No. __-____

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IN THE SUPREME COURT OF THE UNITED STATES

_____

DEAN TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Under 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30 of this Court, petitioner Dean Terry respectfully requests a 30-day extension of time, up to and including July 31, 2024, in which to file a petition for a writ of certiorari in this Court. The Fourth Circuit entered final judgment against Terry on March 1, 2024, and denied his timely rehearing petition on April 2, 2024. Without an extension, Terry's time to file a petition for certiorari in this Court expires on July 1, 2024. This application is being filed more than 10 days before that date. A copy of the Fourth Circuit's unpublished

opinion in this case is attached as Exhibit 1, and a copy of the Fourth Circuit's denial of the petition for rehearing *en banc* is attached as Exhibit 2. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This case presents an entrenched split on a recurring issue of great importance: whether a "controlled substance" under the Federal Sentencing Guidelines § 4B1.2(b) is limited to those substances defined and regulated under the federal Controlled Substances Act, 21 U.S.C. § 801 et seq. The Fourth Circuit and six other courts of appeals have answered in the negative, whereas three courts of appeals have answered in the affirmative. *Compare United States v. DuBois*, 94 F.4th 1284, 1296 (11th Cir. 2024), *United States v. Jones*, 81 F.4th 591, 599 (6th Cir. 2023), *United States v. Lewis*, 58 F.4th 764, 768-69 (3d Cir. 2023), *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021), *United States v. Jones*, 15 F.4th 1288, 1291 (10th Cir. 2021), *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020), *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020) *with United States v. Townsend*, 897 F.3d 66, 68-70 (2d Cir. 2018), *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021), *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015).[1]

The issue's importance is threefold. First, the guideline defining a controlled substance is the Sentencing Commission's interpretation of a direct Congressional

[1] Although *Gomez-Alvarez* interpreted § 2L1.2's "drug trafficking offense[,]"this term is "defined in substantially thew same way" as § 4B1.2's "controlled substance offense" and Fifth Circuit precedent "discussing these definitions are cited interchangeably." *United States v. Arayatanon*, 980 F.3d 444, 453 n.8 (5th Cir. 2020) (quotations and citation omitted).

directive, so the split reflects a disagreement over the extent of Congress's intended punishment for certain recidivist offenders. *United States v. LaBonte*, 520 U.S. 751, 753-54 (1997). Second, the Commission has declined to resolve the split in its promulgated amendments in the last two amendment cycles. 89 Fed. Reg. 36583-36868, 88 Fed. Reg. 28254-28282. It has repeatedly passed over this controversy despite members of this Court expressing hope, and perhaps even an expectation, that the Commission would "address this division to ensure fair and uniform application of the Guidelines." *Guerrant v. United States*, 142 S. Ct. 640, 640-41 (2022) (statement of Sotomayor, J., joined by Barrett, J.). And third, the division results in disparate prison terms for thousands of similarly situated offenders each year. Whether or not a prior state conviction qualifies as a "controlled substance offense" determines the guideline range for career offenders, as well as defendants convicted of certain weapons offenses and those facing postconviction reimprisonment for violating their supervised release. *E.g.,* U.S.S.G. §§ 4B1.1(a), 2K1.3(a), 2K2.1(a), 7B1.1(a)(1).

Undersigned counsel respectfully requests an additional 30 days to prepare the petition due to professional and personal obligations, as well to incorporate this Court's forthcoming opinions in *Loper Bright Enterprises, Inc. v. Raimondo*, Case No. 22-451 and *Relentless, Inc. v. Dep't of Comm.,* Case No. 22-1219.

In addition to this petition, undersigned counsel is also responsible for meeting deadlines in numerous other cases, including *United States v. Valdez*, W.D.N.C. Case No. 1:23-CR-77 (suppression hearing held on May 13, 2024 and post-hearing briefing

filed on May 20 and 22, 2024); *United States v. Mitchell*, W.D.N.C. Case No. 1:23-CR-48 (suppression pleading due June 17, 2024); *United States v. McManus*, Fourth Cir. Case No. 23-4278 (reply brief filed May 6, 2024). In addition, counsel had a preplanned international vacation from April 8-17, 2024, and an immediate family member had an unexpected medical emergency the first week of June 2024.

This Court is also likely to release its decision in *Loper Bright* and *Relentless* and these cases are relevant to the instant petition. They question the continued vitality of the *Chevron* doctrine, which instructs courts to defer to an agency's reasonable interpretation of a statute. *Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 845 (1984). Because this petition involves the U.S. Sentencing Commission's interpretation of 28 U.S.C. § 994(h), the Court's resolution of *Loper Bright* and *Relentless* will likely effect the framework that the question presented is analyzed under. This extension will ensure sufficient time to incorporate the Court's expected forthcoming decisions in the petition.

