

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2017

No.

RICK E. BROWN
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

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May 21, 2018

QUESTIONS PRESENTED

Following Mr. Brown's trial and conviction for home health care fraud, the case proceeded to a sentencing hearing, during which the district court emphasized general deterrence as a significant sentencing consideration. In considering general deterrence, the district court relied upon two unsubstantiated assumptions: that a severe prison sentence is necessary to deter would-be white-collar offenders, despite an abundance of empirical research demonstrating certainty of conviction and punishment, not length of punishment, as the primary deterrent; and that white-collar offenders face a low probability of detection, despite a drastic increase in home health care fraud prosecutions.

In affirming the district court's reliance on unfounded assumptions in sentencing Mr. Brown, the Seventh Circuit disregarded *Townsend v. Burke*, 334 U.S. 736 (1948), where this Court concluded that due process guarantees the right to be sentenced on the basis of accurate information; and *Gall v. United States*, 552 U.S. 38 (2007), where this Court ruled that a court must conduct an individualized sentencing assessment.

Mr. Brown's case presents the following questions to this Court:

1. Whether a district court violates due process when its consideration of a statutory sentencing factor is based upon unreliable assumptions.

2. Whether a district court violates due process when it fails to conduct an individualized assessment of a statutory sentencing factor.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Mary C. Talaga was a defendant in the district court and an appellant below, and Roger A. Lucero, M.D., was a defendant in the district court.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Introduction	2
Proceedings in the District Court	3
Proceedings in the Court of Appeals	9
REASONS FOR GRANTING THE PETITION	10
A. The district court’s general deterrence analysis, which was premised upon speculative assumptions about white-collar offenders, conflicts with this Court’s precedent regarding the due process right to be sentenced based on accurate and reliable information.....	10
B. The district court failed to conduct an individualized assessment when it considered general deterrence.....	14
CONCLUSION.....	17

APPENDIX.....	following page 17
<i>United States v. Brown</i> , 880 F.3d 399 (7th Cir. 2018)	A
Judicial Sentencing of Rick E. Brown	B

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Brown v. United States</i> , No. 17A1094.....	1
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	i, 14
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	10
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	15
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948)	i, 10
<i>United States v. Adams</i> , 873 F.3d 512 (6th Cir. 2017)	12, 13
<i>United States v. Brown</i> , 880 F.3d 399 (7th Cir. 2018)	<i>passim</i>
<i>United States v. Warner</i> , 792 F.3d 847 (7th Cir. 2015).....	9, 12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....	1-2
---------------------------	-----

STATUTES

18 U.S.C. § 1035(a)	4
18 U.S.C. § 1347.....	4
18 U.S.C. § 1349.....	4
18 U.S.C. § 3553(a)	<i>passim</i>
28 U.S.C. § 1254(1)	1

OTHER AUTHORITIES

Daniel S. Nagin, <i>Deterrence in the Twenty-First Century</i> , 42 <i>Crime & Just.</i> 199, 206 (2013) (quoting Beccaria, Cesare. 1986. <i>On Crimes and Punishments</i> . Translated by Henry Paolucci. New York: Macmillan. (Originally published in 1764))	11
Peter J. Henning, <i>Is Deterrence Relevant in Sentencing White-Collar Criminals?</i> , 61 <i>Wayne L. Rev.</i> 27, 47 (2015)	11
A. Mitchell Polinsky & Steven Shavell, <i>On the Disutility and Discounting of Imprisonment and the Theory of Deterrence</i> , 28 <i>J. LEGAL STUD.</i> 1, 12 (1999)	11
Sally S. Simpson & Christopher S. Koper, <i>Deterring Corporate Crime</i> , 30 <i>Criminology</i> 347, 348 (1992)	11
Carlton Gunn & Myra Sun, <i>Sometimes the Cure is Worse Than the Disease: The One-Way White-Collar Sentencing Ratchet</i> , 38 <i>HUM. RTS.</i> 9, 12 (2011)	11
USA Today, <i>Health care fraud prosecutions on pace to rise 85%</i> , August 29, 2011, https://usatoday30.usatoday.com/news/washington/story/2011-08-29/Health-care-fraud-prosecutions-on-pace-to-rise-85/50180282/1	14
DOJ, <i>National Medicare Fraud Takedown Results in Charges Against 243 Individuals for Approximately \$712 Million in False Billing</i> , June 18, 2015, https://www.justice.gov/opa/pr/national-medicare-fraud-takedown-results-charges-against-243-individuals-approximately-712	14

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rick E. Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying relief is reported at *United States v. Brown*, 880 F.3d 399 (7th Cir. 2018), and is reprinted in the appendix to this petition.¹

JURISDICTION

The Court of Appeals entered its judgment on January 19, 2018. Mr. Brown timely moved for an extension to file a certiorari petition. He was given leave to file on or before May 21, 2018. *Brown v. United States*, No. 17A1094. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

¹ Attached as Pet. App. A.

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

Title 18, United States Code, Section 3553 provides in relevant part:

(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—

. . . .

(2) the need for the sentence imposed—

. . . .

(B) to afford adequate deterrence to criminal conduct

STATEMENT OF THE CASE

Introduction

General deterrence was a central issue during Rick E. Brown's sentencing hearing. At sentencing, the government claimed that there was a considerable need for general deterrence with respect to home health care fraud.² The government insisted that fostering deterrence of would-be health care fraudsters depended upon the length of the sanction imposed against Mr. Brown.³ Mr. Brown, however, explained that studies demonstrate that general

² See Judicial Sentencing of Rick E. Brown, attached as Pet. App. B., at R.71.

³ *Id.* at R.72.

deterrence is driven not by length of sentence but rather certainty of punishment.

Relying on the government's unsupported arguments, the district court highlighted general deterrence as a crucial sentencing consideration.⁴ But the district court's consideration of general deterrence was premised upon two unfounded assumptions: (1) that lengthy prison sentences are necessary to deter white-collar offenders; and (2) that white-collar offenders face a low probability of detection. Nothing in the record supports either assumption. The district court's reliance on these two unfounded assumptions about general deterrence failed to satisfy the due process requirement that a court conduct an individualized sentencing analysis based on accurate and reliable information.

Proceedings in the District Court

In 2006, Mr. Brown was president of Home Care America, Inc., a company that managed administrative matters for Medicall Physicians Group, Ltd ("Medicall"). Medicall, which provided health care services to homebound patients, also employed Dr. Roger A. Lucero, who served as its medical director, and Mary C. Talaga, who joined the company in 2007 as its medical biller.

⁴ *Id.* at R.100.

In 2015, a grand jury returned a superseding indictment against Mr. Brown, Dr. Lucero, and Ms. Talaga for one count of conspiring to commit health care fraud, in violation of 18 U.S.C. § 1349, six counts of health care fraud, in violation of 18 U.S.C. § 1347 (with only Mr. Brown and Ms. Talaga charged in counts Six and Seven), one count of concealing a material fact in connection with payment for health care services, in violation of 18 U.S.C. § 1035(a), and two counts of making a false statement in a matter involving a health care benefit program, in violation of 18 U.S.C. § 1035(a).

The government alleged that between January 2007 and December 2011, Mr. Brown, Ms. Talaga, and Dr. Lucero conspired to commit Medicare fraud, and participated in a fraudulent scheme by submitting fraudulent Medicare claims for deceased patients, as well as claims for medical services that were never provided. The government further alleged that in submitting the Medicare claims, the defendants failed to provide supporting documentation, provided documentation falsified by Dr. Lucero, and provided documentation where Mr. Brown forged a physician's signature. The government also alleged that from January 2010 to December 2011, the defendants submitted claims to Medicare with false information.

Mr. Brown and Ms. Talaga proceeded to a jury trial on all ten counts. The jury found Mr. Brown and Ms. Talaga guilty of all charges. Mr. Brown's sentencing hearing was held on September 4, 2015.

The government sought a sentence of 188 months imprisonment. At the sentencing hearing, the government argued that Mr. Brown intentionally defrauded Medicare, failed to accept responsibility, and had advantages in life that exacerbated his culpability.⁵ The government, after noting “it may be true . . . that specific deterrence” is of limited concern in the case, asserted that there was a “substantial and overwhelming need for general deterrence” in home health care fraud.⁶ The government stressed that health care is “riddled with fraud in Chicago and across the country,” and that Medicare “imposed a moratorium on additional companies” joining the program in Chicago.⁷ The government then argued that persons committing health care fraud, as opposed to “run-of-the-mill” criminals (such as drug offenders), weigh the benefits of their schemes against the severity of a potential sentence.⁸ Additionally, the government asserted that people in the health care industry “are watching law enforcement activity and paying attention,” before stating that “there have been a number of searches and arrests done in the home healthcare area.”⁹ During these searches and arrests, according to the

⁵ Pet. App. B. at R.70.

⁶ *Id.* at R.71.

