

NO. 17-

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 2017

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ORLANDO DEWITT,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**QUESTION PRESENTED**

Whether the writ should issue so that this Court may cabin the definition of substantive reasonableness review.

**LIST OF PARTIES TO PROCEEDING BELOW**

United States of America

Orlando Dewitt

## **TABLE OF CONTENTS**

|                                                                                                                                                                                                                |    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| QUESTION PRESENTED. ....                                                                                                                                                                                       | i  |
| LIST OF PARTIES TO PROCEEDING BELOW. ....                                                                                                                                                                      | ii |
| TABLE OF CASES, STATUTES, AND AUTHORITIES . ....                                                                                                                                                               | iv |
| OPINION BELOW. ....                                                                                                                                                                                            | 1  |
| JURISDICTIONAL GROUNDS.....                                                                                                                                                                                    | 2  |
| CONSTITUTIONAL AND STATUTORY PROVISIONS . ....                                                                                                                                                                 | 3  |
| STATEMENT OF THE CASE. ....                                                                                                                                                                                    | 5  |
| MANNER IN WHICH THE FEDERAL QUESTION WAS<br>RAISED AND DECIDED BELOW. ....                                                                                                                                     | 8  |
| REASON FOR GRANTING THE WRIT.....                                                                                                                                                                              | 9  |
| BY AFFIRMING PETITIONER’S SENTENCE, THE UNITED STATES<br>COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN<br>IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT<br>SHOULD BE SETTLED BY THIS COURT. |    |
| CONCLUSION. ....                                                                                                                                                                                               | 10 |

### APPENDIX:

Appendix 1: *United States v. Orlando Dewitt*. 16-4146, 2017 U.S. App. LEXIS 13969  
(4th Cir. Aug. 1, 2017)(*per curiam*; unpublished)

## **TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

### **CASES**

|                                                              |   |
|--------------------------------------------------------------|---|
| <i>Gall v. United States</i> ,<br>552 U.S. 38 (2007).....    | 9 |
| <i>Mullaney v. Wilbur</i> ,<br>421 U.S. 684 (1975).....      | 8 |
| <i>United States v. Booker</i> ,<br>543 U.S. 220 (2005)..... | 9 |

### **STATUTES AND AUTHORITIES**

|                          |      |
|--------------------------|------|
| 18 U.S.C. § 2250(a)..... | 5    |
| 18 U.S.C. § 3553(a)..... | 3, 6 |
| 18 U.S.C. § 4241. ....   | 5    |
| 28 U.S.C. § 1254(1)..... | 2    |
| U.S.S.G. § 4A1.3.....    | 6-8  |

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit rendered in this case on September 27, 2017.

**OPINION BELOW**

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is found at 697 Fed. Appx. 252 (4th Cir. Sept. 27, 2017)(*per curiam*) and is unpublished.

### **JURISDICTIONAL GROUNDS**

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence issued on September 27, 2017. (Appendix 1, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

18 U.S.C. § 3553(a) provides in pertinent part that:

Imposition of a sentence

(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—

\* \* \* \*

(5) any pertinent policy statement—

(A) 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.

## **STATEMENT OF THE CASE**

In 1993, when he was 17, Wisconsin authorities arrested Petitioner for sexual assault. (J.A. 71 ¶12). He subsequently pled no contest to the charge in a state court. (J.A. 71 ¶12). Because of that conviction, Wisconsin law required that, for the rest of his life, Petitioner register as a sex offender. (J.A. 61). At points over the following years, Petitioner pled guilty in North Dakota and Michigan to failing to register. (J.A. 72 ¶16, 74 ¶24). On a third occasion, back in Wisconsin, he was found guilty of the same offense. (J.A. 73 ¶20).

In 2015, Petitioner was living in Augusta, Georgia. (J.A. 61). In October of that year, the Sheriff's Department went to an address Petitioner had listed as his home residence to verify that he in fact lived there. (J.A. 62 ). The officers did not find him, and, ultimately, Georgia authorities deemed Petitioner to have absconded. (J.A. 62).

In November 2015, Petitioner encountered police in Carolina Beach, North Carolina. (J.A. 62). Shortly thereafter, the authorities learned that he was a convicted sex offender who had not registered as such in North Carolina. (J.A. 62-63, 69-70 ¶5). Petitioner was arrested and subsequently indicted federally for violating the Sex Offender Registration and Notification Act ("SORNA). *See* 18 U.S.C. § 2250(a). (J.A. 9, 62-63, 69-70 ¶5).

At his arraignment, Petitioner asked the district court for a continuance so that he and his attorney could determine whether to move for a mental-health evaluation. (J.A. 16). Petitioner subsequently did ask to be evaluated, and the court committed him for that purpose. *See* 18 U.S.C. § 4241. (J.A. 16). After being found competent, Petitioner, returned to court and pled guilty to the charge in the indictment. (J.A. 40, 53, 60-61).

Following the plea, the probation officer calculated Petitioner's imprisonment range under the sentencing guidelines at 33 to 41 months. (J.A. 79 ¶66). Neither Petitioner nor the government objected to the calculation. (J.A. 81). The government, though, did move for an upward departure under U.S.S.G. § 4A1.3. (J.A. 82). The government asked, in the alternative, for an upward variance pursuant to 18 U.S.C. §3553(a). (J.A. 88). Petitioner's case came on for sentencing on January 26, 2017. (J.A. 17).

