

No. _____

In The
Supreme Court of the United States

NORMAN SENEKA BOWERS,

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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QUESTIONS PRESENTED

- I. Whether Amendment 821 to the United States Sentencing Guidelines Should be Applied Retroactively on Direct Appeal.
- II. Whether A District Court May Reasonably Delay Ruling On A Supervised Release Revocation Petition More than Seven Months After the Expiration of the Term of supervised Release Without Defendant's Consent and Retain Jurisdiction.

LIST OF PARTIES

NORMAN SENEKA BOWERS, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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ORDER BELOW

The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit in United States v. Norman Bowers, Case No. 23-4488, Docket Entry No. 41, entered on October 28, 2024. A copy of the unpublished per curiam opinion of the Fourth Circuit issued that date is attached as Appendix A.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeal entered on October 28, 2004 in two consolidated direct appeals of a conviction and sentence imposed against Petitioner Norman Bowers in the United States District Court for the Middle District of North Carolina in M.D.N.C. No. 1:22-cr-216-TDS and a judgment upon revocation of supervised release in M.D.N.C. No. 1:13-cr-458. Accordingly, this Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
U.S. Const. amend V.

STATEMENT OF THE CASE

A. Procedural History.

On December 16, 2013, Mr. Bowers was indicted in the Middle District of North Carolina in Case No. 1:13-cr-458. [JA3].¹ Mr. Bowers was sentenced in that case to 78 months imprisonment and three years of supervised release. [JA5]. Following his release, Mr. Bowers' supervision began on July 19, 2019, with his term expiring on July 18, 2022. [JA24].

On August 3, 2021, a Supervised Release Violation Petition (hereinafter "SRV Petition") was filed alleging three violations of the terms and conditions of Mr. Bower's supervised release. [JA24-25]. An arrest warrant was issued for Mr. Bowers on August 4, 2021, but he was not arrested until March 24, 2022. [JA11.] On April 15, 2022, Mr. Bowers was ordered to be detained under the SRV Petition and has since remained in federal custody. [JA12].

On April 27, 2022, an Amended SRV Petition was filed. The amendment added new criminal activity by Mr. Bowers occurring on March 22, 2022 in Violation No. 4. [JA26-28.]

On July 25, 2022, a new case was filed against Mr. Bowers, M.D.N.C. No. 1:22-cr-216. In this case, the Grand Jury returned an Indictment alleging five instances of possession with intent to distribute a quantity of a mixture and substance containing a detectable amount of cocaine bases, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Count One alleged possession on April 6, 20-21, Count Two alleged May 5,

¹ Record citations are to the Joint Appendix filed in the Court of Appeals at 23-4488 Docket Nos. 28 and 29.

2021, Count Three alleged July 7, 2021, Count Four alleged July 9, 2021, and Count Four alleged July 15, 2021. [JA29-31].

On October 11, 2022, Mr. Bowers pled guilty to Count One of the Indictment pursuant to a written Plea Agreement in M.D.N.C. No. 1:22-cr-216. [JA36-63.]

On January 24, 2023, a draft PSR was filed in M.D.N.C. No. 1:22-cr-216. [JA189-215.] On January 25, 2023, the Government filed an initial response. [JA216-218].

On February 7, 2023, another Amendment to the SRV Petition was filed in M.D.N.C. No. 1:13-458. [JA64-66.]

On February 14, 2023, Mr. Bower's initial trial counsel filed objections to the draft PSR in M.D.N.C. No. 1:22-cr-216. [JA227-256].

On February 27, 2023, the Government filed a Notice that it did not intend to proceed on Violations 2 and 4 alleged in the SRV Petition in M.D.N.C. No. 1:13-cr-458. [JA67-68].

The matter was initially scheduled on March 2, 2023 for a combined Sentencing and final hearing on the SRV Petition. [JA20]. It was continued because defendant's initial trial counsel had not met with him in person previous to the hearing to discuss the PSR and SRV documents in a reasonably timely manner. [JA284; JA304].

On April 3, 2023, Mr. Bowers filed a pro se document containing, *inter alia*, objections to the PSR. [JA279-302.] On April 12, 2023, Mr. Bowers' initial trial counsel moved to withdraw, which was granted on April 20, 2023. [JA20].

The undersigned counsel was then appointed to represent Mr. Bowers, and on June 19, 2023 filed a Position Paper in M.D.N.C. No. 1:22-cr-216 memorializing an agreement reached with the Government concerning all of the objections previously filed on Mr. Bowers' behalf. [JA307-310]. On June 21, 2023, Defendant filed a Sentencing Memorandum in M.D.N.C. No. 1:22-cr-216. [JA311-324].