For these reasons, counsel respectfully requests that an order be entered extending the time to petition for certiorari up to and including July 31, 2024.

Respectfully submitted,

John G. Baker
FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

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June 17, 2024

Exhibit 1

United States
v.
Terry,
2024 WL 888343

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4134

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEAN TERRY,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Kenneth D. Bell, District Judge. (3:22-cr-00123-KDB-DCK-1)

Submitted: February 14, 2024 Decided: March 1, 2024

Before THACKER and BENJAMIN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: John G. Baker, Federal Public Defender, Melissa S. Baldwin, Assistant Federal Public Defender, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. Dena J. King, United States Attorney, Anthony J. Enright, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

PER CURIAM:

Dean Terry pleaded guilty without a plea agreement to a single count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Based on his relevant conduct and criminal history, Terry received a base offense level enhancement for having two prior felony convictions for controlled substance offenses, and his Sentencing Guidelines range amounted to 100 to 120 months' imprisonment. Terry objected to his base offense level enhancement. Citing the Second Circuit's decision in *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022), *aff'd on reh'g*, 60 F.4th 720 (2d Cir. 2023), he argued that his predicate New York state convictions for third-degree sale and attempted sale of a controlled substance should not qualify as controlled substance offenses under the Guidelines because the relevant New York statute criminalizes more drugs than appear on the federal Controlled Substances Act schedules. The district court overruled Terry's objection, noting that *Gibson* directly conflicts with our decision in *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020). Finding that Terry's New York state convictions did qualify as controlled substance offenses, the court sentenced him to 108 months' imprisonment, in the middle of the applicable Guidelines range. On appeal, Terry asserts that his sentence is procedurally unreasonable because the court failed to address his arguments for a lower sentence. He further contends that his sentence is substantively unreasonable because the court relied on an improper rationale to impose a disparate sentence. We affirm.

"We review the reasonableness of a sentence under 18 U.S.C. § 3553(a) using an abuse-of-discretion standard, regardless of 'whether [the sentence is] inside, just outside, or significantly outside the Guidelines range.'" *United States v. Nance*, 957 F.3d 204, 212

(4th Cir. 2020) (alteration in original) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). We are obliged to first "evaluate procedural reasonableness, determining whether the district court committed any procedural error, such as improperly calculating the Guidelines range, failing to consider the § 3553(a) factors, or failing to adequately explain the chosen sentence." *Id.* (citing *Gall*, 552 U.S. at 51). "[T]he district court must address or consider all non-frivolous reasons presented for imposing a different sentence and explain why [it] has rejected those arguments. Importantly, in a routine case, where the district court imposes a within-Guidelines sentence, the explanation need not be elaborate or lengthy." *United States v. Fowler*, 58 F.4th 142, 153 (4th Cir. 2023) (internal quotation marks and citation omitted). "[D]istrict courts have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors." *United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011). And "[w]hen a district court has fully addressed the defendant's central thesis during sentencing, it need not address separately each supporting data point marshalled for a downward variance." *Fowler*, 58 F.4th at 153-54 (internal quotation marks omitted).

"If . . . the district court has not committed procedural error," we then "assess the substantive reasonableness of the sentence." *Nance*, 957 F.3d at 212. Substantive reasonableness review "takes into account the totality of the circumstances to determine whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a)." *Id.* (internal quotation marks omitted). "Any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable. Such a presumption can only be rebutted by showing that the sentence is

unreasonable when measured against the 18 U.S.C. § 3553(a) factors." *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014) (citation omitted).

Upon review, we conclude that the sentence is both procedurally and substantively reasonable. Terry argued for a lower sentence based on the alleged disparity in sentences under the Second Circuit's and Fourth Circuit's differing interpretations of the Guidelines. After listening to both parties' arguments, the district court explicitly discussed how *Ward* bound the court regarding Terry's base offense level enhancement for prior controlled substance offenses and considered any resulting sentencing disparity in its analysis along with the other § 3553(a) factors. The court thus "considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). Therefore, we discern no error in the court's explanation for Terry's sentence. We are satisfied that the sentence is otherwise procedurally reasonable. *See United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019). And while Terry argues that his sentence is substantively unreasonable, he fails to rebut the presumption of reasonableness accorded his within-Guidelines sentence.

Accordingly, because Terry's sentence is both procedurally and substantively reasonable, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Exhibit 2

Denial of petition for panel rehearing and rehearing en banc entered in *United States* v. *Terry,* Fourth Circuit No. 23-4134

FILED: April 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4134
(3:22-cr-00123-KDB-DCK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEAN TERRY

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk