be substantively reasonable. Indeed, Lan's criminal history included shooting at two individuals, killing one of them, and participating in a shootout with police officers. And Lans's present offense also involved dangerously evading the police. The court reasonably concluded that the sentencing guidelines underrated Lan's danger to the public and was within its discretion to place greater weight on criminal history than on the guideline range or other sentencing factors. See *Riley*, 995 F.3d at 1279. Finally, we note that the 240-month sentence is well below the statutory maximum penalty of life, further indicating reasonableness. See *Croteau*, 819 F.3d at 1310.

Thus, any error in calculating Lans's guideline range was harmless. Accordingly, we affirm as to this issue.

The U.S. Supreme Court must assume as the Eleventh Circuit did that the Guideline Range was in error and with the lower drug quantity and without the enhancement for maintaining a premises for distributing drugs, Lans's guideline range would be 135-168 months'

imprisonment far less than the 240-months' imprisonment he actually received. Here, the error produced a significantly higher guideline sentencing range. And because the guidelines are "the starting point and the initial benchmark" in a sentencing proceeding, *Gall v. United States*, 552 U.S. 38, 49, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007), a sentencing court that improperly assigns too lofty a guideline sentencing range infringes upon the defendant's substantial rights, see *Molina-Martinez v. United States*, 578 U.S. 189, 204, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016).

Petitioner Lans, argues that the Fourth and Eleventh Circuit Court of Appeals require that the district court to announce that it would have imposed the same sentence as an alternative variant sentence in light of **all** the 3553 factors. See *United States v. Savillon-Matute*, 636 F.3d 119, 123-124 (4th Cir. 2011), and *United States v. Keene*, 470 F.3d 1347, 1350 (11th Cir. 2006). The U.S. Supreme Court requires that the court must select a sentence in light of the section 3553 (a) factors, and must adequately explain the rationale for its sentence. See *Gall*, 552 U.S. 38, 46, 50 (2007).

It should also be noted the district court's and the Eleventh Circuit's affirmance by relying upon Mr. Lans's prior conviction for

Murder in which he has received a full Pardon was an impermissible factor in which to rely upon to form the basis of a **72-month upward variance** offends his Fifth Amendment due process clause rights. See *Ex Parte Garland*, 71 U.S. 333, 18 L. Ed. 366 (1866). In *Garland*, the Supreme Court held that a **pardon** "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." *Ex Parte Garland*, 71 U.S. 333, 380, 18 L. Ed. 366 (1866).

In order for an alternative sentence to render an initial Guidelines calculation error harmless, the alternative sentence generally must comply with the procedural framework set forth in *Booker*, 543 U.S. 220. 249-252 (2005); and *Gall*, 552 U.S. 38, 46-51 (2007). Therefore, if a district court wishes to provide for the possibility that a different Guidelines calculation applies by handing down an alternative sentence, it must still begin by determining the correct alternative Guidelines range and properly justify the chosen sentence.

Considering what the district court stated regarding the alternative sentence of 240-months' imprisonment would still have to comply with the sentencing procedures set forth by the Supreme Court in *Gall v. United States*, 128 S. Ct. 586, 594, 169 L. Ed. 2d 445 (2007).

The District Court's bald statement that it would have given Lans a 240-month sentence even with the lower drug quantity and without the enhancement for maintaining a premises for distributing drugs is not sufficiently detailed to comply with first step of the post-Booker three-step sentencing process. *Gall*, 128 S. Ct. at 597 ("[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process."). This procedural error in failing to set forth an alternative sentence should have precluded the Eleventh Circuit from concluding that the assumed erroneous calculation of drug quantity and maintaining a premises enhancement was harmless. See *United States v. Smalley*, 517 F.3d 208, 214-215 (3d Cir. 2008) (even an explicit statement that the same sentence would be imposed under a different Guidelines range is insufficient if that alternative sentence is not also a product of the entire three-step sentencing process.).

In addition, the District Court also committed procedural error in sentencing to properly justify its alternative sentence. The U.S. Supreme Court held in *Gall* that it is procedural error to "fail [] to adequately explain the chosen sentence." *Gall*, 128 S. Ct. at 597. The procedural requirement of adequate explanation of sentences includes requiring district court's to provide "an

explanation for any deviation from the Guidelines range.” The Supreme Court held, however, that “appellate courts May 2, 2024 therefore, take the degree of the variance into account and consider the extent of a deviation from the Guidelines.” *Gall*, 128 S. Ct. at 594-95. Because of the Eleventh Circuit’s duty to review the sentence for reasonableness, *Gall* made it clear that “failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines” was procedural error. *Id.* 128 S. Ct. at 597. Moreover, the only reasoning that the District Court stated for the alternative sentence is as follows:

I likely would have sentenced Mr. Lans to the high end of the guidelines, 262 months, but for the mitigating circumstance of his ongoing health consideration, which I thought was a mitigating factor which warranted a sentence slightly below the top end of the guidelines.

I do want to note for the record that I think the criminal history category determination of II underrepresents Mr. Lans’ risk of danger to the public and that but for the mitigating factors of his health would warrant a sentence at the high end of the guidelines.

I also want to note for the record that I would have sentenced—I would have upwardly varied to impose a 240-month sentence on Mr. Lans irrespective of my ruling on the Government’s objection to the evaluation of the appropriate guidelines by the Probation Office for reasons of—for the reasons that I mentioned that I think his criminal history underrepresents his risk of danger to the public.

See Appendix C.

Petitioner Lans, states that the only reasoning the district court provided to justify an “upward variance” due to his prior conviction for Murder that his criminal history underrepresents his risk of danger to the public, however, Avery Lans’ prior conviction for Murder was already reflected in his criminal history score and was taken into account under the applicable Guidelines in which renders the 72-month upward variance a procedural error. *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 2045 (1996) (noting that a district court may exercise its discretion and depart if a factor upon which the Sentencing Commission encourages departure is not taken into account by the applicable guideline); *United States v. Terry*, 142 F.3d 702, 707

(4th Cir. 1998) (upward departure unwarranted because Terry's reckless driving was already accounted for the Guideline Adjustment, thus, as the result of the danger to public posed by defendant's reckless driving already taken into account by the Guidelines. VACATED and REMAND for resentencing); and United States v. Zapete-Garcia, 447 F.3d 57, 60 (1st Cir. 2006) (upward departure not procedurally reasonable when judge did not state reasons for departing for prior deportations when deportations were already considered in Guidelines sentence).

Lastly, the district court and Eleventh Circuit reliance upon Petitioner Lans' fully pardoned Murder conviction in which is an impermissible factor to justify the same sentence of 240-months' imprisonment renders such sentence "substantively and procedurally unreasonable" in the case herein. In devising a sentence, a judge must "refrain from considering impermissible factors. United States v. Rayyan, 885 F.3d 436, 440 (6th Cir. 2018). The realm of "impermissible factors" is limited. See United States v. Robinson, 898 F.2d 1111, 1115 (6th Cir. 1990) (noting that a sentencing judge's inquiry is "largely unlimited" but that "[s]entences imposed on the basis of material misinformation... may violate due process") (emphasis added).

Petitioner Lans, respectfully request that this Honorable

U.S. Supreme Court **GRANT** his Pro Se Petition for Writ of Certiorari and VACATE his 240-month federal sentence and REMAND to the lower court for further proceedings in the matter herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Avery Lamm

Date: 04/30/2024