

United States Court of Appeals
for the Fifth Circuit

No. 25-10167

United States Court of Appeals
Fifth Circuit

FILED

September 10, 2026

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MARCO ANGELE HENDRICKSON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CR-418-1

Before WIENER, HAYNES, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Defendant-Appellant Marco Angele Hendrickson appeals his sentence after a jury trial conviction for possession of a firearm by a convicted felon in violation of 18 U.S.C. § § 922(g)(1), 924(a)(8). Because the district court abused its discretion in imposing a substantively unreasonable sentence and a special condition of supervised release for mental health treatment, we

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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VACATE and REMAND for resentencing for the reasons discussed herein.¹

I. FACTS AND PROCEDURAL HISTORY

Marco Angele Hendrickson was shot several times outside a Food Mart store and gas station in Dallas by an unknown individual in June 2023. Law enforcement obtained video footage from both the store and an adjacent Jack in the Box restaurant that showed the unknown individual approach Hendrickson, shoot him five times, and run away. Hendrickson, who was severely injured, returned fire as he was falling to the ground. The footage also showed that, as Hendrickson walked toward the gas station, he put his firearm in a trash can before sitting back down. Hendrickson underwent an emergency transfusion and multiple surgeries as a result of the injuries.

Hendrickson was later indicted and tried for possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(8). The Federal Public Defender (FPD) was appointed to represent Hendrickson. However, Hendrickson moved to appear as pro se co-counsel or, alternatively, to terminate the FPD's appointment and proceed pro se because of difficulties in communicating with his attorney. The district court granted Hendrickson's motion to represent himself but ordered the FPD to remain on the case as stand-by counsel. The jury ultimately found Hendrickson guilty.

In the Presentence Investigation Report (PSR), the probation officer calculated the guidelines range to be between 37 to 46 months, based on a criminal history score of three and a total offense level of 20. The probation

¹ Judge Haynes would affirm. She notes that, even if others would do differently, the district judge's decision is not an abuse of discretion. Accordingly, she concludes it should not be vacated.

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officer set out that Hendrickson had five juvenile adjudications and approximately 15 adult convictions over an approximate 10-year period but only his 2009 conviction for Hobbs Act robbery and possession of a firearm in furtherance of a crime received criminal history points. Significantly, the PSR also included the following statement:

A downward variance may be warranted in this case due to the specific nature and circumstances of the offense. As observed by this probation officer in the surveillance videos, the defendant was seemingly randomly targeted by an unknown individual and fired upon multiple times. While the defendant is a convicted felon and should not have possessed a firearm, he was not observed to be actively engaged in any other criminal activity at the time of his attack and fired back upon his assailant in self-defense. The defendant suffered five bullet wounds causing significant damage to his body.

The probation officer also said that “this language does not necessarily constitute a recommendation for a downward variance by the probation officer.”

Hendrickson objected to the total offense level, asserting that his Hobbs Act robbery conviction predated the guidelines amendment classifying it as a crime of violence. The government agreed with Hendrickson’s objection but objected to the PSR’s statement that Hendrickson was “not actively engaged in any other criminal activity at the time of the attack” based on its unproven suspicions but conceded that Hendrickson’s injuries could offer “a compelling reason to grant a downward variance.” In response, the addendum to the PSR reiterated that there was no evidence as to the shooter’s “knowledge” or “motivations for targeting” Hendrickson. Further, the addendum reiterated that no evidence showed Hendrickson engaged in any crimes before the shooting, and Hendrickson was not in possession of any other contraband. The addendum also reiterated

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the unique facts that may warrant a downward variance. The government said that the addendum resolved its issue, and the district court agreed it was not necessary to rule on the objection. The district court sustained Hendrickson's objection and accepted the corrected guidelines range as 18 to 24 months.

Hendrickson asked the district court to sentence him within the applicable advisory range of 18 to 24 months and to weigh his record against the mitigating facts. Because it disagreed with the way the U.S. Sentencing Guidelines assign criminal history points, the government moved for an upward variance and asked the district court to impose at least 84 months' imprisonment. The district court granted the government's motion and sentenced Hendrickson to 100 months of imprisonment and three years of supervised release. Hendrickson objected to the sentence as both procedurally and substantively unreasonable. The district court also imposed a mental health treatment condition on the supervised release to which Hendrickson also objected. Hendrickson appealed.

II. STANDARD OF REVIEW

This court reviews a preserved challenge to the substantive reasonableness of a sentence for an abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *see also United States v. Diehl*, 775 F.3d 714, 724 (5th Cir. 2015).

A non-Guidelines sentence unreasonably fails to reflect the statutory sentencing factors set forth in § 3553(a) where 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. The farther a sentence varies from the applicable Guidelines sentence, the more compelling the justification based on factors in section 3553(a) must be.

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Diehl, 775 F.3d at 724 (internal quotation marks and citations omitted).

This court’s review for substantive reasonableness is “highly deferential,” as “the sentencing court is in a better position to find facts and judge their import under the § 3553(a) factors with respect to a particular defendant.” *Id.* (citing *United States v. Hernandez*, 633 F.3d 370, 375 (5th Cir. 2011)). “Even a significant variance from the Guidelines does not constitute an abuse of discretion if it is commensurate with the individualized, case-specific reasons provided by the district court.” *Id.* (internal quotation marks and citations omitted).

III. DISCUSSION

A. Whether the district court imposed a substantively unreasonable sentence.

In determining a sentence, the district court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” 18 U.S.C. §3553(a); *see also Kimbrough v. United States*, 552 U.S. 85, 101 (2007); *United States v. Booker*, 543 U.S. 220, 245 (2005). This court has conveyed the relevant factors to be considered as follows:

In selecting a sentence, the district court must consider the § 3553(a) sentencing factors, including: (1) the nature and circumstances of the offense and the history and characteristics of the defendant, (2) the need for the sentence to reflect the seriousness of the offense and provide just punishment, protect the public from further crimes of the defendant, and provide the defendant with needed correctional treatment, (3) the kinds of sentences available, (4) the Sentencing Guidelines and any relevant policy statements, and (5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

Diehl, 775 F.3d at 723; *see* 18 U.S.C. § 3553(a)(2).

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While the district court has discretion in considering whether aggravating factors exist to support an upward departure, this court will affirm such a departure only if the district court offers “acceptable reasons for the departure and the departure is reasonable.” *United States v. Davis*, 30 F.3d 613, 615 (5th Cir. 1994) (citation omitted).

In its motion for an upward variance, the government argued the following:

When the defendant was sentenced for Hobbs Act robbery in 2009, he had 23 criminal history points and a criminal history category of VI.... The defendant subsequently served a federal prison sentence almost as long as the lookback period for felony offenses under USSG § 4A2.1(e)—a circumstance that would reward the defendant for his lengthy sentence by eliminating prior offenses from his criminal history calculation. An upward variance to 84 months’ imprisonment in this case would reflect factors not currently considered by the Guidelines: (1) the defendant’s underrepresented criminal history, and (2) the fact that the defendant was subject to a term of supervised release when he committed the instant offense.

(Citation omitted). The government presented alternative calculations at sentencing, arguing that the district court should replace Hendrickson’s applicable criminal history with the one that applied in 2009 or substitute the base offense level that would have applied if the earlier robbery been considered a “crime of violence” at the time it occurred. The government asserted that a sentence within the range of 70 to 87 months would apply if Hendrickson’s based offense level were 20, rather than 14, and his criminal history category were six, rather than two.

However, the government offered no applicable authority allowing the district court to re-punish a defendant for past offenses, manipulate time periods, substitute alternative calculations, or disregard the types of offenses

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involved. Moreover, this argument is contrary to the very language of § 3553(a), as discussed below. There is also no authority for somehow doubling up if a defendant is a convicted felon and subject to a term of supervised release. That is particularly so when violating a term of supervised release leads to a separate action and punishment in the case for which the supervised release was imposed.

Again, § 3553 requires the district court to consider “the nature and circumstances of the offense and the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). The very factors the government asks the district court to manipulate are the ones that the district court must consider. It is not reasonable for the district court to first change the factors before considering them. To say, for example, if he had committed this crime in 2009—closer in time to when he committed some other crime, or if this other crime had been considered a crime of violence at the time it was committed, then he would have a different criminal history or base offense level, so those alternative factors are the ones that will be considered instead. That is wholly unreasonable and an abuse of discretion. *See Diehl*, 775 F.3d at 724; *see also United States v. Gerezano-Rosales*, 692 F.3d 393, 400-01 (5th Cir. 2012).

Hendrickson does have numerous prior convictions, both as a juvenile and as an adult. But, as he asserted to the district court, four of his adult convictions occurred within a short period of time and were resolved on a single day in 2001. Further, he has already been sentenced for those offenses. More importantly, he was the victim in the shooting here, and there is no evidence he was engaged in any other criminal activity at the time.

After signaling a tentative conclusion that an upward variance was necessary, the district court focused extensively on Hendrickson’s prior adult convictions at sentencing to conclude that his criminal history score

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was “way underrepresented,” the applicable guidelines range “were ridiculously low,” and “this court is going to do a variance to account for it.” Hendrickson argued that the district court ignored the mitigating facts about his history and characteristics and gave too much weight to his prior convictions. The district court reiterated a 100-month sentence was appropriate based on Hendrickson’s criminal history. The district court made no mention of the facts highlighted by the PSR. The district court also said nothing to indicate that it had actually considered the mitigating circumstances.

Hendrickson was making an argument about getting credit for time served. The judge said: “That is not how it works. You don’t get credit in federal custody when you’re on a writ. You don’t.” Hendrickson then attempted to explain his argument under the guidelines. The district court said: “Fair enough.” But moments later the district court began to extensively recount detailed facts of cases beginning when Hendrickson was 18 years old.² Clearly the district court was not talking about having considered the mitigating circumstances.

