

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

CHALON CHISHOLM,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether a substantively reasonable sentence that falls outside the defendant's Guideline range should be vacated on procedural grounds if the district court erroneously determines the defendant's eligibility (or ineligibility) for a Guidelines "departure"?

PARTIES

Chalon Chisholm is the petitioner; she was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chalon Chisholm respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Chisholm*, 697 Fed. Appx. 835 (5th Cir. September 27, 2017)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on September 9, 2016, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of the opinion affirming the judgment, which was issued on September 27, 2017. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 3553(a) of Title 18 of the United States Code provides:

(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.
- (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.

Section 3742(f)(1) of Title 18 of the United States Code provides:

(f) Decision and Disposition. — If the court of appeals determines that—

- (1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate...

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Chalon Chisholm pleaded guilty to one count of possessing a firearm in violation of 18 U.S.C. §922(g). (ROA.39).¹ A Presentence Report (PSR) noted nine convictions for forgery, theft, DWI, and marijuana possession and trafficking. (ROA.123-129). Six of these were more than 20 years old, and none of them resulted in more than five months actual imprisonment. (ROA.123-129). Although it determined that the Guideline range was 24-30 months imprisonment, the PSR also contained three paragraphs noting the possibility of a sentence above the Guideline under either USSG §4A1.3 and/or USSG §3553(a). (ROA.139, 141).

The defense filed an objection to the PSR's suggestion of an upward departure or variance. (ROA.143-150). As to USSG §4A1.3, trial counsel noted that the PSR failed to state the correct legal standard. (ROA.146). While the PSR suggested a departure because "the defendant's criminal history is not adequately reflected in the Criminal History Category III," (ROA.139), the Guidelines contemplate a departure only when the criminal history is "substantially in excess of" the ordinary case, and only when the criminal history "substantially" under-represents the seriousness of the defendant's criminal history." USSG §5K2.0; USSG §4A1.3. The objection further noted that the text and application notes of USSG §4A1.3 contemplated that a criminal history departure would be based on "serious" offenses. (ROA.146).

The court issued a notice "tentatively" concluding that a sentence in excess of the Guidelines was appropriate. (ROA.48). At sentencing, the district court adopted the PSR, "bearing in mind that the issue of – the possibility of a sentence above the top of the advisory guideline range is still an open question." (ROA.98). Defense counsel offered a lengthy argument against upward departure or variance. (ROA.101-106). Included were several objections to a departure under USSG §4A1.3, including: an argument that the defendant's criminal record was not "extraordinary," an argument

¹ Citations to the record on appeal in the court of appeals are included in hopes that they may be of use to the government in responding to the Petition, or the Court in evaluating it.

that any uncounted convictions were not deliberately disregarded by the Guidelines, an observation about the age of most of the convictions, and an argument that incremental deterrence would call for a sentence within the Guidelines because a Guideline sentence would still be much longer than any prior sentence served by the defendant. (ROA.101-106). The district court nonetheless recited the defendant's criminal history and imposed a sentence of 40 months, ten months in excess of the Guidelines. (ROA.106-109). The defense attorney asked to be heard after the sentence was imposed, but was refused and reprimanded for interrupting, following which the court completed the imposition of sentence and terminated the proceeding.² (ROA.109-111).

B. Appellate Proceedings

On appeal, Petitioner argued that the district court had erred both in overruling his objection to USSG §4A1.3 and in failing to explain the extent of variance.

The court of appeals affirmed. As to the §4A1.3 claim, the court of appeals held that any challenge was mooted by the court's use of §3553(a) to sustain the above-range sentence:

This court recognizes three types of sentences: (1) a sentence within the advisory guidelines range; (2) a “departure” based on the Guidelines; and (3) a non-guidelines sentence or “variance” independent of the Guidelines and based on the 18 U.S.C. § 3553(a) factors. *United States v. Brantley*, 537 F.3d 347, 349 (5th Cir. 2008). To that end, the record reflects that the district court imposed a non-guidelines sentence or variance based on the § 3553(a) factors. Thus, Chisholm's arguments regarding the district court's misapplication of § 4A1.3 are inapposite.

[Appx. A].

²Notably, the same attorney had a pleading unfiled by the same judge in another case, because the judge held it improper to object to a sentence before it was imposed. *See United States v. Carrizales-Menchaca*, 16-11179, Record on Appeal, page 96 (5th Cir. 2017).