On July 7, 2023 the Honorable Thomas D. Schroeder conducted a joint sentencing hearing and SRV final hearing. [JA69-124.] Mr. Bowers was sentenced to 51 months in 1:22-cr-216 and 18 months in 1:13-cr-456-1. to be run consecutively. Written judgments memorializing the sentences were filed on July 13, 2023 and July 18, 2023. [JA125-140]. On July 27, 2023 two timely notices of appeal were filed in the respective cases. [JA141-144.] On July 28, 2023, amendments were filed to the two judgments. [JA145-160].

On August 1, 2023, the two appeals were consolidated. [JA22.] On October 28, 2024, the Fourth Circuit Court of Appeals affirmed the district court in an unpublished per curiam decision. App. A.

B. Statement of the Facts:

According to the PSR in M.D.N.C. No. 1:22-cr-216:

3. During the Spring of 2021, the Lexington, NC, Police Department was advised the defendant was selling cocaine base in Lexington, NC. Officers subsequently utilized a confidential informant to make a series of controlled purchases of cocaine base from Defendant Bowers. Each transaction was conducted at the defendant's residence located at 403 Holt Street in Lexington, NC, and surveillance was established. Each purchase was field tested and yielded a positive result for cocaine.

[JA229].

According to the field testing, the approximate drug amounts for each of the controlled purchases was .5 grams of cocaine base on April 6, 2021 (Count One), .6 grams of cocaine base on May 5, 2021 (Count Two), .4 grams of cocaine base on July 7, 2021 (Count Three) and .2 grams of cocaine base on July 9, 2021 (Count Four). [JA229]. The PSR then recounted the events of July 14, 2021 which were the basis for Count 5.

4. On July 14, 2021 (Count Five), Defendant Bowers was arrested as a result of a traffic stop after he was observed operating a vehicle, and the arresting officer knew the defendant did not have a valid driver's license. A canine sniff of the exterior of the vehicle resulted in a positive alert for the presence of a controlled substance. A search of the vehicle revealed several crumbs of cocaine base in the driver's seat. Officers also found additional crumbs of cocaine base in a small pull down compartment to the left of the steering wheel. Officers located \$542 in United States currency in the glove box.

5. A search warrant was later executed at 403 Holt Street, Lexington, NC, immediately following the traffic stop. The residence is next to the playground of Sheets Memorial Christian School in Lexington, NC. Defendant Bowers claimed that he did not live at the residence, but investigators found numerous pieces of mail and/or documents to include utility bills, vehicle registration documents, rent documents, and unemployment correspondence bearing the defendant's name and the address of 403 Holt Street. Defendant Bowers' driver's license and social security card were also located inside the residence. Officers found approximately 2.3 grams of cocaine base hidden in a jacket pocket inside the closet of the master bedroom. The substance field tested positive for cocaine. Officers also found 20 (4 mg) dosage units of hydromorphone hydrochloride inside of a cigarette pack that was found in a shirt pocket in the master bedroom. The defendant was read his Miranda rights and elected not to speak with officers.

[JA230].

The PSR also discussed an incident occurring on March 22, 2022 which was the basis for Count Four of the SRV Petition in M.D.N.C. No. 1:13-cr-458. [JA27;

JA230]. Including drug weight based on the March 22, 2022 incident, Mr. Bowers' drug weight was calculated at 23.55 grams of cocaine base. [JA231].

Mr. Bowers' Base Offense level was calculated at 22, with a two level enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance pursuant to U.S.S.G. § 2D1.1(b)(12). This resulted in an adjusted offense level of 24. [JA232]. After a reduction of three levels for acceptance of responsibility, Mr. Bower's Total Offense Level was calculated as 21. [JA232].

Mr. Bower's criminal history category was scored at five points based upon his convictions. [JA241]. The PSR also added two points pursuant to U.S.S.G. § 4A1.1(d). [JA241.] As a result, the PSR calculated Mr. Bower's Sentencing Guideline range based on a total offense level of 21 and criminal history category of IV, resulting in a range of 57 to 71 months. [JA247.]

The PSR also recommended a variance upward to 90 months, to be served consecutively with his SRV sentence in M.D.N.C. No. 1:13-cr-458. [JA251]. This recommendation was justified by the Probation Officer because "[t]he defendant received a 78 month sentence of imprisonment for his prior federal sentence which did nothing to deter the defendant from committing future crimes, as evidenced by the instant offense conduct." [JA250].