⁷ *Id.*

⁸ *Id.* at R.72.

⁹ *Id.*

government, law enforcement personnel regularly discovered press releases regarding other searches and arrests in the home health care industry.¹⁰

Mr. Brown requested the court impose a sentence substantially below the guideline range. As support for this request, defense counsel detailed Mr. Brown’s difficult, often chaotic, childhood; his subsequent distinguished career in the Air Force; his time as a medic and later transition into home health care; and his volunteer work and devotion as a father.¹¹ Further, Mr. Brown—as well as his employer, daughter, and a former Medcall employee—addressed the court, and supporting documents were provided on Mr. Brown’s behalf, including twenty-six letters from family, friends, and associates; copies of Mr. Brown’s numerous military awards; fifteen letters of appreciation from his former patients; magazine articles about Mr. Brown’s contributions to home health care; and a variety of other documents detailing his volunteer service and dedication to his family.

With respect to specific deterrence, defense counsel highlighted Mr. Brown’s lack of criminal history, age, and compliance on pretrial release as evidence of his low risk for recidivism. Turning to general deterrence, defense counsel explained that 18 U.S.C. § 3553(a) “only requires adequate

¹⁰ *Id.*

¹¹ *Id.* at R.49-52.

deterrence,” and emphasized that studies show certainty of punishment, rather than severity, promotes general deterrence.¹² Continuing, defense counsel explained that “when the public is able to know that people who commit Medicare fraud will get caught and will be punished, that’s the kind of message that deters, not the fact that a person who committed Medicare fraud got X amount of years in prison.”¹³

The district court determined that the total offense level was thirty-two, with a criminal history category I, resulting in an advisory guidelines range of 121 to 151 months imprisonment.¹⁴ The district court sentenced Mr. Brown to 87 months on counts 1 through 7, to be served concurrently.¹⁵ For counts 8 through 10, the district court sentence Mr. Brown to 60 months, to be served concurrently with each other and counts 1 through 7.¹⁶

In explaining the length of the sentence, the district court noted that “anything less than 87 months” would not be sufficient to fulfill the purposes under section 3553(a).¹⁷ The district court provided several reasons for

¹² *Id.* at R.61.

¹³ *Id.*

¹⁴ *Id.* at R.45.

¹⁵ *Id.* at R.111.

¹⁶ *Id.*

¹⁷ *Id.* at R.105.

declining to impose a less severe sentence: the duration of the scheme and the amount of loss; Mr. Brown's lack of acceptance of responsibility; and deterrence.¹⁸

With respect to deterrence, the district court noted that specific deterrence was not an important factor in the case, given Mr. Brown's age and lack of prior criminal history.¹⁹ The district court, however, described general deterrence as a "significant factor" in the case.²⁰ The district court explained that would-be offenders in the medical field "have to know, that the penalties are severe, particularly given the low likelihood of getting caught."²¹ The district court said that "the sentence imposed here is far more likely to have a deterrent effect on Mr. Brown's cohorts . . . in the medical profession, than a sentence in a drug case or illegal re-entry case."²² Adopting the government's reasoning, the district court stated that medical professionals "engage in a cost/benefit analysis."²³ The district court further explained that given the "low probability of getting caught . . . the sanction has to be serious. It has to be

¹⁸ *Id.* at R.105-06.

¹⁹ *Id.* at R.101.

²⁰ *Id.* at R.100.

²¹ *Id.*

²² *Id.* at R.105.

²³ *Id.*

real, if there's any hope of ensuring that . . . they realize that the cost will outweigh the benefits.”²⁴

Proceedings in the Court of Appeals

Mr. Brown appealed, arguing that the district court's consideration of general deterrence, which was rooted in the court's baseless assumptions about white-collar offenders, violated his right to an individualized sentencing analysis based on accurate and reliable information. The United States Court of Appeals for the Seventh Circuit affirmed the district court.

The Seventh Circuit reasoned that the district court properly considered general deterrence in the context of Mr. Brown's case. In particular, the Seventh Circuit explained that the district court appropriately concluded that white-collar offenders engage in a cost benefit analysis, and that deterrence of these types of offenders depends upon a serious penalty given the low probability of detection. Further, quoting its decision in *United States v. Warner*, 792 F.3d 847, 860-61 (7th Cir. 2015), the Seventh Circuit noted that it “previously endorsed the idea that white-collar criminals ‘act rationally, calculating and comparing the risks and the rewards before deciding whether to engage in criminal activity.’” *United States v. Brown*, 880 F.3d 399, 405 (7th Cir. 2018). The Seventh Circuit also noted that the district court was “entitled

²⁴ *Id.* at R.105-06.

to accept the penal philosophy embodied' in the Guidelines that societal goals are served by increasing fraud sentences to reflect the amount of loss, as opposed to imposing only nominal sentences." *Id.* at 409.