REASONS FOR GRANTING THE WRIT

I. This Court should grant the Petition to resolve the disagreement among the circuits as to whether a substantively reasonable sentence that falls outside the defendant's Guideline range should be vacated on procedural grounds if the district court erroneously determines the defendant's eligibility (or ineligibility) for a Guidelines "departure."

A. The circuits are divided.

Before *United States v. Booker*, 543 U.S. 220 (2005), district courts were authorized to sentence outside the range provided by the Federal Sentencing Guidelines only when the case presented:

an aggravating or mitigating 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.

18 U.S.C. §3553(b)(1). Sentences that meet this standard are known as "departures." *See Irizarry v. United States*, 553 U.S. 708, 714 (2008).

After *Booker*, the district court need only impose a sentence that reasonably applies the factors enumerated at 18 U.S.C. §3553(a). *See Booker*, 543 U.S. at 260-262. Sentences outside the Guideline range based solely on the §3553(a) factors are known as "variances." *See Irizarry*, 553 U.S. at 714.

This Court has nonetheless specified certain procedural requirements for federal sentencing proceedings after *Booker*. These requirements are enforced by courts of appeals, who:

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.

Gall v. United States, 552 U.S. 38, 51 (2007). Critically, the district court must begin each sentencing by calculating the Guidelines. *See Gall*, 552 U.S. at 50. That requirement is not merely the holding of this Court, it follows from 18 U.S.C. §3553(a), which includes the Guidelines and Policy Statements as among the sentencing factors the district court must consider before passing sentence. *See* 18 U.S.C. §3553(a)(4),(5).

This raises an interpretive question that has divided the courts of appeals: does the district court have to correctly determine the propriety of a “departure” before selecting the proper sentence under §3553(a)? *See United States v. Motley*, 587 F.3d 1153, 1158 (D.C. Cir. 2009)(“Most (but not all) circuits have held that calculating the correct Guidelines sentence includes taking into account any traditional Guidelines-based departure...”)

The Third and Tenth Circuits answer this question in the affirmative, as they consider departure analysis to be part and parcel of the requirement that district courts apply the Guidelines before proceeding to §3553(a). *See United States v. Friedman*, 658 F.3d 342, 359, 362 (3d Cir. 2011); *United States v. Lofink*, 564 F.3d 232, 238-239 (3rd Cir. 2009); *United States v. Jackson*, 467 F.3d 834, 838-839 (3d Cir. 2006); *United States v. Robertson*, 568 F.3d 1203, 1210-1211 (10th Cir. 2009). These courts thus independently review the district court’s departure analysis, even if it ultimately chooses to impose a substantively reasonable variance. *See Friedman*, 658 F.3d at 361; *Lofink*, 564 F.3d at 242; *United States v. Brown*, 578 F.3d 221, 226-27 (3d Cir. 2009); *Robertson*, 568 F.3d at 1210-1211.

By contrast, the Fourth and Ninth Circuits have concluded that district courts need not undertake a departure analysis before considering the proper sentence under §3553(a). *See United States v. Mohamed*, 459 F.3d 979, 986-987 (9th Cir. 2006); *United States v. Ellis*, 641 F.3d 411, 421 (9th Cir. 2011); *United States v. Vasquez-Cruz*, 692 F.3d 1001, 1005 (9th Cir. 2012); *United States v. Evans*, 526 F.3d 155, 164 (4th Cir. 2008); *United States v. Diosdado-Star*, 630 F.3d 359, 365-366 (4th Cir. 2011). Accordingly, these courts, like, the opinion below³, offer no appellate review of the district court’s departure analysis for substantively reasonable variance sentences. *Mohamed*, 459

³Although the opinion below clearly declines to review the district court’s departure analysis, the Fifth Circuit has issued conflicting opinions on the subject. *Compare United States v. Diaz-Navarro*, 2014 U.S. App. LEXIS 8686, at *2-3 (5th Cir. May 8, 2014)(unpublished)(“The characterization of a sentence is irrelevant ‘if the sentence imposed was reasonable under the totality of the relevant statutory factors.’”)(quoting *Brantley*, 537 F.3d at 349); *with United States v. Primm*, 479 Fed. Appx. 593, 595 (5th Cir. 2012)(unpublished)(“To gauge the sentence's procedural soundness, whether a sentence is a variance or a departure is significant.”)

F.3d at 986-987; *Vasquez-Cruz*, 692 F.3d at 1005; *Evans*, 526 F.3d at 164; *Diosdado-Star*, 630 F.3d at 365-366.