As noted above, a number of objections to the calculations were filed by Mr. Bower's previous trial counsel and by Mr. Bowers *pro se*. [JA223-236; JA279-306.] The

undersigned negotiated the objections with the Government, and filed a resolution of these objections on behalf of both parties. This document stated in pertinent part:

The Government and Defendant Norman Seneca Bowers (hereinafter “Defendant” or Mr. Bowers”) hereby give notice to the Court of their agreement concerning the resolution of Defendant’s factual objections to the Pre-Sentence Report submitted in the above captioned action. Previous counsel for Mr. Bowers submitted objections to the Pre-Sentence Report on February 14, 2023, Docket No. 13. Additionally, on April 3, 2023, Mr. Bowers submitted a number of pro se objections. Docket Nos. 17, 17-1, and 17-2. The undersigned counsel for Defendant hereby adopts all previous objections made in Docket Nos. 13 and 17 for purposes of their adjudication and resolution as follows:

1. The Government does not plan to offer evidence concerning Defendants’ various objections to the attributable drug weight based on the incidents alleged in Paragraphs 7 and 8 of the Final Pre-Sentence Report and concedes Defendants’ objections to including the \$141.00 in cash and 12.75 grams of cocaine base described therein in his attributable drug weight. This would result in an attributable drug weight of approximately 9.4 grams in Paragraph 10.
2. Based on the above and Defendant’s withdrawal of his other objections as noted below, Defendant’s Base Offense Level in Paragraph 15 should [be] changed to 16, his Adjusted Offense Level in Paragraph 20 should be 18, and his Total Offense Level in Paragraph 24 should be 15. With a Criminal History Category of IV, this should result in an Advisory Sentencing Guideline Range of 30 to 37 months.
3. The Parties request that a Revised Pre-Sentence Report be prepared in line with calculations set forth in the preceding paragraphs. Defendant requests the deletion of Paragraphs 7, 8, and 9 of the Pre-Sentence Report.
4. Defendant withdraws his previous counsel’s objection to the maintaining a dwelling enhancement in paragraph 16 of the Final Pre-Sentence Report.
5. Defendant withdraws his objections to the inclusion of the funds described in Paragraph 4 of the Pre-Sentence Report in his attributable drug weight.
6. Defendant withdraws his objection to the Criminal History Category calculated in the Final Pre-Sentence Report.

7. Defendant withdraws his procedural objection to the drafter of the Pre-Sentence Report being a different Probation Officer than who interviewed him, however Defendant reserves the right to address this situation to the extent it may affect the 18 U.S.C. § 3553(a) factors.

8. Defendant withdraws his objections to paragraphs 76 and 81 of the Final Pre-Sentence Report.

9. The parties do not believe that the remainder of Defendants' objections affect the Sentencing Guideline Range. At this time, Defendant does not withdraw his objection to the statements in Paragraph 9 concerning his warrants and charges as well as his objection to the Probation Officer's statement to him concerning turning himself in as related in Paragraph 40, pp. 14-15. Finally, Defendant reserves the right to make appropriate arguments at sentencing with respect to the Probation Officer's variance recommendation.

[JA307-308].

The undersigned also submitted a Sentencing Memorandum on behalf of Mr. Bowers, arguing for a sentence within the Guidelines. [JA311-319].

The Sentencing Memorandum first argued that it would be procedurally improper to adopt the Probation Officer's reasoning based upon the length of a prior federal sentence.

If the Court were to mechanically start from the length of a defendant's previous sentence and go up, such a procedure would be inconsistent the controlling case law of the Supreme Court and this Court. It would improperly disregard the nature and circumstances of the instant offense and substitute an arbitrary starting point based upon the nature and circumstances of a previous offense, not the instant offense. Thus, the balance involved in the design of the United States Sentencing Guidelines to account for previous criminal activity in the calculation of a guideline range would sidestepped and rendered irrelevant. Specifically, such a procedure would violate the first factor, which requires the sentencing court to consider both the nature and circumstances of the offense and the history and characteristics of the defendant in tandem. 18 U.S.C. § 3553(a)(1). Privileging the history and characteristics of the defendant to the point where it alone is the de facto starting point creates a structural imbalance in the sentencing process which downgrades from consideration the nature and circumstances of

the offense. Case 1:22-cr-00216-TDS Document 24 Filed 06/21/23 Page 5 of 9 JA315 6 Further, the fourth, fifth, and sixth factors would also be structurally undermined. The sentencing guidelines themselves are to be taken into account., as well as their policy statements. 18 U.S.C. § 3553(a)(4); 18 U.S.C. § 3553(a)(5). Finally, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct would also be eviscerated, in violation of 18 U.S.C. § 3553(a)(6). Instead of giving this factor its rightful place, such a procedure would classify defendants by their records only, as opposed to their conduct in the instant offense.

[JA315-316].

Second, the undersigned argued that in this case:

Mr. Bowers' relevant conduct consists of small amounts of possession and sale of crack cocaine, which he conducted primarily in order to support his drug habit that he had lapsed back into. There were no firearms involved, nor any violent conduct. This is a "mine run" or "run-of-the-mill" drug sale and possession case. There are no aggravating factors other than the fact that Mr. Bowers kept drugs at his residence, which is taken into account by the two level enhancement in the calculation of his range. Even with respect to that enhancement, the fact that it was his primary residence is somewhat mitigating, in that Mr. Bowers did not maintain a separate "stash house." There are simply no other aggravating factors involved with the instant offense itself. The nature of the current offense strongly militates against a variant sentence.

[JA316].

Third, the undersigned raised the impact and relevance of the Dec. 16, 2022 Memorandum for All Federal Prosecutors from the Attorney General. That Memorandum states that:

At sentencing, prosecutors should advocate for a sentence consistent with the guidelines for powder cocaine rather than crack cocaine. Where a court concludes that the crack cocaine guidelines apply, prosecutors should generally support a variance to the guidelines range that would apply to the comparable quantity of powder cocaine.

[JA322].

The undersigned argued that the result of the crack versus powder disparity makes a difference of five levels in Mr. Bowers' case, which would result in an Advisory Guideline Range of 15-21 months. [JA317]. The Attorney General's memorandum would significantly impact the sixth sentencing factor, which guides the court to avoid unwarranted disparities amongst similarly situated defendants. Rather than varying downward according to the guidance of this memorandum, any upward variance would greatly exasperate the violation of this sentencing factor. [JA317.]

Finally, the undersigned argued that the existence of the additional SRV sentence to be applied consecutively should be a significant factor in deciding against a variance in this case. [JA317].

At the sentencing hearing, the trial judge adopted the position of the parties and amended the presentence report accordingly.

All right. I'll amend the presentence report with those amendments. The amendments set out in paragraph 9 of Docket Entry 23 would not affect the guideline range, so I'm not going to adopt those. But the other amendments I will adopt and revise the presentence report as amended, and as to all matters of the presentence report I adopt as findings of fact.

[JA78].

The trial judge then calculated Mr. Bowers' revised guideline range for M.D.N.C. No. 1:22-cr-216 as 30 to 37 months, based on an offense level of 15 and a Criminal History Category of IV. [JA79-80].

Turning to the SRV Petition, the trial judge found that, as admitted, Mr. Bowers violated the conditions of his supervised release as charged in Violations 1 and 3, and that the violations were willful and without lawful excuse. [JA82]. He then calculated the guidelines for these violations as 24 months without objection. [JA82-83].

Having made these calculations, the trial judge invited the parties to address the application of the advisory guidelines and other sentencing factors under 18 U.S.C. § 3553(a).

The undersigned attorney reiterated the arguments in the Sentencing Memorandum, and then asked the Court to consider whether or not a variance downward would be appropriate pursuant to the guidance of the Attorney General. [JA83-85]. The undersigned asked the trial court to sentence Mr. Bowers at 30 months or less consecutive in M.D.N.C. No. 1:13-cr-458 with the 18 months recommended by the Probation Officer in the Supplement to the SRV Petition. [JA86].

The trial court then turned to the Government for its position. [JA86]. The Government indicated it supported the variance requested by the Probation Officer. [JA86]. The Government argued that its position was not so simple as to say the sentence must be higher than the previous 78 month term of imprisonment because that didn't work. Instated it is complicated by Mr. Bower's three prior controlled substance felony convictions in Paragraph 34, 36, and 39 of the PSR. [JA87]. In addition, "a further justification for an upward variance of the magnitude that probation is recommending and the Government is supporting is the speed with which the Defendant returned to serious criminal conduct." [JA87-88].

With respect to the supervised release violation, however, the Government suggested that the Court could fashion a sentence to come to a total sentence of 90 months in support of the recommendation by the Probation Officer. Thus, the Government took the position that if the 18 months is the number for the supervised

release relation, that amount could be deducted from the sentence in M.D.N.C. 1:22-cr-216 in order to arrive at the total combined sentence of 90 months. [JA89-90].

When Mr. Bowers was given the chance to allocate, he talked about the need for him to maintain sobriety and his plans to relocate out to live with relatives in Georgia away from the Lexington, North Carolina area. [JA94.] After this, the trial judge announced the sentence and his reasons for it.

THE COURT: All right. I've taken the guidelines into account. Let me start with the sentencing in 22CR216. I've considered all 3553(a) factors in determining a sentence, will impose a sentence that in my view is sufficient, but no greater than necessary, to meet the sentencing objectives of Section 3553(a) and any that may apply as well under the advisory guidelines.

One of the factors the Court considers is the nature and circumstances of the offense. I hear the Defendant had been reported to be selling cocaine base in Lexington, and so law enforcement utilized a confidential informant and made not one but a series of purchase -- controlled purchases -- four of them are set out in the presentence report in paragraph 3 -- from 403 Holt Street, which was the Defendant's residence; and the Defendant, as already indicated, was on supervision at the time for the related case where he was on supervision for a conviction for -- 78 months of imprisonment followed by three years -- a felon in possession of a firearm. So this series of drug transactions comes in light of a history of felony drug convictions and misdemeanor drug convictions.

You have a longstanding relationship with cocaine, Mr. Bowers. At age 18 you were charged with felony possession of cocaine, and that was dismissed. You were convicted instead of possession of drug paraphernalia and sentenced to 45 days, suspended. Unfortunately, that was revoked, and you then served 45 days.

And then at age 20, paragraph 34, you were convicted of felony possession with intent to sell and deliver cocaine. That's a trafficking offense. Had a suspended sentence in 2001 and were revoked, and then you elected to serve 8 to 10 months. You possessed 4.6 grams of cocaine with the intent to sell and deliver.

I should also indicate in paragraph 32, you were convicted of a misdemeanor assault on a government official when you kicked a police officer in the leg. What's significant about that, from a deterrence point of view, is while you had a suspended sentence, your probation was revoked, and you served 70 days of imprisonment.

Getting back to the drug issues, you had drug paraphernalia you possessed at age 21 in paragraph 35 and were convicted of that, and then at age 23 convicted of felony possession of cocaine. It's noteworthy that a related charge of felony possession of a firearm by a felon was dismissed. But you had your probation revoked and served 6 to 8 months of imprisonment in 2007.

And then in 2012, at age 31, you were convicted of felony sell of cocaine, received a suspended sentence of 17 to 21 months, and eventually, in 2014, had a probation violation and served 90 days of imprisonment. In that case, you sold an unspecified amount of cocaine to an undercover officer. Unfortunately, you failed to -- as part of your probation in that case, to attend the DART program, which might have helped you, and then -- so your drug history comes now, in light of that.

And in the PSR, page 14, paragraph 40, you admit that you had been using cocaine on a regular basis as of April 2021 for several months.

So you have a problem with cocaine. It's not just a use problem, though. Here you were selling too. Perhaps you were selling to have money to buy cocaine, but that doesn't necessarily make it any better.

In terms of deterrence, I've reviewed a number of your sentences, but you've had multiple drug offenses with multiple sentences that did not deter you. The largest sentence you had was the 78 months for the felon in possession of a firearm, and you were on supervision for that when you committed the instant offense, and we'll address that shortly.

I agree with Mr. Neyhart that the Court doesn't look simply to the length of punishment and then determine whether additional punishment is necessary for a subsequent offense. There are a number of factors to look at, not the least of which is the nature of the offense and the passage of time and the facts relating to each of the offenses.

Your drug conviction here is different from the felon in possession. There's a report you had a firearm at the time the police were called, but I don't have any evidence that you actually possessed a firearm. So I don't make that finding here on this record. I would be more concerned if I knew you

had a firearm that day, and I don't have any evidence of that. So understand me clearly. I'm not finding that.

But you have a number of probation violations too. So you just seem to have a problem complying with the law. Every time you get a sentence from a court, you should follow the sentence, comply with the law, not violate your probation or your supervision.

I am concerned about protecting the public. Your sale of drugs is a danger to the public. Cocaine and crack cocaine are dangerous, and the whole drug distribution process is dangerous. It has criminal activity written all over it in terms of the distribution process. It causes people to go steal things so they can go afford the drugs. You're selling drugs in an illegal market. Some people who are engaged in drug dealing do have to -- or find that they think they have to carry a firearm to protect themselves and the drugs. So it's not simply a victimless crime.

You do have a history of drug use. I do think you need treatment, but I've not considered that fact for the length of your sentence. The Defendant has asked for a guideline sentence or a slight variance below. I've considered that request, also the request for a variant sentence based on the alleged disparity between power and crack cocaine. On this record, I'm going to decline to vary downward. I'm going to vary upward, but not to the extent recommended by probation. And I recognize that that recommendation was made when a different guideline was issued. The guidelines are advisory in any extent. But this record shows a consistent pattern of drug activity, and it's been unrelenting, and it returned here. You cannot -- simply cannot return to selling drugs. You just can't do that. And it's not simply a drug use case.

So in this case, I'm going to vary upward to 51 months and impose three years of supervision.

[JA96-100].

After discussing terms of supervised release and recommendations requested by Mr. Bowers, the trial judge turned to the SRV Petition and sentenced Mr. Bowers to the 18 months recommended by the Probation Officer in M.D.N.C. No. 1:13-cr-458. [JA106-107].

At this point in the hearing, the Probation Officer pointed out that Mr. Bowers' supervised release term had expired on July 18, 2022. [JA107]. The trial judge observed that Mr. Bowers had been in federal custody on the SRV Petition since March, 2022, and had not been brought to hearing until 2023. [JA108]. The trial judge then *sua sponte* raised the issue of whether the district court had jurisdiction over the supervised release revocation proceeding, and announced a recess for lunch. [JA109.]

When the hearing resumed, the Government stated it believed the Court had jurisdiction. [JA110.] The trial judge responded by describing the record in detail.

The petition originally, Docket Entry 56, was filed August 2nd, 2021, which was well within the period of supervision. The supervision period in 13CR458 expired July 18, 2022. A warrant was issued two days later, Docket Entry 59, and the Defendant was detained but released by the Davidson County police department on September the 8th, 2021, before any federal arrest could be made, and that's based on the Davidson County state charges.

The Defendant absconded from that date forward until he was arrested on March 22nd, 2022, for what's listed as Violation 4 in the 12C. He was arrested by the Thomasville Police Department and -- but was brought that same day into federal custody on the SRV warrant and detained. Ms. Parsonage was appointed as his attorney two days later, March 24, 2022, and then a detention hearing was held and -- eventually held. It was set for and eventually held on April the 7th, 2022, and the supervised release revocation proceeding was set for a hearing on May 12th, 2022.

I should say at the time of -- the conduct in the -- well, let me get to it. So then the 12C was amended April 27, 2022, and following that the Government moved on April 28th to continue the matter. It's Docket Entry 75, which is what I think Mr. Meinecke is referring to.

That docket entry states that -- Mr. Meinecke indicated in that document that there were new felony charges, and the undersigned intended to pursue a felony indictment against the Defendant as a result of a March '22 incident, but it would "take some time," it says, "for investigative reports to be compiled, and for all aspects of the investigation, to include forensic testing of any controlled substances, to be completed."

Then it indicates: "The Government has consulted with counsel for the defense, who does not object to this motion."

So then you requested a continuance for a period of 60 days. Judge Tilley entered an order that it be continued until the clerk's office sets a date.

And then nothing, apparently, happened in the case, it doesn't appear, except that then the indictment -- new indictment came down in the related case, and that's noted in the amended 12C. July 25, 2022, the new indictment finally came down, and then it appears that, the best I can tell, the parties were waiting to resolve the matters together, because there was no further setting of -- resolving the matters because the new indictment had come down. Hold on just a minute. (Pause in the proceedings.)

THE COURT: The Defendant finally entered his plea in the related case on October 11, 2022, and then that case was set for sentencing. Because they were going to be held together, that explains the delay through the fall, and they were set for sentencing, it looks like, March the 2nd, 2023.

Prior to that, February 7, 2023, an amended 12C to reflect the new charge was filed, and March the 2nd the Defendant appeared with counsel and moved to continue for more time, and so the matter was continued to April the 20th, 2023. I presided over the March 2nd and April 20th matters. I should note Judge Tilley had the case before that. On April 20th, Ms. Parsonage moved to withdraw, and after hearing from her and the Defendant, I granted the motion and reset it for sentencing on June the 22nd, 2023. Mr. Neyhart was appointed the next day after the hearing -- that is April 21, 2023 -- and on June the 22nd, 2023, there was apparently some miscommunication. Mr. Neyhart did not appear at the sentencing, so we had to reset it. It's been reset for today.

And so it would appear to me that the charges that are the subject of the violations today appeared in the initial -- all of them appeared in the initial 12C filed well before the expiration of the time for supervision; that is, the July 14, 2021, incident that turned out to be Count One, I believe, of the new indictment, as well as the positive drug screens, which were from December of 2019 through April of 2021, all of which were part of the initial 12C.

So it would appear to me that the period of time -- well, let me put it this way. The petition was timely filed before the expiration of the period of supervision; that the Defendant's having absconded would have tolled any period of time from -- during the period of his having absconded, which

would have been from the period of his arrest by Thomasville Police Department in August of 2021 through and until his arrest by Thomasville, and then brought into federal custody on March 22nd, 2022. And that's under 3624. Well, let me see. That's under the case law under absconding.

