

No. _____

In the

Supreme Court of the United States

Michael Wayne Bogar,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a 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 Petitioner's sentence was substantively unreasonable?

PARTIES TO THE PROCEEDING

Petitioner is Michael Wayne Bogar, who was the Defendant-Petitioner in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS.....	1
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THIS PETITION.....	5
I. The district court imposed an unreasonable sentence upon Petitioner	5
CONCLUSION.....	7
APPENDICES	
Fifth Circuit Opinion.....	App. A
Judgment of the District Court.....	App. B

Table of Authorities

Cases

<i>Gall v. United States</i> , 552 U.S. 38 (2007)	5
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	5
<i>United States v. Cisneros-Gutierrez</i> , 517 F.3d 751 (5th Cir. 2008)	5
<i>United States v. Fraga</i> , 704 F.3d 432 (5th Cir. 2013)	6
<i>United States v. Rajwani</i> , 476 F.3d 243, 250 (5th Cir. 2007)	6
<i>United States v. Smith</i> , 440 F.3d 704, 708 (5th Cir. 2006)	5-6

Statutes

18 U.S.C. § 1341	2
18 U.S.C. § 3553(a)	3, 4, 6, 7
18 U.S.C. § 3231	1
28 U.S.C. § 1291	1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Wayne Bogar seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is *United States v. Bogar*, 711 Fed. App'x 246 (5th Cir. 2018). It is reprinted in Appendix A to this Petition. The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on February 14, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves 18 U.S.C. § 3553(a), which 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.[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.

Tex. Pen. Code § 3553(a).

STATEMENT OF THE CASE

On July 2, 2016, Michael Wayne Bogar, Petitioner, entered First Convenience Bank in Fort Worth. (ROA.228). He informed the teller that a robbery was taking place and told the teller to give him the money. (ROA.228). The teller provided him with \$4,207. (ROA.228). As a result of an anonymous tip, Mr. Bogar was arrested later that month. (ROA.228-29). During his interrogation, Mr. Bogar admitted to robbing the bank as well as other banks in the past. (ROA.228-29).

A grand jury indicted Mr. Bogar on one count of Bank Robbery, in violation of 18 U.S.C. § 2113(a). (ROA.8-10). Mr. Bogar pleaded guilty on November 9, 2016. (ROA.164). The presentence report fixed Mr. Bogar's total offense level at 29 and his criminal history category at VI. (ROA.233,241). Accordingly, his advisory sentence range was 151 to 188 months. (ROA.247). On March 30, 2017, the district court issued an order, stating as follows:

After having reviewed the presentence report pertaining to defendant, MICHAEL WAYNE BOGAR, defendant's objections thereto, and the other sentencing items, the court tentatively has concluded that, except to the extent accepted by the probation officer, all objections made by defendant to the presentence report and addendum are without merit, and that a sentence of imprisonment significantly above the top of the advisory guideline imprisonment range would be appropriate for essentially those reasons given by the probation officer in paragraphs 138 and 140 of the presentence report. The parties should take such tentative conclusions into account in making decisions as to what presentations to make at the sentencing hearing.

(ROA.121). At Mr. Bogar's sentencing hearing, the district court maintained its conclusion that an upward variance was warranted, focusing entirely on Mr. Bogar's

criminal history and characterization of Mr. Bogar as a violent person. The court concluded its recitation of Mr. Bogar's criminal history with the following remarks:

It would be hard to find a criminal history and, particularly, a history of violence and threat to kill people that would match yours, so I'm satisfied that a sentence above the top of the advisory guideline range is absolutely essential to adequately and appropriately address all the factors the Court should consider in sentencing under 18 United States Code Section 3553(a).

Frankly, if the Court had the availability of a sentence above 240 months, the Court probably would be going above that. That is the maximum for the offense of conviction in your case, so that's the sentence I'm going to impose.

(ROA.197-98). After the district court imposed the 240-month sentence, which was the maximum authorized by statute, defense counsel objected to the sentence as substantively and procedurally unreasonable. (ROA.202). The Fifth Circuit affirmed and this Petition follows.

REASONS FOR GRANTING THIS PETITION

I. The district court imposed an unreasonable sentence on Petitioner.

Circuit courts exist, in part, to correct mistakes of substantive reasonableness when they occur. *Rita v. United States*, 551 U.S. 338, 354 (2007). Moreover, appellate review of a sentencing decision for “reasonableness” is proper regardless of whether the sentence is within or outside of the guidelines range. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). But when a sentence is above-guidelines, the district court does not benefit from a presumption of reasonableness. *See Rita*, 551 U.S. at 347.

An above-Guidelines sentence is unreasonable when 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). Here, the district court abused its discretion when it gave Petitioner a statutory maximum sentence, well above the advisory sentencing range, based solely on Petitioner’s criminal history. (ROA.193-98). In doing so, the district court failed to properly account for other aspects of Mr. Bogar’s history and characteristics, specifically: the staleness of his prior convictions, his past success in betting himself both through education and employment, and his age at the time of sentencing.

First, Mr. Bogar’s criminal history was predominately from many years prior to the instant offense. Many of his offenses, in fact, were nearly 40 years old and only counted toward Mr. Bogar’s criminal history category by a slim margin. (*See*

ROA.235-38). Even his most recent convictions were nearly 25 years old. (*See* ROA.239-41). Second, while Mr. Bogar has served a good deal of time behind bars, he has continued to try to better himself. He received an education while in prison and acquired a job upon his release. (ROA.190). Third, although Mr. Bogar committed two prior “crimes of violence” for purposes of the career offender sentencing enhancement, his conduct was almost never actually violent. Although there were threats, no one was seriously harmed by Mr. Bogar. (*See* ROA.191-92). This is relevant because it mitigates the notion that Mr. Bogar is a dangerous or violent person, which is the view held by the district court. (*See* ROA.193). Fourth, Mr. Bogar was 56 years old at the time of his sentencing. (ROA.225). A 240-month sentence places him well within his seventies upon release, even with credit for good time. This is a relevant characteristic of Petitioner that the district court paid little heed when arriving at its sentence.

Courts also evaluate whether the “degree of the departure or the sentence as a whole is unreasonable.” *United States v. Rajwani*, 476 F.3d 243, 250 (5th Cir. 2007), *modified on other grounds*, 479 F.3d 904 (5th Cir. 2007). Here, the PSR’s guideline range was 151 to 188 months. (ROA.247). Yet the district court sentenced Petitioner to 240 months, which is years above the guidelines range. (ROA.198). Under the totality of the circumstances, this was unreasonable. Justice does not require him to suffer an enhanced sentence here.

CONCLUSION

This Court should grant this Petition and order briefing on the merits.

Respectfully submitted,

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