1. Circuits where error in departure analysis constitutes reversible procedural error

The Third Circuit has required district courts to engage in a three-step process in federal sentencings. District courts in that circuit must:

(1) calculate the applicable Guidelines range, (2) formally rule on any departure motions, and (3) exercise its discretion in applying the factors set forth in 18 U.S.C. § 3553(a).

United States v. Grier, 585 F.3d 138, 141-42 (3d Cir. 2009); accord *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006); *Friedman*, 658 F.3d at 359; *Lofink*, 564 F.3d at 242; *Brown*, 578 F.3d at 226-27. Sentencing courts must undertake each of these three steps – including a departure and a variance analysis – “separately and sequentially.” *Friedman*, 658 F.3d at 361 (citing *Lofink*, 564 F.3d at 242; *Brown*, 578 F.3d at 226-27); *Gunter*, 462 F.3d at 247. A district court’s missteps in the departure analysis may constitute reversible error even if the court ultimately settles on an out-of-range sentence pursuant to §3553(a). See *Friedman*, 658 F.3d at 361; *Lofink*, 564 F.3d at 242; *Brown*, 578 F.3d at 226-27. The Third Circuit reasons that the duty to correctly determine the Guideline (imposed by *Gall* and §3553(a)(4)) includes the duty to determine the applicability of a departure. See *Lofink*, 564 F.3d at 238; *Jackson*, 467 F.3d at 838-39. Further, the Third Circuit also believes that the erroneous decision to impose or forego a departure sentence “may presage the sentence ultimately set” under §3553(a), and hence constitute reversible error. See *Jackson*, 467 F.3d at 838-39; *Lofink*, 564 F.3d at 238-39; *Friedman*, 658 F.3d at 362.

The Tenth Circuit has likewise rejected any suggestion “that the Guidelines’ departure provisions [are] superfluous post-*Booker*,” and has instead “steadfastly upheld their vitality and instructed district courts to continue to apply them in ‘appropriate cases.’” *Robertson*, 568 F.3d at 1210-1211 (quoting *United States v. Sierra-Castillo*, 405 F.3d 932, 936 n.2 (10th Cir. 2005), and citing *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1215 (10th Cir. 2008)). Accordingly, the Tenth Circuit independently reviews the propriety of a departure before examining a sentence’s

substantive reasonableness. *See Robertson*, 568 F.3d at 1211.

2. *Circuits that offer no independent review of a district court's departure analysis*

In contrast to the Third and Tenth Circuits, the Ninth Circuit has concluded that “the scheme of downward and upward ‘departures’ [has been] essentially replaced by the requirement that judges impose a ‘reasonable’ sentence.” *Mohamed*, 459 F.3d at 986-987; *accord Ellis*, 641 F.3d at 421; *Vasquez-Cruz*, 692 F.3d at 1005. That court has thus reasoned that “any erroneous application of the departure would be harmless so long as the sentence actually imposed was substantively reasonable.” *Vasquez-Cruz*, 692 F.3d at 1005; *accord Mohamed*, 459 F.3d at 986-987. It has explicitly declined to undertake independent review of a district court’s departure analysis. *See Mohamed*, 459 F.3d at 987 (announcing that it would “elect to review the district court’s application of the advisory sentencing guidelines only insofar as they do not involve departures.”); *Vasquez-Cruz*, 692 F.3d at 1005 (“We have long held that we do not review the procedural correctness of a district court’s discretionary decision to depart from the Guidelines range.”)

Similarly, the Fourth Circuit has held that the parties are due only reasonableness review on appeal, even if the district court has described the sentence imposed as a departure. *See Evans*, 526 F.3d at 164; *Diosdado-Star*, 630 F.3d at 365-366. An error in the district court’s departure analysis is thus not reversible in that circuit, so long as the ultimate sentence is substantively reasonable. *See Evans*, 526 F.3d at 164; *Diosdado-Star*, 630 F.3d at 365-366. Rather, that circuit has held that “the method of deviation from the Guidelines range—whether by a departure or by varying—is irrelevant so long as at least one rationale is justified and reasonable.” *Diosdado-Star*, 630 F.3d at 365-366.

