
No.

**IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA**

GEORGE ANDERSON,
PETITIONER-DEFENDANT

v.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
FIFTH CIRCUIT CASE NO. 16-60832

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court imposed a procedurally and substantively unreasonable sentence.

PARTIES TO THE PROCEEDING

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

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OPINIONS BELOW

The petitioner, Mr. George Anderson, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 11, 2017. The Opinion and Judgment are attached hereto as composite Appendix 1. The opinion of the Court of Appeals for the Fifth Circuit is not reported in the Federal Reporter, but can be found in the Westlaw electronic database at *United States v. Anderson*, No. 16-60832, 2017 WL 4005112 (Sept. 11, 2017). A copy of the unpublished Opinion is attached as Appendix 3.

The district court entered a Judgment reflecting this sentence on December 9, 2016. A copy of the Judgment is attached hereto as Appendix 2.

JURISDICTIONAL STATEMENT

Petitioner, George Anderson, entered a plea of guilty to Title 18, United States Code, § 2250(a). Mr. Anderson was sentenced to 60 months' imprisonment by the Honorable Sharion Aycock, Chief United States District Judge for the Northern District of Mississippi.

The United States Court of Appeals for the Fifth Circuit affirmed in an unpublished *per curiam* opinion filed on September 11, 2017. No petition for rehearing was sought.

This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL STATUTE INVOLVED

U.S. Const. amend. V (Due Process Clause):

“No person shall be ... deprived of life, liberty, or property, without due process of law[.]”

18 U.S.C. § 3553(a)

(a) Factors To Be Considered in Imposing a Sentence.—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; and

(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 sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(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.

STATEMENT OF THE CASE

I. Procedural History

This is an appeal from a final judgment entered by the United States District Court for the Northern District of Mississippi sentencing Mr. Anderson to 60 months. On September 23, 2015, a one count Indictment was returned against Mr. Anderson for failing to register as a sex offender in violation of 18 U.S.C. § 2250(a). Mr. Anderson pled guilty on August 2, 2016 before the district court. At sentencing, the district court sentenced Mr. Anderson to sixty months' imprisonment, an upwards variance from the suggested sentencing Guidelines' range of 33-41 months, followed by ten years of supervised release along with both mandatory and special conditions. Mr. Anderson filed a timely notice of appeal on December 16, 2016.

The Fifth Circuit affirmed the decision on September 11, 2017, *per curiam*, in a three page unpublished opinion.

II. Statement of Facts

Prior to sentencing, defense counsel filed a sentencing memorandum, outlining Mr. Anderson's difficult and tragic childhood. At the sentencing hearing, the district court notified defense counsel that it was considering an upwards variance due to the pre-sentence report's recommendation based upon Mr. Anderson's criminal history. Mr. Anderson addressed the court and apologized for his actions, expressed remorse, and stated he would pay restitution if necessary. The prosecution, while not requesting a variance, noted the pre-sentence report and deferred to the discretion of the court.

In the memorandum and at the sentencing hearing, defense counsel explained that Mr. Anderson grew up without a father figure; his mother cared for him until age 13, when she tragically passed away because of a heart attack. Forced to move to Chicago to live with an estranged uncle, Mr. Anderson essentially became homeless. During those first few years, Mr. Anderson was forced to fend for himself. As a teenager, Mr. Anderson began stealing food to eat which led to a host of trespass and theft charges. At one point, he was shot in the neck, luckily surviving. At 21 years old, he was convicted of aggravated sexual assault, serving 14 years before being released.

Upon release from prison, Mr. Anderson moved home to Mississippi to try and stabilize his life. He learned a few vocational skills that would help him find temporary work, but eventually moved to Massachusetts to live with his girlfriend, hoping that a change of scenery and better job prospects would benefit him in the long run. Mr. Anderson did not update his registration, leading to the current charge.

Defense counsel argued that taking into account his childhood and his sincerity, a within Guidelines range sentence would be sufficient, but not greater than reasonably necessary to satisfy § 3553(a).