REASONS FOR GRANTING THE PETITION

A. The district court's general deterrence analysis, which was premised upon speculative assumptions about white-collar offenders, conflicts with this Court's precedent regarding the due process right to be sentenced based on accurate and reliable information.

"[S]entencing is a critical stage of the criminal proceeding" *Gardner v. Florida*, 430 U.S. 349, 358 (1977). An indispensable constitutional safeguard at sentencing is the accuracy and reliability of the information guiding the court's decision. In *Townsend v. Burke*, 334 U.S. 736, 741 (1948), this Court concluded that due process guarantees the right to be sentenced on the basis of accurate information. Indeed, the "sentencing process . . . must satisfy the requirements of the Due Process Clause." *Gardner*, 430 U.S. at 358. But the sentencing process here, where the district court's general deterrence analysis was based upon unfounded assumptions, flouts this Court's precedent. As noted above, the unfounded assumptions that rendered the district court's sentencing analysis unconstitutional were the court's belief that (1) a severe custodial penalty was required to promote general deterrence; and (2) white-collar offenders face a low probability of detection.

First, the district court’s belief that a severe prison sentence was necessary to deter white-collar offenders is contradicted by literature dating back to the 18th century. For example, in 1764, Cesare Beccaria, a legal philosopher whose seminal writings helped establish modern deterrence theory, “observed that ‘one of the greatest curbs on crime is not the cruelty of punishments, but their infallibility The certainty of punishment even if moderate will always make a stronger impression.’”²⁵ Beccaria’s prescient conclusion—that certainty, not severity, of punishment is the primary deterrent—has since been reinforced in evidence-based literature. Such studies²⁶ demonstrate that the district court grounded its understanding of general deterrence (and therefore its sentencing analysis) on unfounded assumptions.

²⁵ Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 206 (2013) (quoting Beccaria, Cesare. 1986. *On Crimes and Punishments*. Translated by Henry Paolucci. New York: Macmillan. (Originally published in 1764)).

²⁶ See Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 61 Wayne L. Rev. 27, 47 (2015) (“Research shows, however, that the deterrent effect of punishment is minimal for both street crimes and white-collar offenses, while the likelihood of detection and swift adjudication has a far greater impact.”); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 12 (1999) (“[F]or individuals who commit white-collar crimes, the disutility of being in prison at all may be substantial and the stigma and loss of earning power may depend relatively little on the length of imprisonment. Thus, such individuals are likely to be risk preferring in imprisonment, which suggests that less-than-maximal sanctions, combined with relatively high probabilities of apprehension, may be optimal.”); Sally S. Simpson & Christopher S. Koper, *Deterring Corporate Crime*, 30 Criminology 347, 348 (1992) (“[C]ertainty of sanction is more important than severity.”); Carlton Gunn & Myra Sun, *Sometimes the Cure is Worse Than the Disease: The One-Way White-Collar Sentencing Ratchet*, 38 HUM. RTS. 9, 12 (2011) (“A wealth of studies suggest, perhaps especially in the case of white-collar offenders but also more generally, that it is the certainty of punishment, i.e., the certainty of being caught, that deters more than the extent of punishment once caught.”).

The Seventh Circuit’s opinion in Mr. Brown’s case further demonstrates that the district court’s beliefs about white-collar offenders were grounded on assumptions. As explained above, in announcing its approval of the district court’s views, the Seventh Circuit quoted its decision in *Warner*: “We previously have endorsed the idea that white-collar criminals ‘act rationally, calculating and comparing the risks and the rewards before deciding whether to engage in criminal activity.’” *Brown*, 880 F.3d at 405 (quoting *Warner*, 792 F.3d at 860-61). But the language immediately preceding this quote makes clear that the Seventh Circuit has recognized that the “rational white-collar offender” is merely an assumption: “White collar criminals seem like prime candidates for general deterrence because they (*presumably*) act rationally” *Warner*, 792 F.3d at 860 (internal quotation marks and citation omitted) (emphasis added). Despite this recognition, the Seventh Circuit affirmed the district court’s reliance upon the assumption, disregarding this Court’s requirement that accurate and reliable information be the basis of sentencing determinations.

