

NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

KEVIN DAY

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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QUESTIONS PRESENTED

I. Whether the District Court abused its discretion by failing to give Mr. Day a variance sentence and a shorter period of incarceration based upon a criminal history score that overrepresents the seriousness of his criminal history, and the appropriate downward departure or variance to his Sentencing Guidelines range that should have been applied to his sentence under U.S.S.G. Sec. 4A1.3(b).

II. Whether the Fourth Circuit erred by granting the Government's Motion to Dismiss Mr. Day's appeal.

RULE 14.1(b) STATEMENT

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

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
RULE 14.1(b) STATEMENT.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OFFICIAL OPINION BELOW.....	v
STATEMENT OF JURISDICTION.....	vi
CONSTITUTIONAL PROVISIONS.....	vii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	4
I. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT APPLYING A LOWER CRIMINAL HISTORY SCORE.....	4
A. The Standard Of Review	4
B. The Totality Of Circumstances Establish That The District Court Abused Its Discretion By Not Granting Mr. Day A Lower Sentence.....	4
1. The Applicable Legal Standard For Sentencing...	4
2. Mr. Day's Prior Conviction Was When He Was A Juvenile.....	5
3. The USSG Call For A Variance Under These Circumstances.....	7
II. THE SENTENCING ISSUES ARE OF GREAT IMPORTANCE.....	9
CONCLUSION....	9
APPENDIX I.....	10

TABLE OF AUTHORITIES

CASES	PAGE
<i>Dean v. United States</i> , 137 S.Ct 1170, 581 U.S. ____ (2017)	5
<i>Gall v. United States</i> , 552 U.S. 38, 51 (2007)	4
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007)	5
<i>Pepper v. United States</i> , 562 U.S. 476 (2011)	7
<i>United States v. McCain</i> , 974 F.3d 506 (4 th Cir. 2020) ..	4
STATUTES	
18 U.S.C. 1956(h) .	
21 U.S.C. Sec. 841(a)(1), 841(b)(1)(A), Sec. 846	1
28 U.S.C. Sec. 1254(1)	vi

OPINION BELOW

The March 28, 2024 opinion and Order of the United States Court of Appeals for the Fourth Circuit granted the Government's Motion to Dismiss Mr. Day's appeal. A copy of the Fourth Circuit's order 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 March 28, 2024. 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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STATEMENT OF THE CASE/STATEMENT OF FACTS

A. THE RECORD BEFORE THE DISTRICT COURT.

On October 8, 2020, Mr. Day, along with three co-defendants, were charged in a four count Superseding Indictment. Mr. Day was charged in Count I with Conspiracy to Manufacture, Distribute, and Possess with Intent to Manufacture and Distribute Methamphetamine, in violation of 21 U.S.C. Sec. 841(a)(1), 841(b)(1)(A), and Sec. 846. In addition, Mr. Day was charged in Count IV with Conspiracy to Launder Money, in violation of 18

U.S.C. 1956(h).

On August 4, 2022, Mr. Day entered a guilty plea to Count I of the Superseding Indictment, Conspiracy to Manufacture, Distribute, and Possess with Intent to Manufacture and Distribute Methamphetamine, in violation of 21 U.S.C. Sec. 841(a)(1), 841(b)(1)(A), and Sec. 846.

The facts involved Mr. Day and his co-defendants who worked to distribute methamphetamine in, among other places, the Eastern District of Virginia. Mr. Day operated primarily as the conspiracy's California-based source of supply of methamphetamine and other narcotics. During the conspiracy (fall 2018 and continuing until after September 2019), Mr. Day, working with other individuals, shipped methamphetamine and fentanyl via the United States Postal Service from the Los Angeles area to Hampton Roads, within the Eastern District of Virginia, where it was received and distributed by co-defendants and others.

Mr. Day's United States Sentencing Guidelines ("USSG") Offense Level was 37, and Criminal History Category was IV, for a USSG range of 292-365 months, including a statutory mandatory minimum of 120 months. The Criminal History included a 1st degree residential robbery conviction in 2006 when Mr. Day was 17 years old. This added 3 points to his criminal history record.

On August 4, 2023, Mr. Day was sentenced by the Honorable John A. Gibney, Jr. to 288 months, and other conditions. Mr. Day filed

a timely Notice of Appeal on August 8, 2023.

On January 29, 2024, the Government filed a Motion to Dismiss Mr. Day's appeal, arguing that he had waived his right to appeal under his written plea agreement as well as in his statements to the District Court at the time of his appeal.

On February 14, 2024, Mr. Day filed an Opposition to the Government's Motion to Dismiss his appeal.

On March 28, 2024, the Fourth Circuit granted the Government's Motion to Dismiss the Appeal, stating that Mr. Day knowingly and voluntarily waived his right to appeal.

SUMMARY OF ARGUMENT

The District Court abused its discretion by failing to give Mr. Day a lower sentence on based upon a criminal history score that over-represents the seriousness of his criminal history, and an appropriate downward departure or variance to his Sentencing Guidelines range that should have been applied to his sentence under U.S.S.G. Sec. 4A1.3(b).

The sentencing issues involved in this appeal are such that the Fourth Circuit should have heard and decided Mr. Day's appeal on the merits.

ARGUMENT**I. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT APPLYING
A LOWER CRIMINAL HISTORY SCORE.**

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 this 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. Day A Lower Sentence.

Mr. Day's crimes were very serious. The Defense conceded that point at sentencing. However, under the totality of circumstances, it is clear that Mr. Day's sentence should have been lower, as recommended by the defense.

1. 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.)

The "parsimony principle" is the touchstone for "the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation." *Dean v. United States*, 137 S.Ct 1170, 1176, 581 U.S. ____ (2017).