And then the question from that is whether it's reasonably necessary for the delays since then. A combination of having been agreed to by the Defendant's counsel and the desire to address both cases at one time rendered the delay reasonable, in my view. So I don't know if anybody wants to speak to that.

[JA110-114].

After confirming that the warrant was executed prior to the expiration of the supervised release hearing, the undersigned contended that the operative questions is the reasonableness of the extensions, and that “there’s a significant difference between a two-month consented to extension and it just sitting there indefinitely.” [JA115.] Thus, the undersigned argued that “the delays in this case were not all consented to, and certain large portions of those would render the delay unreasonable. Therefore, the Court would no longer have jurisdiction to impose a sentence.” [JA116.]

In response, the trial judge asserted that he did have jurisdiction and that he found the delays to be reasonably necessary. [JA116-117]. He explained his finding as follows:

[A]nytime there's conduct in a new indictment or a separate proceeding, whether in state court or in federal court, that is the subject of the same basis for a violation of supervision, it seems that it's reasonable to resolve them all at one time. Put another way, it's highly unlikely, in my 15 years on the bench, that a defendant consents to or admits to criminal conduct when there's a pending federal charge for the same conduct, and that's what happened in this case.

So because a new indictment was foreshadowed as coming starting in the spring of 2022, before the expiration of the term of supervision, and

because the indictment didn't get filed until July -- but once it got filed, it was not likely -- even with the pendency of it, or likely pendency of it, it's unlikely that the defendant is going to admit the criminal conduct in a supervised release revocation proceeding that has an effect on a pending indictment; and for that reason, it's reasonable to consider both matters at once. That appears to be what the parties indicated here in this case.

I will say that it is not my practice to set a case indefinitely, and that's what Judge Tilley did on this case. Instead of entering an order continuing it for 60 days, he simply said it's continued until the clerk's office sets a date. I don't do that, and the reason I don't do that is it's an action-forcing event to have another date, and then the parties can come to the Court and ask if they want more time or not to precisely avoid any question in a situation like this. So everybody should understand that's an unusual situation, and that's not my practice in these cases. But I didn't have that case at that point in time.

In any event, I do think it's reasonably necessary to delay the case so that both these matters can be held at once; and, in fact, that's the practice even when Ms. Parsonage was involved. From the moment that the case was pled out in October of 2022, the other case, and then when they were set for sentencing in the spring of 2023, and then continuances were requested, and then new counsel was requested, everybody was handling both cases at once; and new counsel was appointed in both cases at the same time. Give me just a minute. (Pause in the proceedings.)

THE COURT: So 3583(i) provides that the "term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation." That occurred here. In my view, it's reasonably necessary for the delay.

So it may be the Defendant did not expressly consent for a period of 60 days -- or more than 60 days, but the clear import from the Government's motion was that a new indictment was coming, and the parties were awaiting a new indictment to determine what to do next and that these would be handled together. In fact, that was the conduct of the parties throughout the proceeding.

[JA117-118].

After this, there was an exchange between the Court and the undersigned concerning whether Mr. Bowers had actually absconded from the supervision of the Probation Office. The trial court then agreed that the issue of absconding was not relevant for purposes of whether to extend the period of time, “because whether he was or wasn’t in an absconding status all occurred before the expiration of the time of his term of supervision.” [JA122].

The trial judge then proceeded to sentence Mr. Bowers to 18 months on the SRV Petition in M.D.N.C. 1:13-cr-258 consecutive with his sentence in M.D.N.C. 1:22-cr-216. Mr. Bowers’ direct appeals were consolidated and this petition was timely filed after the Fourth Circuit Court of Appeals affirmed the two judgments.

REASONS CERTIORARI SHOULD BE GRANTED

I. The Court Should Grant Certiorari to Establish that Amendment 821 to the United States Sentencing Guidelines Should be Applied Retroactively on Direct Appeal.

The factors to be considered by the trial judge in determining a sentence are set out in 18 U.S.C. § 3553(a), which states in relevant part:

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. 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;
- 2) the need for the sentence imposed—
 - a. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - b. to afford adequate deterrence to criminal conduct;
 - c. to protect the public from further crimes of the defendant;
 - d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- 3) the kinds of sentences available;
- 4) the kinds of sentences and the sentencing range established for – the applicable category of offense committed by the applicable category of defendant as set for in the guidelines...issued by the Sentencing Commission;
- 5) any pertinent policy statement...issued by the Sentencing Commission...;
- 6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- 7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

The trial court must begin the sentencing proceedings by correctly calculating the applicable Guidelines range. See Gall v. United States, 552 U.S. 38, 50 (U.S. 2007). "The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." Id. On review of a federal criminal sentence, the Court

must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.

