

No. \_\_\_\_\_

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In The  
Supreme Court of the United States

LADARRIUS O'BRIAN WALKER,

*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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*Dated: March 5, 2018*

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## **QUESTION PRESENTED FOR REVIEW**

- I. Whether The Court Should Grant Certiorari to Resolve A Split of Authority as to the Circumstances Under Which an Appeal Waiver May Be Enforced.

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## **OPINION AND ORDER BELOW**

The order appealed from is located at the CM/ECF Docket of the United States Court of Appeals for the Fourth Circuit Case No. 17-4217, Docket Entry No. 28, entered on December 6, 2017, which judgment upheld the judgment and sentence of the Middle District of North Carolina on April 10, 2017, for a criminal violation of 18 U.S.C. § 922(g). The Fourth Circuit also issued an unpublished per curiam opinion in No. 17-4217 at Docket Entry No. 28. (Appendix A)

## **JURISDICTIONAL STATEMENT**

This petition for writ of certiorari is from the order and judgment entered on December 6, 2017 in the above referenced case by the Fourth Circuit Court of Appeals upholding the judgment of the United States District Court for the Middle District of North Carolina. Accordingly, the Court has jurisdiction over this petition for writ of certiorari matter 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**

On July 25, 2016, Mr. Walker was named in a single count indictment which charged him with possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). [J.A. at 7.]<sup>1</sup>

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<sup>1</sup> The Joint Appendix references for the factual statements in this Petition for Certiorari are taken from the Joint Appendix filed with the Fourth Circuit Court of Appeals in Case No. 17-4217.

On October 5, 2016, Mr. Walker pled guilty to the indictment pursuant to a written Plea Agreement. [J.A. at 8-15.] A sentencing hearing was scheduled for January 18, 2017. [J.A. at 3.]

On December 12, 2016, the first draft of a Pre-Sentence Report was served via CM/ECF upon the Government and Mr. Walker's previous counsel, Mr. Greg Davis. Mr. Davis did not file any objections on behalf of Mr. Walker, and the final Pre-Sentence Report was filed on January 4, 2017. [J.A. at 4, 94-120.]

On January 16, 2017, Mr. Davis filed a motion to withdraw, which the Court granted. The Court rescheduled Mr. Walker's sentencing hearing for March 30, 2017. [J.A. at 4.] On February 21, 2017, the Court rescheduled the sentencing hearing for March 27, 2017. [J.A. at 5.]

On March 17, 2017, the Probation Office issued a revised Final Pre-Sentence Report. [J.A. at 5, 121-48.]

On March 27, 2017, the district court conducted a sentencing hearing and announced a sentence of 90 months of imprisonment, three years of supervised release, and a \$100.00 special assessment.

On April 10, 2017, the written Judgment was entered. [J.A. at 85-91.] Also on April 10, 2017, Mr. Walker appealed to the Fourth Circuit Court of Appeals. [J.A. at 92-93.]

On December 6, 2017, the Fourth Circuit Court of Appeals issued its judgment affirming the Middle District of North Carolina.

## STATEMENT OF THE FACTS

The Revised Final PSR describes the facts surrounding Mr. Walker's conviction as follows:

3. Ladarrius O'Brian Walker was convicted on October 16, 2013, of Felony Sell and/or Deliver Cocaine (12CRS72313), in Guilford County Superior Court, High Point, NC. Defendant Walker received a sentence of 17 to 30 months imprisonment.

4. On March 1, 2016, the Greensboro 911 Dispatch relayed information from a 911 caller that an individual with a black coat and short hair, sitting in the driver's seat of a car with Virginia plates, had a gun. An officer responded to the scene of 900 Lowdermilk Street and parked his unmarked patrol car at an angle in a semi-circular driveway, thereby preventing the car with Virginia plates from leaving the area of a small apartment complex.

