Oral argument not yet scheduled

Nos. 17-5904/17-5905/17-5906

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Stephen Murray Mitchell,
Defendant-Appellee/Cross-Appellant,

v.

United States of America,
Plaintiff-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Western District of Tennessee

Nos. 2:99-cr-20272 / 2:17-cv-02341 (Mays, J.)

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT STEPHEN MURRAY MITCHELL

Amit R. Vora
Brian Wolfman
Georgetown Law
Appellate Courts Immersion Clinic
600 New Jersey Avenue NW, Suite 312
Washington, DC 20001
(202) 662-9557
arv46@georgetown.edu

Counsel for Defendant-Appellee/Cross-Appellant

Table of Contents

Table of Authorities

Cases

Statutes

Introduction

In this cross appeal, Mitchell does not challenge the district court's decision to grant his habeas motion and vacate his sentence under 28 U.S.C. § 2255. Instead, he argues that the court erred in two ways when it ruled that "Mitchell is sentenced to time served, to be followed by a three-year period of supervised release." *See* Op. 44. First, the court erred in sentencing Mitchell to "time served." The *time* Mitchell *served* in prison was seventeen years—that is, seven years more than the maximum ten-year sentence he could have received absent the invalidated Armed Career Criminal Act ("ACCA") enhancement. *See* Mitchell Opening Br. 47–49. Second, the court erred in summarily reimposing the three-year supervised release term that was part of Mitchell's seventeen-year-old vacated sentence. Presuming (without explanation) that he deserves the same three-year supervised release term now that he deserved seventeen years ago was an abuse of discretion. *See id.* at 41–47.

Argument

I. At Mitchell's request, counsel asks this Court for a limited remand directing the district court to clarify Mitchell's "time served" sentence.

The Government has stated: "If this Court does not rule for the United States on its appeal, then the United States submits the Court should vacate and remand to the district court for the imposition of a judgment reflecting a 10-year sentence—the default maximum sentence for an 18 U.S.C. § 922(g) violation." *See* Gov't Third Br. 16. So, the Government has conceded that the district court erred in sentencing Mitchell

to "time served." One point of contention remains, however. Mitchell maintains that it would be improper for the court on remand to mechanically rule that his sentence was the default maximum of ten years. Rather, Mitchell requests that the court on remand properly calculate his enhancement-free sentence. *See* Mitchell Opening Br. 47–49.

II. The district court erred in summarily reimposing Mitchell's three-year supervised release term.

A. The district court offered no rationale for imposing the same supervised release term that a different court had imposed seventeen years ago, in conflict with the requirement to justify sentencing decisions and the equitable nature of habeas relief.

The Government observes that a district court has broad discretion to fashion an appropriate Section 2255 remedy. *See* Gov't Third Br. 16–17. But even broad discretion is limited, and the Government offers no authority for the proposition that the wide latitude afforded judges to craft Section 2255 relief negates the bedrock requirement to justify sentencing decisions. *See* 18 U.S.C. § 3553(c) (requiring the judge to "state in open court the reasons for [her] imposition of the particular sentence"). Holding otherwise—that is, "reflexively presum[ing] that the learned judge appropriately exercised his discretion and considered all of the relevant [sentencing] factors"—would "risk turning abuse of discretion review into merely a 'rubber stamp.'" *United States v. Mathis-Gardner*, 783 F.3d 1286, 1288–89 (D.C. Cir. 2015).

This Court has "made clear that the requirement of an adequate explanation applies to the district court's determination to impose supervised release to the same extent that it applies to a determination regarding the length of a custodial term." *United*

States v. Solano-Rosales, 781 F.3d 345, 351–52 (6th Cir. 2015); *see also United States v. Inman,* 666 F.3d 1001, 1004 (6th Cir. 2012) ("The record does not demonstrate that the district court considered any of the pertinent § 3553(a) factors when it imposed the term of supervised release … . Without proper analysis and an explanation for the length of the supervised release term chosen, we cannot review the reasonableness of the sentence as imposed."). A sentencing explanation for supervised released not only facilitates "meaningful appellate review," but it also "promote[s] the perception of fair sentencing." *Gall v. United States*, 552 U.S. 38, 50 (2007). "Confidence in a judge's use of reason underlies the public's trust in the judicial institution," and a "public statement of those reasons helps provide the public with the assurance that creates that trust." *Rita v. United States*, 551 U.S. 338, 356 (2007).