At the hearing, counsel for Petitioner told the court his client had "not shown any recidivism toward sexually offending" nor, effectively, any other felony conduct other than failing to register. (J.A. 21). Counsel said that Petitioner, since childhood, had experienced a life of "people important to him being taken away," forcing him to move from one home to another. (J.A. 22). Petitioner "just didn't have anywhere to set down any roots," counsel said. (J.A. 22). Petitioner's mother abandoned him in his infancy, and he grew up in foster homes. (J.A. 22). The first several of these homes were bad situations, involving physical and suspected sexual abuse. (J.A. 22).

At the age of seven, Petitioner moved in with a family in Indiana, and, for the next five years, "had a stable upbringing, a loving family support." (J.A. 22-23). When he was 12, however, his foster mother died. (J.A. 23). That same year, Petitioner learned he had a sister and met her, and then he never saw her again. (J.A. 23).

At the age of 15, Petitioner was sent to a group home in Wisconsin; two years later, in 1993, he picked up the conviction would follow him the rest of his life and require that he register wherever he went. (J.A. 23). The sexual assault conviction, the attorney said, came from his client's "one and only hands-on sexual offense." (J.A. 23). Citing the psychiatric evaluation,

counsel told the court Petitioner “present[ed] less with acute psychiatric symptoms and more with characterological symptoms, basically how he's reacted to the circumstances of his life.” (J.A. 24).

Counsel conceded that Petitioner “continually and habitually” broke the law by moving between states without telling the authorities. (J.A. 25). Counsel said his client had not had a “strong attachment to people or places [and] not even [to] family.” (J.A. 25). He did not worry Petitioner would reoffend by committing another sexual assault, counsel said; rather, his only concern was that Petitioner would continue to change residences without registering. (J.A. 26).

Counsel said he hoped that with a “better psychological diagnosis and better treatment,” Petitioner would cease violating the registration law. (J.A. 26). The attorney asked that the court consider Petitioner’s “psychological characteristics, any needed treatment, but also that the [c]ourt consider he really has not had any sort of a violent offense in almost 25 years, and . . . that says something . . . a great deal about him.” (J.A. 26).

Government counsel, in turn, told the court that while Petitioner had not been convicted of a hands-on sexual offense in 25 years, police in North Carolina had arrested him for “‘targeting’ children at skate parks, convenien[ce] stores, [and] restaurants[.]” (J.A. 27). The government said it did not view Petitioner as merely “someone who innocently just travels from state to state and just can’t follow the rules.” (J.A. 27). “He is a dangerous person,” the government argued. (J.A. 27).

Petitioner, the government continued, was someone “the SORNA Act was created to protect the public from[.]” (J.A. 28). He was, effectively, “a poster child of why we have the sex offender registration laws, to monitor and track defendants such as this[.]” (J.A. 28-29). The

government said either an upward departure under § 4A1.3 an upward variance was necessary given the likelihood Petitioner would commit other crimes in the future. (J.A. 30). In response, Petitioner's attorney emphasized his client had gone almost a quarter century without committing a hands-on sexual offense. (J.A. 30).

The district court denied the government's motion for an upward departure or variance, but it sentenced Petitioner to imprisonment for 41 months, the top of the guideline range. (J.A. 34, 41). The court also announced the same imprisonment term as an alternative, variant sentence. (J.A. 36).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 46). In that forum, Petitioner argued that, albeit within the advisory guideline reason, his sentence nonetheless had been substantively unreasonable. In particular, Petitioner cited his hard upbringing and the long period of time that had passed since his only hands-on sexual offense—an offense committed when he was a teenager—as warranting a sentence lower than the one the district court imposed. In an opinion issued on September 27, 2017, the Fourth Circuit affirmed Petitioner's sentence as reasonable.

**MANNER IN WHICH THE FEDERAL QUESTION  
WAS RAISED AND DECIDED BELOW**

The question whether Petitioner's within-guidelines sentence was substantively reasonable was presented to the Fourth Circuit. The Court of Appeals affirmed Petitioner's sentence. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration. *See generally, Mullaney v. Wilbur*, 421 U.S. 684 (1975).

## **REASONS FOR GRANTING THE WRIT**

BY AFFIRMING PETITIONER’S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court decided that the standard of review for sentences imposed by the district court is reasonableness. *Id.* at 261-262.

Reasonableness review has a procedural and a substantive component. *Gall v. United States*, 552 U.S. 38, 51 (2007). Review for substantive reasonableness takes into account the “totality of the circumstances, including the extent of any variance from the Guidelines range.” *Id.*

Petitioner received a within-guideline sentence that he argued was substantively unreasonable. The Fourth Circuit affirmed the sentence on the most generalized of bases. Petitioner respectfully submits that the “totality of the circumstances” test for reviewing substantive reasonableness has, in practice, proven so amorphous as to effectively constitute no standard.

Petitioner asks that the writ issue so that this Court may draw a fuller picture of what does and not constitute substantive reasonableness.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 26th day of December, 2017.

Respectfully submitted,  
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