5. As the officer approached the vehicle, he observed the driver of the vehicle turn and reach frantically toward the empty passenger seat. The officer also observed the driver of the car, later identified as Ladarrius O'Brian Walker, continued to disobey commands to put his hands on his face. Defendant Walker reached toward a pink purse in the front passenger seat, and attempted to fold the opening of the purse down to cover the purse's contents. Additional officers arrived to the scene of 900 Lowdermilk Street to assist. As officers secured the defendant and the car's other occupants, officers looked down into the passenger seat and observed the back strap of a Glock pistol, through the opening of the pink purse. Officers then assisted the driver and the two backseat passengers out of the vehicle. A search of the purse yielded a loaded **Glock, model 17, 9mm semi-automatic pistol** (serial# MUK655). The Glock contained **a high-capacity 31-round magazine loaded with approximately 29 live rounds** of mixed hollow-point and full metal jacket ammunition. *(According to information provided by the government, the firearm was not reported stolen.)*

6. Defendant Walker initially lied about his name, age, and birthdate. The officer determined the false identity to be the defendant's cousin1, Timothy Walker. The officer verified Defendant Walker's identity using his tattoos, and confronted the defendant about his initial false identification. Defendant Walker subsequently correctly identified himself. The defendant asked the officer what his charges would be and the officer informed the defendant he would likely be charged with

possession of a firearm by a felon. Defendant Walker responded, “so it’s illegal for me to be around a gun even if it’s not mine.”

7. The officers identified the backseat passengers as Kala Bell and Robert Napper. Ms. Bell conveyed the pink purse was her purse and indicated that it was initially in the back seat with her when the officer first arrived. Ms. Bell told officers Defendant Walker brandished the pistol at another black female during an argument over a bottle of liquor after dropping off the front seat passenger at the Lowdermilk apartments. Ms. Bell advised officers the firearm in her pink purse did not belong to her. The other backseat passenger, Mr. Napper, was similarly compliant and told police that he had a small amount of marijuana in his pocket. Mr. Napper received a citation for possessing a misdemeanor weight of marijuana. Officers did not arrest Mr. Napper and Ms. Bell and they were released from the scene.

8. The officer then conducted a brief interview with the 911 caller at the Lowdermilk apartments. The caller told the officer her daughter ran into the family’s apartment, slamming the front door behind her. The caller believed her daughter was under the influence of alcohol or drugs. The daughter yelled something about “a bottle,” but the caller was not clear if there was a disagreement between her daughter and the occupants of the car. Prior to calling 911, the caller walked outside to the car. She observed two males and a female sitting in the car. The caller told the driver that her daughter did not have “a bottle” and asked that the driver leave the area. The driver of the car, a black male, with short hair, wearing a black coat, pointed a gun at her, and stated, “give us the bottle.” The caller then went inside and called 911. The caller provided a description of the individual who pointed the firearm at her to 911, which matched the description of Defendant Walker and the clothes he was wearing.

[J.A. at 96-97; 123-24.]

As noted in the Statement of the Case, Mr. Walker pled guilty to the indictment pursuant to a written plea, and a pre-sentence report (“PSR”) was prepared on the regular schedule of the Middle District of North Carolina. [J.A. at 4, 94-120.]

The initial Final PSR calculated Mr. Walker’s Advisory Guideline Range based on an Offense Level of 19 and a criminal history category of VI, resulting in a range

of 63 to 78 months. [J.A. at 118.] The Probation Officer recommended a sentence at the high end of this range. [J.A. at 118.] It also stated in Paragraph 87 that “[t]he probation officer has not identified any factors which, under 18 U.S.C. § 3553(a), would warrant a sentence outside of the advisory guideline range.” [J.A. at 117.]

After the Final PSR was filed, Mr. Walker’s previous trial counsel moved to withdraw and the sentencing hearing was rescheduled. This resulted from an incident which occurred at Alamance County Detention Center in the cell block where Mr. Walker was being housed. Mr. Walker and several other federal inmates were alleged to have assaulted another individual.

Also as a result of this incident, the Probation Office revised the PSR to take away credit for acceptance of responsibility. The revised Final PSR stated:

**Acceptance of Responsibility:** The defendant stated he agrees with the Factual Basis. However, investigative reports allege the defendant assaulted another individual while in custody in the Alamance County Detention Center, Graham, NC. The defendant has failed to voluntarily withdrawal from criminal conduct; therefore, the defendant does not qualify for the offense level reduction for Acceptance of Responsibility. USSG § 3E1.1. However, the sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility. USSG § 3E1.1, comment. (n.5).