2. Mr. Day's Prior Conviction Was When He Was A Juvenile.

The District Court found that Mr. Day had Criminal History points totaling 7, for a Criminal History Category of IV, based on a robbery conviction in 2006, when Mr. Day was just 17 years old. (JA 250, adding 3 points to Criminal History for 2006 robbery conviction.)

However, on November 8, 2016, Proposition 57 was passed in

California. It took effect the following day. Proposition 57 had two express purposes: (1) stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles; and (2) it requires a judge, not a prosecutor, to decide whether juveniles should be tried in an adult court.¹ The District Court acknowledged that Prop. 57 applied retroactively.

In 2006, when Mr. Day was charged with the robbery offense, he was a minor with no prior convictions. With application of Prop. 57, Mr. Day would have remained under the juvenile justice system, and juvenile jurisdiction would have terminated for Mr. Day in 2013 when he was 24, and not in 2017 when he was 28, under the adult system.

As a result, Mr. Day should not have received the three (3) criminal history points for the 2006 robbery conviction under USSG Sec. 4A1.2(d)(2)(A) (the 2006 conviction timed-out under a juvenile adjudication). Further, the two criminal history points under USSG Sec. 4A1.1(d) would not attach, as the criminal justice sentence would have ended before the applicable period commenced.

Accordingly, Mr. Day's Criminal History score is 2, for a Criminal History Category of II. With an Offense Level of 37, and a Criminal History Category of II, Mr. Day's USSG range would be 235-293 months, significantly below the court-ordered sentence of

¹ Proposition 57, the Public Safety and Rehabilitation Act of 2016, Voter Information Guide, Gen Elec. Text of Prop. 57.

288 months.

3. The USSG Call For A Variance Under These Circumstances.

18 U.S.C. Sec. 3553(b)(1) expressly provides for a departure or variance sentence when "there exists an aggravating or mitigating factor circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

Sec. 4A1.3(b)(1) of the USSG provides that "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a down-ward departure may be warranted."

The Sentencing Commission's advisory guideline ranges for drug offenses often find disfavor with sentencing judges because they violate the parsimony provision. Disagreements with the Sentencing Commission's positions are an appropriate basis for variance. See *Pepper v. United States*, 562 U.S. 476, 501 (2011). As set forth before the District Court, a substantial amount of data shows that defendants convicted of drug offenses are likely to be sentenced below the advisory guideline range.

In fashioning its 288 month sentence, the District Court found that Mr. Day has "lived a lifetime of crime." In fact, Mr. Day had the robbery conviction at age 17, and a Pandering charge. At the

time of sentencing, he was 34 years old. While Mr. Day served 11 years on the robbery charge, he has not lived a lifetime of crime. The District Court cited the need for deterrence, and protecting the public from Mr. Day. (JA 197.) Yet, deterrence is a problematic issue. The National Institute of Justice issued a study on deterrence, and found the following:

Studies show that most individuals convicted of a crime, short to moderate prison sentences may be a deterrent but longer prison terms produce only a limited deterrent effect. In addition, the crime prevention benefit falls far short of the social and economic costs.

United States Department of Justice, National Institute of Justice, *Five Things About Deterrence*, p. 2 (May 2016).

With this study in mind, the District Court sentenced Mr. Day, a 34 year old man with one prior criminal conviction committed as an adult, to 288 months, or 24 years.

The low end of the correct USSG range above, 235-293, would result in a sentence of just under 20 years.

The defense recommendation at sentencing of 192 months would have resulted in a sentence of 16 years. A sentence in the 16-20 year range would have reasonably satisfied the Sec. 3553(a) factors, achieved deterrence, and protected the public.

The District Court sentence of 288 months, imposed on a 34 year old man with one prior conviction committed as an adult, is in essence a life sentence. It fails the parsimony provision, and it enforces the statement of former Supreme Court Justice Anthony

Kennedy. "Our sentences are too long, our sentences are too severe, our sentences are too harsh ... there's no compassion in the system. There's no mercy in the system." (Justice Anthony Kennedy Testimony before the Senate Judiciary Committee, February 14, 2007.)


II. THE SENTENCING ISSUES ARE OF GREAT IMPORTANCE.

The sentencing issues raised in Mr. Day's appeal are of such importance that the Fourth Circuit should have heard and decided Mr. Day's appeal on the merits.

III. CONCLUSION

WHEREFORE, Mr. Day respectfully requests that the Court grant this Petition for Certiorari and hear this matter on the merits.

Respectfully submitted,



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APPENDIX I

FILED: March 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4510
(2:20-cr-00011-JAG-LRL-2)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN DAY, a/k/a Yung Hauncho,

Defendant - Appellant.

O R D E R

Kevin Day seeks to appeal the 288-month sentence imposed following his guilty plea to conspiracy to manufacture, distribute, and possess with intent to manufacture and distribute methamphetamine, in violation of 21 U.S.C. § 846. The Government has moved to dismiss the appeal as barred by Day's waiver of the right to appeal included in the plea agreement. Upon review of the record, we conclude that Day knowingly and voluntarily waived his right to appeal and that the issue Day

seeks to raise on appeal falls squarely within the scope of his waiver of appellate rights. Accordingly, we grant the Government's motion to dismiss.

Entered at the direction of the panel: Judge King, Judge Rushing, and Senior Judge Motz.

For the Court

/s/ Nwamaka Anowi, Clerk

FILED: March 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4510
(2:20-cr-00011-JAG-LRL-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KEVIN DAY, a/k/a Yung Hauncho

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

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

/s/ NWAMAKA ANOWI, CLERK