B. The division of authority merits review.

This Court should resolve the division of authority regarding the status of departures following *Booker*. This conflict involves a basic question of federal sentencing and appellate review, potentially presented in thousands of cases. Although it involves the application of sentencing Guidelines, it is more fundamentally about the continuing status of 18 U.S.C. §3553(b)(1), the proper application of 18 U.S.C. §3553(a)(4) and 18 U.S.C. §3553(a)(4), and appellate review under 18

U.S.C. §3742. It is thus a question of statutory interpretation, most appropriately resolved by this Court. Further, the division of authority regarding the post-*Booker* status of departures is longstanding and widely acknowledged. *See Jackson*, 467 F.3d at 839 (“...we disagree with the Courts of Appeals for the Seventh and Ninth Circuits, which have ruled Guidelines departures obsolete in the wake of *Booker*.”)(citing *Mohamed*, 459 F.3d at 985-87, and *United States v. Arnaout*, 431 F.3d 994, 1003-04 (7th Cir. 2005)); *Mohamed*, 459 F.3d at 986 (“We note that other circuits have different approaches to whether ‘departures’ still apply following the Supreme Court’s decision in *Booker* and, if so, how they should be reviewed.”); *Motley*, 587 F.3d at 1158 (noting the split); *Robertson*, 568 F.3d at 1210-1211 (noting the split); Lee Heckman, *The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-Booker World*, 69 Ohio St. L.J. 149, 171-172 (2008)(“One question that remains unanswered in the wake of *Booker* is whether requiring consultation of the Guidelines in the sentencing process necessarily requires consulting traditional departures from the Guidelines. The overwhelming majority of the U.S. circuit courts have answered in the affirmative. A distinct minority comprising the Seventh and Ninth Circuits has answered in the negative.”)

C. This case is an appropriate vehicle.

This case directly presents the question that has divided the courts of appeals: whether it is appropriate to review a district court’s departure analysis if the sentence imposed is substantively reasonable. The opinion below passed on this question explicitly, stating that a challenge to a district court’s departure is “inapposite” when the court ultimately grounds the sentence in §3353(a). [Appx. A]. This is in plain conflict with the reasoning of the Third and Tenth Circuits, which regard an error in the choice to depart from the Guidelines as an independent source of potentially harmful error.

Further, there was likely error in the district court’s application of the Guidelines’ departure provisions. Guideline 4A1.1 sets forth the basic rules for computing a defendant’s criminal history score: three points for offenses resulting in more than 13 months imprisonment, two points for offenses resulting in more than 30 days imprisonment, and one point for all other non-petty

convictions. *See* USSG §4A1.1(a-c). Recognizing that the point system may not fully account for variation in the defendant’s criminal history, the Guidelines also contain a departure provision, authorizing an above-range sentence:

[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes...

USSG §4A1.3(a).

But the Guidelines include multiple filters to preclude the use of departures in less than extraordinary cases. Guideline 4A1.3 calls for departure only when the defendant’s criminal history under-represents the risk of recidivism, and only when that under-representation is **substantial**. *See* USSG §4A1.3(a). Guideline 5K2.0 then states that a circumstance taken into consideration by the defendant’s Guideline range may trigger a departure only “in an exceptional case,” where the circumstance is “present in the offense to a degree substantially in excess of ... that which ordinarily is involved.” USSG §5K2.0 (emphasis added).

Petitioner’s criminal history is not exceptional, still less is it “substantially” more serious than criminal history III. Departures are reserved for cases not anticipated by the Commission in promulgating the relevant Guidelines. *See Koon v. United States*, 518 U.S. 81, 98 (1996)(“Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline.”) Further, the offenses committed by the defendant are not the pattern of “serious” offenses contemplated by USSG §4A1.3. Rather, they consist of small-scale economic and substance abuse offenses.

And even if the defendant’s criminal history might have merited a departure under USSG §4A1.3's correct standard, it does not appear that the district court applied that standard. The PSR suggested a departure because “the defendant's criminal history is not adequately reflected in the Criminal History Category III,” (ROA.139). As trial counsel pointed out in district court, this omitted an import filter – the requirement of “substantial under-representation” – used by the Guidelines to restrain criminal history departure. Yet the district court adopted the PSR, after tentatively holding

the defendant's objection to it "without merit." (ROA.48, 98).

If the law requires the district court to determine correctly whether a departure is appropriate before imposing a non-Guideline sentence, it does not appear that the district court did what was required of it. Rather, it appears that the district court applied the wrong standard to make this determination, and then reached the wrong conclusion. In the Third and Tenth Circuits, this would have ordinarily called for *vacatur*. See *Friedman*, 658 F.3d at 361; *Lofink*, 564 F.3d at 242; *Brown*, 578 F.3d at 226-27; *Robertson*, 568 F.3d at 1210-1211. This case directly implicates an important division of authority, and merits review.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*.

Respectfully submitted this 26th day of December, 2017.

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