[J.A. at 126.] The revised Final PSR recalculated Mr. Walker’s Advisory Guideline Range without acceptance of responsibility as 84 to 105 months, based on an Offense Level of 22 and a Criminal History Category of VI. [J.A. at 145.] The revised Final Pre-Sentence Report also reflects an objection to this recommendation based upon a telephone call with the undersigned. [J.A. at 147.]

The undersigned submitted a Position Paper and Sentencing Memorandum on Mr. Walker's behalf. [J.A. at 148-155.] The undersigned argued for a sentence at the bottom of his initial range of 63 months. [J.A. at 153-54.]

At sentencing, Mr. Walker persisted in his objection concerning the acceptance of responsibility issue. After hearing evidence concerning what occurred at the Alamance County Detention Center, the district court sustained Mr. Walker's objection and allowed him three levels for acceptance of responsibility. [J.A. at 69.] This resulted in returning to the initial advisory guideline range of 63 to 78 months. [J.A. at 70.]

In addressing the appropriate sentence under the factors under 18 U.S.C. § 3553(a), the undersigned asked the district court to sentence Mr. Walker at the low end of his sentence. [J.A. at 72-73, 153-54], arguing that a sentence of this amount would be approximately three and a half times longer than his longest previous sentence of 17 months. [J.A. at 153-54.] The Government, in turn, asked for a sentence of 78 months at the high end of the advisory guideline range. [J.A. at 74-75.]

The trial judge, however, imposed an upward variance of 12 months, sentencing Mr. Walker to 90 months of incarceration, three years of supervised release, and a \$100.00 special assessment. [J.A. at 80.] He explained his reasoning behind the sentence as follows:

I'm going to impose an upward variance in this case, and I am going to explain the reasons for that in just a moment. I'm going to impose 90 months in this case. That's an upward variance from the high end of the guidelines from 78 up to another 12 months above that, and the reasons are as follows:

The nature and circumstances of the offense here are substantial. The Defendant had a loaded Glock Model 17, 9mm semiautomatic pistol. It

was a high-capacity firearm, had 29 live rounds in it with hollow point and full metal jacket ammunition. Now, I know that the guideline range was enhanced for that, but according to paragraph 8 as well, the Defendant pointed a gun at somebody over a bottle of apparently alcohol, and it was described to be the Defendant who pointed the gun at somebody in order to get a bottle of alcohol.

When the Defendant was stopped by law enforcement, he lied to the law enforcement officers when he was stopped, and then he tried to disclaim any ownership of the firearm, arguing that -- wondering whether it's illegal for him to be around a gun "even it's not mine," and it was his gun in this case. In any event, it's a possession offense.

What concerns me significantly is the need to afford adequate deterrence in this case. I counted a total of 44 convictions for breaking and entering. They had various punishments, usually in the range of 4 to 5 months when they were consolidated, but at least nine separate sentences were imposed ranging from 4 to 5 months on the one hand to 5 to 6 months on the other, to 9 to 11 months, to 8 to 19 months, and then 17 to 30 months, which is what the Defendant indicated.

So it's true that the largest sentence he ever received, apparently active time, was roughly 17 months, but total time for all these sentences is significant, in the neighborhood of 60 months or more. And in most of the cases, probation was revoked and he was given active time on these sentences. So there was a constant pattern, Mr. Walker, of Courts imposing penalties and then you totally ignoring the Court and, worse yet, when you are put on probation, ignoring the Court and then having your probation revoked and then sentenced to active time. Frequently people ask me for a second chance, and I would agree everybody is entitled to a second chance. You've had so many multiple chances that you have shown an unwillingness up to this point in time to abide by the rule of law in this country.

I've considered the need for this sentence to reflect the seriousness of this offense. It's a possession offense, but it involved an active use of the firearm, as I've indicated, as well -- by pointing it at somebody while it was loaded, as well as the nature of the firearm itself, and to promote respect for the law, indicating how this offense now comes after all of these multiple offenses that you've -- convictions that you had.