The district court noted the case was “pretty complex” due to Mr. Anderson’s criminal history, further noting “it is a charge about noncompliance.” Based upon the totality of the circumstances, specifically noting his lengthy criminal history, the nature of the underlying sexual offense, and his inability to comply, the district court imposed a sentence of 60 months’ imprisonment, varying upwards. The district court

also doubled the supervised release term from the statutory minimum 5 years to 10 years. There was no mention of the mitigation presented during the sentencing phase.

The Fifth Circuit affirmed the sentence, finding no plain error on review of procedural error and that the district court did not abuse its discretion in imposing an upwards varied sentence of 60 months.

REASONS FOR GRANTING THE WRIT

As stated in Rule 10 of the Supreme Court Rules, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.”

Reasonableness is the cornerstone of sentencing law. *Gall* requires the sentencing court to impose a procedurally and substantively reasonable sentence. 552 U.S. 38 (2007). The court must consider the 18 U.S.C. § 3553(a) factors and adequately explain its chosen sentence. *Id.* Defense counsel submitted a sentencing memorandum and provided oral argument at the sentencing hearing. The district court failed to acknowledge any of the mitigation provided prior to sentencing.

Gall also requires sentences to be substantively reasonable and sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. § 3553(a). Mr. Anderson received 60 months’ imprisonment, a sentence almost double the low end of the Guidelines’ range. Fifth Circuit precedent states that a sentence is substantively unreasonable if it “(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006). Based on this, and the court’s failure to acknowledge the mitigation provided, the sentence is substantively unreasonable.

Granting certiorari in this case will provide valuable protection to defendants' due process rights, and will provide valuable guidance to lower courts on proper sentencing methods and what constitutes a reasonable sentence.

I. The district court imposed a procedurally and substantively unreasonable sentence by imposing an overly harsh sentence as it did not account for a factor that should have received significant weight, places too much emphasis on the defendant's criminal history, and represents a clear error of judgment in balancing the sentencing factors.

A. Procedural Error

Prior to *Rita v. United States*, 551 U.S. 338 (2007), the Fifth Circuit held that if a district court imposes a sentence within the properly determined Guidelines range, little explanation is required. *See United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). In *Rita*, this Court indicated that more than a brief statement may be required when a district court is presented with nonfrivolous arguments for a sentence outside the Guidelines. 551 U.S. at 357. Similarly, Fifth Circuit precedent explains that the district court must more thoroughly articulate its reasons when it imposes a non-Guidelines sentence than when it imposes a sentence under authority of the Sentencing Guidelines. *Mares*, 402 F.3d at 519. These reasons should be fact-specific and consistent with the sentencing factors enumerated in section 3553(a). *Id.* The farther a sentence varies from the applicable Guideline sentence, “the more compelling the justification based on factors in section 3553(a)” must be. *United States v. Dean*, 414 F.3d 725, 729 (7th Cir.2005).

§ 3553 sets forth the following factors:

- (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; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

18 U.S.C. § 3553(a)(1)-(2)¹.

In this instance, the district court focused on Mr. Anderson’s criminal history when imposing a sentence almost twice the length of the low end of the Guidelines range. While criminal history is a factor that may be properly considered, the district court failed to consider the mitigation factors offered by defense counsel in balancing it against the criminal history. The district court did not acknowledge defense counsel’s lengthy mitigation which was both submitted by sentencing memorandum and argued orally at the hearing. Defense counsel admitted Mr. Anderson’s criminal history was lengthy, but explained that most of it came from an early, troubled childhood.