Gall v. United States, 552 U.S. 38, 51 (2007).

In this case, the district court's calculation of Mr. Bowers' Criminal History Category as IV instead of as III does not conform to the current version of the United States Sentencing Guidelines. Specifically, the two level enhancement for committing the instant offense while under state supervision for a criminal sentence pursuant to U.S.S.G. § 4A1.1(d) has now been replaced by Amendment 821 to the United States Sentencing Guidelines. The current version of U.S.S.G. § 4A1.1(d) would not apply any criminal history points to Mr. Bowers, leaving him with only five points, not seven, resulting in a Criminal History Category of III.

The Fourth Circuit Court of Appeals held that on direct appeal it would not find that the district court erred by not applying Amendment 821 because that amendment was not going to be effective for several months. App. A at 3-4 (citing 18 U.S.C. § 3553(a)(4)(A)(ii)). However, Amendment 821 had gone into effect prior to the briefing on direct appeal.

Because Amendment 821 had been made retroactive and is listed as such in the current version of U.S.S.G. § 1B1.10, it is respectfully contended that the Fourth Circuit should have applied it retroactively on this appeal. See U.S. v. Capers, 61 F.3d 1100, 1109 (4th Cir. 1995). (quoting Braxton v. United States, 500 U.S. 344, 348 (1991)). Thus, for Court to apply the amendment on direct appeal, "U.S.S.G. § 1B1.10 allows for consideration of a reduced sentence only if the amended range is the result of one of the amendments listed in that guideline." Id.²

² Despite the fact that the Amendment at issue in Capers was not given retroactive status in U.S.S.G. § 1B1.10, the Court in that case ultimately found another basis to apply it in U.S.S.G. § 1B1.11(b)(2), finding that it was a clarifying amendment and not a substantive amendment. U.S. v. Capers, 61 F.3d 1100, 1110 (4th Cir. 1995).

The Fourth Circuit did not address Capers in its per curiam opinion in this case. See App. A. To the extent that the undersigned's understanding of Capers may not be shared by the Fourth Circuit and in any event the undersigned brings this argument to the Court in this petition as a good faith argument for extension or modification of existing law. Notably, the fact that a district court has calculated the Sentencing Guidelines in effect at its sentencing pursuant to 18 U.S.C. § 3553(a)(4)(A)(ii)) does not specifically address whether a Court of Appeals should uphold that sentence or remand for resentencing on direct appeal when an Amendment has been made retroactive pursuant to 28 U.S.C. § 994(u) as listed in U.S.S.G. § 1B1.10.

For the above reason, the Court should grant certiorari and hold that the appeals court should have found Mr. Bowers' advisory sentencing guideline was erroneously calculated at the time of the direct appeal in that it should have been based on Offense Level 15, Category III with a resulting range of 24 to 30 months. As such, the sentence is a result of procedural error and the Court should remand Mr. Bower's felony case for resentencing.

II. The Court Should Grant Certiorari to Give Guidance on How Long A District Court May Reasonably Delay Ruling On A Revocation Petition After the Expiration of the Term of supervised Release.

"A district court's power to revoke a term of supervised release or to sanction violations ends when that term expires." United States v. Thompson, 924 F.3d 122, 127 (4th Cir. 2019). A district court's authority to enter a revocation judgment, however, "extends beyond the expiration of the term of supervised release for any period

reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation." 18 U.S.C. § 3583(i).

For this provision to apply, two conditions must be met. The warrant or summons must be issued before the term's expiration, and second, any delay in adjudicating that summons must be reasonably necessary. Thompson, 924 F.3d at 132.

In this case, there was a significant delay in the adjudication of the SRV Petition in M.D.N.C. No. 1:13-cr-458. Although Defendant had initially consented to a 60 day continuance on April 28, 2022, the case dragged on for over a year. Specifically, the defendant did not consent to the time between June 28, 2022 and his request for a continuance on March 2, 2023, a time period of over seven months.

Respectfully, the Court should grant certiorari, hold that this amount of time was not reasonable or reasonably necessary to adjudicate the SRV Petition, find that the district court did not have jurisdiction to render judgment on the case, and vacate the SRV sentence below.

CONCLUSION

For the above stated reasons, Appellant respectfully requests that the Court vacate his sentences, remand the matter to the district court with appropriate instructions, and grant whatsoever other relief the Court may find just and proper.

Respectfully submitted this the 27th day of January, 2025.

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