As I've said, I've considered the need to afford adequate deterrence. You basically have devoted your life up to the young age of 27 of being a career criminal, which is difficult to do. You've had so many breaking and enterings, and I've considered the need, above all of that, to protect the

public because you've shown a constant proclivity toward violating the law, taking things that aren't yours, and harming others, and now you're doing it with a firearm.

So I have as well considered your age. You are a young man at age 27. You don't have a GED. You've indicated you want to study while in prison and obtain your GED, and I recommend that you do that. That's going to help you when you get out. You have no significant employment history, which may be a reflection of the fact that you're constantly in and out of prison or taking things from other people, and you have multiple drug use. I've considered that not for the fact or length of your sentence, but for the recommendations I will make to the Bureau of Prisons.

So having said all of that, I have arrived at the sentence of 90 months, which is an upward variance in this case.

[J.A. at 77-80.]

The Fourth Circuit's unpublished opinion noted the impact of its prior precedent on this case, stating that:

Although “[w]e must defer to the district court and affirm a reasonable sentence, even if we would have imposed something different,” we will vacate a variance sentence if the district court’s “stated reasoning is inadequate or if it relies on improper factors.” United States v. Bolton, 858 F.3d 905, 915 (4th Cir. 2017) (internal quotation marks and citations omitted).

December 6, 2017 Opinion at 3, United States v. Walker, No. 17-4217.

The Fourth Circuit then stated:

We have reviewed the record and conclude that the district court did not abuse its discretion in sentencing Walker, and his sentence is substantively reasonable. Taking into account the totality of the circumstances, including the extent of the variance, the district court provided adequate reasoning for its sentence and did not rely on improper factors. We therefore give due deference to the district court’s decision.

Accordingly, we affirm the district court’s judgment.

Id.

This petition follows.

## STATEMENT OF REASONS FOR GRANTING CERTIORARI

### **I. The Court Should Grant Certiorari to Provide Further Clarification as to the Requirements for Upward Variances from the United States Sentencing Guidelines To Be Upheld as Substantively Reasonable When Their Stated Basis is Already Included in the Calculations of the Advisory Guideline Range.**

In 1984, Congress established the U.S. Sentencing Commission in order to address “[f]undamental and widespread dissatisfaction” with the then-prevailing regime of discretionary sentencing. Mistretta v. United States, 488 U.S. 361, 365–366 (1989). It charged the Commission with reducing “the great variation among sentences imposed by different judges upon similarly situated offenders” and the resulting “uncertainty as to the time [each] offender would spend in prison.” Mistretta, 488 U.S., at 366, 109 S. Ct. 647. The Sentencing Guidelines are the product of that mandate. The United States Sentencing Guidelines ensure “uniformity in sentencing ... imposed by different federal courts for similar criminal conduct” and “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.” Rita v. United States, 551 U.S. 338, 349 (2007) (internal quotation marks omitted).

The Guidelines today play a central role in federal sentencing. They are, “in a real sense[,] the basis for the sentence.” Molina–Martinez v. United States, 578 U.S. —, —, 136 S. Ct. 1338, 1345 (2016) (quoting Peugh v. United States, 569 U.S. 530, 542 (2013)). Although no longer binding on federal courts, see United States v. Booker, 543 U.S. 220, 245 (2005), the Guidelines nonetheless “provide the framework for the tens of thousands of federal sentencing proceedings that occur each year,”

Molina–Martinez, 578 U.S., at —, 136 S. Ct., at 1342. A district court must “begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” Gall v. United States, 552 U.S. 38, 49–50, (2007). The court must entertain the parties' arguments and consider the factors set forth in 18 U.S.C. § 3553(a) as possible grounds for deviation from the Guidelines range, 552 U.S., at 49–50, and “may not presume the ... range is reasonable,” id., at 50.

But it must explain any deviation from the range on the record, and it must “ensure that the justification is sufficiently compelling to support the degree of the variance.” Id. A district court that incorrectly calculates the Guidelines range commits reversible procedural error, see Gall, 552 U.S., at 51.