The district court imposed a sentence of 60 months, while the Guidelines range was 33-41 months, and ten years of supervised release. The sentence was well above the recommended Guidelines range, and based significantly on Mr. Anderson’s

¹ Other considerations are “the kinds of sentences available,” § 3553(a)(3); the Guidelines, § 3553(a)(4); “any pertinent policy statement” issued by the Sentencing Commission, § 3553(a)(5); “the need to avoid unwarranted sentence disparities,” § 3553(a)(6); and “the need to provide restitution to any victims,” § 3553(a)(7).

criminal history. When explaining the chosen sentence, a sentencing court should discuss the effect of mitigating factors when those factors have a factual basis and recognized legal merit. *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). For example, in *Gomez-Herrera*, it was clear from the record that the district court considered both parties' arguments and evidence regarding defendant's § 3553(a) factors for a within Guidelines sentence. *United States v. Gomez-Herrera*, 523 F.3d 554, 564 (5th Cir. 2008). The court noted that Gomez-Herrera sought a sentence below the Guidelines range based on various factors but stated that it was persuaded by the arguments at the hearing and in the sentencing memos that it should not depart downward from the Guidelines range. *Id.* at 565. The court also concluded that there was no reason to sentence Gomez-Herrera at either extreme of the Guideline range and that it would choose the midpoint. *Id.*

It is unclear from the current record whether the district court properly considered any of the mitigation evidence presented by counsel since the district court failed to acknowledge any of the mitigation evidence presented. Even during the recitation of things considered, nothing was mentioned about mitigation or the sentencing memorandum:

THE COURT: In imposing sentence, the Court has considered the advisory guideline range, the statutory penalties, and the sentencing factors enumerated in 18 U.S.C., Section 3553(a). The Court finds that imposing a sentence outside the advisory guidelines range pursuant to 18 U.S.C. Section 3553(a), would better serve the statutory purposes of sentencing.

No consideration of mitigation was mentioned. At most, the district court noted that Mr. Anderson's case was "pretty complex." Mr. Anderson is currently 48

years old. He has spent the majority of his life homeless, incarcerated, or struggling to make ends meet due to his previous experiences. It has taken more than half of his life to find, but Mr. Anderson finally found stability in his life, a caring relationship with his fiancé, and a better future for employment in Massachusetts. None of this was mentioned or acknowledged by the court. Instead, the district court noted his criminal history and non-compliance with registering which led to the instant offense. Because of the lack of specificity and reasoning behind the non-Guidelines, upwardly varied sentence, the district court committed procedural error. Mr. Anderson requests this Court vacate the sentence and remand for resentencing.

The Fifth Circuit erred by finding no plain error, due to the district court's failure to properly consider the factors. The Fifth Circuit noted the district court did not, in fact, expressly address the mitigating factors set forth in Mr. Anderson's sentencing memorandum. *See Anderson*, No. 16-60832, 2017 WL 4005112, *2 (Sept. 11, 2017).

B. Substantive Reasonableness

Substantive reasonableness is reviewed under an abuse of discretion standard. Where, as here, the district court imposed a non-Guidelines, upwardly varied sentence, this court must determine whether the sentence “unreasonably fails to reflect” the § 3553(a) sentencing factors. *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006). An above-guidelines sentence is unreasonable if it “(1) does not account for a factor that should have received significant weight, (2) gives significant

weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *Id.*

Section 3553(a) provides that, after considering the factors set forth in § 3553(a)(1)-(7), a “court shall impose a sentence sufficient, but not greater than necessary.” Courts of Appeal may consider the degree of variance from the Guidelines range when evaluating the reasonableness of a particular sentence. *Gall*, 552 at 594-95.

In this case, a sentence that is almost twice the low end of the Guidelines range, and 19 months more than the high end is a sentence that is greater than reasonably necessary. Because it is unclear from the record whether there was a proper balancing of § 3553(a) factors, it cannot be determined whether the district court erred in balancing the sentencing factors. *See Smith*, 440 F.3d at 708.

The Fifth Circuit affirmed the sentence, finding the sentence almost double the low end of the guidelines range reasonable.

CONCLUSION

For all of the reasons stated above, Mr. Anderson asks this Court to grant his Petition for Writ of Certiorari. Granting certiorari will afford this Court an opportunity to correct a grave constitutional error.

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