Unlike the Seventh Circuit in Mr. Brown’s case, the Sixth Circuit, when faced with unsubstantiated assumptions at sentencing, adhered to this Court’s due process jurisprudence. In *United States v. Adams*, 873 F.3d 512 (6th Cir. 2017), the Sixth Circuit concluded that the district court violated due process “when it incorporated [] unreliable information in its sentencing decision”

Id. at 519. Specifically, the district court imposed an eighteen month custodial sentence based on the government’s “unsubstantiated assertion” that “this length of time was required for a drug addict to successfully battle his addiction.” *Id.* at 519, 523. The Sixth Circuit reasoned that this misinformation was an “important factor” in the district court’s sentencing determination. *Id.* at 518.

In Mr. Brown’s case, as in *Adams*, the district court adopted the government’s unsupported argument; incorporated unsubstantiated assumptions into its sentencing analysis; and considered the unfounded assumptions as important factors in its sentencing decision. The parallels between this case and *Adams* further demonstrate that Mr. Brown was denied due process when the district court imposed a sentence premised upon the belief that a severe prison sentence was required “if there’s any hope of ensuring”²⁷ deterrence of others.

The second reason the district court’s deterrence analysis conflicts with due process of law was its reliance on the belief that white-collar offenders face a low probability of detection. This assumption contradicts the drastic increase in health care fraud prosecutions prior to Mr. Brown’s sentencing. At sentencing, the government alluded to the heightened law enforcement efforts

²⁷ Pet. App. B., R.105-06.

surrounding home health care fraud: “[T]here have been a number of searches and arrests done in the home health care area.”²⁸ These type of law enforcement initiatives, as the government explained, were also the subject of press releases. Despite these increased law enforcement efforts and the publicity they generated,²⁹ the district court cited a low probability of detection as a basis for its general deterrence analysis.

B. The district court failed to conduct an individualized assessment when it considered general deterrence.

In *Gall v. United States*, 552 U.S. 38, 51 (2007), this Court explained that, among other things, “failing to consider the 3553(a) factors . . . or failing to adequately explain the chosen sentence” constitutes a significant procedural error. At sentencing, a district court must “make an individualized assessment based on the facts presented.” *Id.* at 50. To carry out an individualized assessment, the district court must apply the 3553(a) factors to the specific facts and circumstances of the case before the court. And, the district court “should set forth enough to satisfy the appellate court that [it] has considered

²⁸ Pet. App. B., R.72.

²⁹ See USA Today, *Health care fraud prosecutions on pace to rise 85%*, August 29, 2011. Accessed at <https://usatoday30.usatoday.com/news/washington/story/2011-08-29/Health-care-fraud-prosecutions-on-pace-to-rise-85/50180282/1> on March 22, 2018; DOJ, *National Medicare Fraud Takedown Results in Charges Against 243 Individuals for Approximately \$712 Million in False Billing*, June 18, 2015. Accessed at <https://www.justice.gov/opa/pr/national-medicare-fraud-takedown-results-charges-against-243-individuals-approximately-712> on March 22, 2018.

the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007).

Here, the district court did not undertake an individualized assessment when it considered general deterrence. Specifically, the district court (1) disregarded (in fact, never even mentioned) Mr. Brown's general deterrence argument; (2) failed to provide support for its assumptions about white-collar offenders; and (3) relied upon assumptions about white-collar offenders that were inconsistent with reality and empirical research.

First, the district court never acknowledged Mr. Brown's argument that certainty of punishment is the primary deterrent. Instead, the court merely adopted the government's assertion that deterring would-be white-collar offenders required imposition of a severe prison sentence on Mr. Brown. Next, the district court failed to tie this belief to any corroborative information—from within the record or otherwise. Similarly lacking in support was the district court's belief that home health care fraudsters faced a low probability of detection. Finally, the district court's assumptions were not only devoid of support, but were also divorced from the reality of the drastic increase in home health care prosecutions and at odds with evidenced-based literature which has repeatedly recognized certainty, as opposed to severity, of punishment as the principal deterrent.

The district court highlighted general deterrence as a significant factor in its sentencing determination. In considering general deterrence, the district court relied upon unfounded assumptions about white-collar offenders and failed to conduct an individualized assessment. Because the district court's general deterrence analysis was premised on inaccurate and unreliable information and lacked the hallmarks of an individualized assessment, Mr. Brown was denied due process of law.

CONCLUSION

For the reasons detailed above, the petition for a writ of certiorari should be granted.

Dated May 21, 2018, at Chicago, Illinois.

Respectfully submitted,

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