The importance of the Guidelines makes them “not only the starting point for most federal sentencing proceedings but also the lodestar.” Molina–Martinez, 578 U.S., at —, 136 S. Ct., at 1346. In most cases, it is the range set by the Guidelines, not the minimum or maximum term of imprisonment set by statute, that specifies the number of years a defendant will spend in prison. District courts impose a sentence within the Guidelines (or below the Guidelines based on a Government motion) over 80% of the time. Id. Thus, the Guidelines are, “in a real sense[,] the basis for the sentence” imposed by the district court. Molina–Martinez, 578 U.S., at —, 136 S. Ct., at 1345 (quoting Peugh, 569 U.S., at 542, 133 S. Ct., at 2083; emphasis deleted).

On appeal of criminal sentences in the Fourth Circuit Court of Appeals, the Court reviews legal questions, including the interpretation of the guidelines, de novo,

while factual findings are reviewed for clear error. United States v. Caplinger, 339 F.3d 226, 233 (4th Cir. 2003). The Court’s review takes place in two sequential steps. First, the Court must ensure that the district court did not commit a significant procedural error in sentencing. If it did, the Court must vacate and remand for resentencing. United States v. Wilkinson, 590 F.3d 259, 269 (4th Cir. 2010). If the Court concludes no significant procedural error occurred, the Court then considers the substantive reasonableness of the sentence under an abuse of discretion standard. Id. The Court considers the substantive reasonableness of the sentence only after it has determined it to be procedurally reasonable. United States v. Carter, 564 F.3d 325, 328 (4th Cir. 2009).

The factors to be considered by the Court 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).

“Reviewing the reasonableness of the resulting sentence is a ‘complex and nuanced’ task that “requir[es] us to consider the extent to which the sentence imposed by the district court comports with the various, and sometimes competing, goals of § 3553(a).” U.S. v. Tucker, 473 F.3d 556, 561 (4<sup>th</sup> Cir. 2007) (quoting U.S. v. Moreland, 473 F.3d 424, 433 (4<sup>th</sup> Cir. 2006).) “The reasonableness of a sentence ultimately will turn on the particular factors of each case.” Id.

The “district court’s job is not to impose a ‘reasonable’ sentence. Rather, a district court’s mandate is to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of § 3553(a)[]”. Reasonableness is the appellate standard of review in judging whether a district court has accomplished its task.” United States v. Davenport, 445 F.3d 366, 370 (4<sup>th</sup> Cir. 2006) (quoting United States v. Foreman, 436 F.3d 638, 644 n.1 (6<sup>th</sup> Cir. 2006).

The overarching standard of review for unreasonableness will not depend on whether the reviewing court agrees with the particular sentence selected, but whether the sentence was selected pursuant to a reasoned process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law. United States v. Green, 436 F.3d 449, 457 (4<sup>th</sup> Cir. 2006) (internal citation omitted).

[A] sentencing court has flexibility in fashioning a sentence outside of the Guidelines range." United States v. Diosdado-Star, 630 F.3d 359, 364 (4th Cir. 2011) (citing Rita v. United States, 551 U.S. 338, 356 (2007)). When the district court imposes either a variance or a departure sentence, this Court "consider[s] whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range." United States v. Hernandez-Villanueva, 473 F.3d 118, 123 (4th Cir. 2007). A larger variance requires more substantial justification. Diosdado-Star, 630 F.3d at 366. The court will affirm a variant sentence if "the § 3553(a) factors, on the whole, justified the sentence" imposed. Id. at 367 (internal quotation marks omitted).

In Tucker, the Fourth Circuit held that a 144 month sentence for embezzlement was substantively unreasonable in a case where the defendant's Advisory Sentencing Guideline Range was 24 to 30 months. Tucker, 473 F.3d at 557-65. The Court held that "although Tucker's risk of recidivism could justify a variance sentence, the district court did not adequately justify the extent of the variance imposed." Id. at 557.