In *United States v. O'Georgia*, 569 F.3d 281 (6th Cir. 2009), for example, this Court reversed a summary reimposition of a one-year supervised release term and remanded for an adequate explanation. *Id.* at 288–89. Although the district court had first imposed the term when the Sentencing Guidelines were mandatory, by the time of resentencing, the Guidelines had become advisory. *Id.* The court was thus required to supply an explanation reflecting "consideration of whether the now-advisory period of supervised release [was] appropriate." *Id.* Here, similarly, rather than silently adopting a seventeen-year-old sentencing explanation, the court was required to demonstrate that it had considered Mitchell's dramatically changed circumstance. *See United States v. Johnson*, 877 F.3d 993, 998 (11th Cir. 2017) ("Without any indication from the Court, it would be

unacceptable speculation to impart sentencing considerations from 1997 to this case.").

True, in some cases, little explanation is necessary because the reason for the sentence is obvious from the record. One such case is *Chavez-Meza v. United States*, 585 U.S. — , 2018 WL 3013811 (June 18, 2018). There, the defendant was sentenced to 135 months, the bottom of the Guidelines range for his offense. *Id.* at *4. After the Sentencing Commission reduced the range, the defendant moved to reduce the sentence to 108 months, the bottom of the new range. *Id.* In lowering the sentence to 114 months, the district judge entered the order on a form certifying that he had considered the defendant's motion, the Section 3553(a) factors, and the relevant Guidelines policy statement. *Id.* The Supreme Court held that no further explanation was needed because that judge "was the same judge who had sentenced petitioner originally," and "[t]he record as a whole strongly suggest[ed] that the judge originally believed that, given petitioner's conduct, 135 months was an appropriately high sentence." *Id.* at *6. "So it [was] unsurprising that the judge considered a sentence somewhat higher than the bottom of the reduced range to be appropriate." *Id.*

But here, the district court did not even give a minimal, *Chavez-Meza*-level justification for Mitchell's supervised release term. The court gave no justification whatsoever. And the court's reason for reimposing Mitchell's supervised release term cannot be gleaned from the record. A different judge imposed that term on him seventeen years ago under drastically different circumstances.

The Government's suggestion here—that the district court's Section 2255

discretion empowers the court to abrogate its duty to justify Mitchell's supervised release term—contravenes the very reason for that discretion: equity. A court has leeway to shape Section 2255 relief because "habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). Access to flexible remedial power enables the court to tailor its Section 2255 remedy to the particular injustice at issue. But disabling the "requirement of adequate explanation," *Solano-Rosales*, 781 F.3d at 351–52, serves no equitable purpose at all.

Ajan v. United States, 731 F.3d 629 (6th Cir. 2013), is instructive. There, the defendant was convicted and sentenced under several counts. *Id.* at 632. He filed a Section 2255 motion to set aside one count. *Id.* In granting him habeas relief, the district court vacated the sentence on the invalidated count but—without explanation—reimposed the remaining sentences. *Id.* at 633. The Government insisted that the court was "well aware of its general authority to vary a sentence and purposefully [chose] to reimpose the same term on Ajan's remaining counts." *Id.* at 632. But this Court declined the Government's invitation to construe Section 2255 discretion, however broad, as a license for the district court to remain silent. "Without more explanation," it was unclear whether the district court knew that it was within its movant-friendly power to lower Ajan's remaining sentences. *Id.* at 633. This Court thus vacated the amended judgment and remanded for further 2255 proceedings. *Id.* at 643.

So too here. The Government insists that "the district court knew the nuances of Mitchell's case well and did not abuse its discretion in reimposing a three-year term

of supervised release upon Mitchell's sudden release from prison." Gov't Third Br. 18. But the Government is speculating. Without any explanation, it is unclear whether the district court knew that it was within its movant-friendly power not to reimpose Mitchell's supervised release term. And even if the court did know that it had that discretionary power, the court's silence leaves this Court guessing as to whether the court actually exercised its discretionary power or did so appropriately.

B. Mitchell's supervised release sentence is substantively unreasonable in light of the extent to which his circumstances have changed since he was originally sentenced seventeen years ago and the inequity of his seven-year prison excess.

With or without an explanation, imposing a three-year supervised release term on Mitchell is an abuse of Section 2255 discretion because the term is substantively unreasonable. *See* Mitchell's Opening Br. 41–45. Seventeen years have passed since a court first imposed Mitchell's three-year supervised release term. Considering the person Mitchell is today, that term would no longer further "deterrence," "protect the public," "provide just punishment for the offense," or "promote respect for the law." *See* 18 U.S.C. § 3553(a). It is especially inequitable to impose the maximum term available today (a three-year term) when the court in 2001 chose to impose less than the maximum term available then (a five-year term). *See* Mitchell's Opening Br. 44–45.

The Government does not meaningfully address Mitchell's argument that his three-year supervised release term is substantively unreasonable. Instead, the Government suggests that Mitchell has failed to identify an analogous case—that is, a

case where a court has granted a Section 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), and reduced a supervised release term as part of its Section 2255 relief package. *See* Gov't Third Br. 17. The Government is mistaken. *See* Mitchell's Opening Br. 43 (citing *United States v. Josiah*, 2016 WL 5864427 (D. Haw. Oct. 6, 2016); *United States v. Lee*, 2016 WL 4179292 (D. Haw. Aug. 4, 2016)).

The Government also suggests that Mitchell's argument runs counter to the rule, laid down in *United States v. Johnson*, 529 U.S. 53, 59 (2000), that a sentencing court is not *required* to count excess prison time against supervised release time. *See* Mitchell's Opening Br. 18. But that ruling is not the straightjacket that the Government suggests it is. *Johnson* does not foreclose the possibility that, in a particular case, it would be substantively unreasonable for a sentencing court to reimpose a supervised release term without reducing it to account for a lengthy prison excess. Quite the contrary: *Johnson* also observed that "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term." 529 U.S. at 60; *see also Pope v. Perdue*, 889 F.3d 410, 414 (7th Cir. 2018) (making the same point in reliance on *Johnson*, 529 U.S. at 59–60).

Motion practice under 18 U.S.C. § 3583(e) illustrates our point. Under that provision, a defendant may move to terminate a supervised release term after one year, or may move to reduce or modify supervised release conditions at any time. Although courts are well aware that excess prison time does not automatically compel them to grant such motions, they nonetheless factor excess prison time into their decisions. As

the Seventh Circuit recently observed: "A finding by this court that [the defendant] spent too long in prison would not automatically entitle him to less supervised release. But it would carry 'great weight' in a § 3583(e) motion to reduce that term." *Pope*, 889 F.3d at 414 (quoting *Johnson*, 529 U.S. at 60); *see also United States v. Shultz*, 733 F.3d 616, 624 (6th Cir. 2013) ("[M]uch can happen during a prison term, and much of it may support a modification to the conditions of supervised release when the sentence ends."); *United States v. Epps*, 707 F.3d 337, 344 (D.C. Cir. 2013) ("[T]hat Epps over-served his sentence … is of paramount importance to whether he should continue under supervised release for five years.").

The limits of *Johnson* are even more pronounced in the Section 2255 context than in the Section 3583(e) context because, as noted earlier, equity is the touchstone of Section 2255 relief. If it is settled that the inequity of a prison excess should carry great weight in a Section 3583(e) decision, then the inequity of Mitchell's seven-year prison excess should have carried at least as much weight in the district court's Section 2255 decision here. But it did not. Indeed, in reimposing Mitchell's seventeen-year-old supervised release term without explanation, the court's decision on its face failed to weigh any "equitable considerations" at all. Both procedurally and substantively, the court thus overlooked equity's demands and abused its Section 2255 discretion.

Conclusion

This Court should reverse the district court's imposition of Mitchell's three-year supervised release term. Alternatively, this Court should remand and direct the district

court to reconsider its imposition of the supervised release term and, if a term is imposed, to justify its imposition.

This Court should also remand for the limited purpose of directing the district court to clarify its imposition of a "time served" sentence.

June 22, 2018

Respectfully submitted,

/s/ Amit R. Vora
Amit R. Vora
Brian Wolfman
Georgetown Law Appellate Courts
Immersion Clinic
600 New Jersey Avenue NW, Suite 312
Washington, DC 20001
(202) 662-9557
arv46@georgetown.edu

Counsel for Mitchell

Certificate of Compliance

This document complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) because it contains 2,197 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

The brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Garamond, 14-point, in Microsoft Word.

June 22, 2018

/s/ Amit R. Vora
Amit R. Vora

Counsel for Mitchell

Designation of Relevant Documents

Appellee/Cross-Appellant, pursuant to Sixth Circuit Rules 28(b) and 30(c), designates the following filings in the record as entries that are relevant to this appeal.

Description of entry	Docket Entry Number	Page ID	Date
2:99-cr-20272			
Order on Jury Verdict	RE 124	74	1/8/2001
Notice of Appeal	RE 219	530-31	7/28/2017
2:17-cv-02341			
Response to Motion	RE 6	22-40	5/30/2017
Order	RE 14	199-243	7/5/2017
Notice of Appeal	RE 17	303-04	7/28/2017
Notice of Appeal	RE 20	308	7/17/2017
15-6178			
Corrected Habeas Motion	RE 4-2	1-41	11/6/2015
Order	RE 16-1	1-2	1/23/2016
17-5904			
Order Granting Redesignation and Consolidation	RE 15-1	1	1/2/2018

Certificate of Service

I certify that on June 22, 2018 I filed this brief with the Clerk of the Court electronically via the CM/ECF system. I also certify that this attorney is a registered CM/ECF participant for whom service will be accomplished by the CM/ECF system on June 22, 2018:

Tony R. Arvin
Assistant United States Attorney
167 North Main Street, Suite 800
Memphis, Tennessee 38103

June 22, 2018

/s/ Amit R. Vora
Amit R. Vora

Counsel for Mitchell