Shortly after Tucker was decided, the Court issued its opinion in United States v. Gall, 552 U.S. 38 (2007). In Gall, the Supreme Court held that in reviewing substantive reasonableness, the Court "may consider the extent of the deviation [from the guidelines range], but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." Gall, 552 U.S. at 51.

With respect to this case, while the fact that "a variance sentence deviates significantly from the advisory Guidelines range . . . does not alone render it

presumptively unreasonable." United States v. Rivera-Santana, 668 F.3d 95, 106 (4th Cir. 2012), it is not clear from the Fourth Circuit's opaque review process whether there is any meaningful ability to substantively review a sentence, even when it varies significantly above the advisory Guideline range.

Here, the district court gave excessive weight to several factors and did not render a fair and just result in light of the relevant facts and law. Specifically, the district court gave excess weight to the fact Mr. Walker possessed a firearm with a high capacity magazine and the perceived need to deter Mr. Walker from future illegal conduct. Both of these factors were adequately addressed in Mr. Walker's sentencing guideline range.

With respect to the high capacity magazine, the district court's first question when discussing the Section 3553(a) sentencing factors, asked almost immediately, was "What was he doing with a high-capacity magazine and what's he doing with hollow points and full metal jackets?" [J.A. at 72.] Later, when discussing the rationale for a variance upward, the district court returned to the nature of the magazine and ammunition. [J.A. at 77-78.]

Mr. Walker's sentencing guideline range was already enhanced for possession of a high capacity magazine. [J.A. at 125.] Thus, the guideline range took into account the fact that Mr. Walker's firearm had a high capacity magazine. As to the question of why he had a high capacity magazine with hollow points and full metal jackets, the answer given at the sentencing hearing was that this is how the gun came when Mr. Walker obtained it. [J.A. at 72.] Further, while not in the record, the

normal ammunition used with a Glock pistol is hollow points, while the full metal jacket ammunition being usually used for target practice. The fact that these two types of ammunition were mixed in one magazine tends to indicate that Mr. Walker did not pay particular attention to the ammunition contained therein, because they are usually not mixed.

With respect to the need to deter Mr. Walker, the district court did note his extensive criminal history, which involved repeated stints of incarceration, the longest being seventeen months. [J.A. at 78-79.] To the undersigned's argument that a 63 month sentence in federal prison would have a different deterrence effect than his previous state incarcerations, the district court noted that if all of them were added, Mr. Walker's total state incarceration was in the neighborhood of 60 months. [J.A. at 78.]

In this case, however, the district judge did not make any findings concerning the adequacy or inadequacy of Mr. Walker's criminal history category of VI. [J.A. at 77-80.] Thus, the seriousness of his prior conduct and recidivism likelihood was taken into account by this factor, as well as the enhanced offense level of 22. As a result, the Probation Officer did not identify any rationale for departing or varying from the Advisory Guideline Range. [J.A. at 117.]

Finally, the district court addressed statements by the 911 caller to the effect that Mr. Walker had brandished the firearm. [J.A. at 77-78.] While the Government had also brought up this aspect of the case, it did so in arguing that the Court should impose a sentence within the Advisory Guideline Range. It did not take the position

that this was a basis, in whole or in part, for departing upward from the Advisory Guideline Range. [J.A. at 74-76.]

On appeal, the Fourth Circuit did not address how, if at all, district courts are permitted to take sentencing factors already included in the calculations of the advisory Sentencing Guideline range while fashioning an upward variance. There does not appear to be significant guidance on this issue in the Court's current caselaw as to how to determine whether an upward variance is substantively reasonable under 18 U.S.C. § 3553(a) factors when it is based on factors already included in the guidelines. Accordingly, the Court should grant this petition for certiorari to provide further clarification on this category of sentences, find that the sentence imposed in this case is substantively unreasonable, and remand for resentencing.

### **CONCLUSION**

For the above stated reasons, Petitioner respectfully requests that the Court grant this petition for Writ of Certiorari to the Fourth Circuit Court of Appeals, find that the sentence imposed in this case is substantively unreasonable, remand for resentencing, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 5<sup>th</sup> day of March, 2018.

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