Also, as background, one of the issues Hendrickson raised in his pro se brief was that the district court erred in refusing his justification defense instruction to the jury. Both the government and the district court appeared to equate the mitigating factors issue with the jury instruction issue. For example, the district court said the following at sentencing when discussing the government’s objection to the PSR’s mention of a basis for a downward variance:

² While doing so, the district court pointed out what it believed was an “interesting” discrepancy between Hendrickson’s allocution and the PSR’s discussion of a prior conviction. What is also interesting is that, in recounting one of the prior convictions, the district court varied slightly from the PSR.

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And the movie trailer version is, there was a discussion in the PSR as to whether or not the defendant's actions were connected to self-defense. Obviously that's a legal term that's loaded. That was something that this court considered in doing the court's jury charge.

The court did not include a charge on it because the court believes that its assessment of the law and the facts of this case made it inappropriate for the jury to consider self-defense, because there were no facts in this record to support it.

Hendrickson asserts that the "government mistakenly seizes on the district court's response to this objection as helpful evidence against Mr. Hendrickson's preserved substantive-reasonableness claim" and somehow proving the district court's "consideration and rejection" of the mitigating factors evidence "but that simply is not true." We agree. None of the discussion regarding the proposed jury instructions establishes that the district court considered the required factors for purposes of sentencing. Regardless of whether Hendrickson was entitled to a justification defense or how he came to possess the firearm, the evidence is clear that he did not go out and randomly start shooting at someone. Instead, he returned fire when his life was in danger. There's a difference for purposes of sentencing, particularly when the only crime involved was possession of a firearm by a convicted felon.

The government alludes to its suspicions that Hendrickson must have been doing something illegal because other crimes had previously occurred in that area.³ Yet the government points to no evidence pertaining to Hendrickson as support. What the record does show, though, is that the shooting occurred along a busy, main thoroughfare dotted with stores, gas

³ The government's assertions regarding crime in the area also illustrate why someone, even a felon, might carry a weapon for protection.

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stations, and fast food restaurants, all of which would provide non-nefarious reasons for Hendrickson and anyone else to be there. What the record also shows is that nothing on the video depicts Hendrickson engaged in anything illegal, and he was not in possession of any other contraband.

All of this is indicative of the district court's abuse of discretion in granting an upward variance that was substantively unreasonable. *See Davis*, 30 F.3d at 615. Thus, we vacate and remand for resentencing on this issue.

B. Special condition of supervised release.

Hendrickson asserts that the district court erred in imposing a special condition of supervised release for mental health treatment because the record fails to support such a condition. Specifically, the district court mandated that Hendrickson "shall participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged" and "shall contribute to the costs of those services," which "may include medications prescribed by a licensed physician."

The PSR here said:

The defendant reported no history of psychological diagnoses or treatment. To cope with any stress while in custody, he advised he prays and exercises. He indicated no need for mental health treatment at this time.

[Hendrickson's maternal half-sister] disclosed the defendant was diagnosed with ADHD⁴ during his childhood. She advised she did not believe he had ever been diagnosed with any other mental health problems; however, she believes he suffers from symptoms of depression. She confirmed she thought the defendant would benefit from mental health treatment.

⁴ Attention Deficit Hyperactivity Disorder.

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Based on this, the PSR said that the special condition of mental health treatment was applicable and Hendrickson should be required to contribute monetarily for such services. The PSR then listed the mental health condition among other special conditions that “are recommended to ensure the defendant’s compliance with his conditions of supervised release and based on the information provided to this probation officer by his sister.”

In his written objections, Hendrickson said:

The USPO reports that Defendant’s sister disclosed that Hendrickson was diagnosed with ADHD during his childhood. This statement is inaccurate and should be removed in its entirety from the PSR. As of date, Hendrickson has never been diagnosed with any mental health disorder and has no mental health issues and does not need mental health treatment.

Hendrickson later set out the Sentencing Commission’s policy and legal authority on the applicability of a mental health treatment condition and reiterated the following: “Hendrickson has never been diagnosed with a mental health disorder, treated for mental health, or had a questionable mental health history. Wherefore, the recommendation to include mental health treatment as a special condition of supervised release is improper and should be removed in its entirety.”

In the addendum to the PSR, the probation officer reiterated the statement from the sister and said: “The mental health treatment recommendation was made to ensure the defendant has access to the proper resources *should* he need them at any point during his future term of supervised release.” (Emphasis original). Hendrickson reiterated his objection to the addendum and asserted that it would be error to include a mental health condition just in case he needed one in the future, absent any evidence of such a diagnosis or treatment.

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At sentencing, Hendrickson reminded the court that he had an outstanding objection to the mental health condition in the PSR. The district court responded: “I saw that, to the ADD [sic] and the mental health. Those are standard conditions.” Hendrickson reiterated that he had never been diagnosed with or treated for mental health issues or ADHD. The district court said: “Okay. Well, I—I note that for the record. I’m going to leave those conditions in place at this time. And, Probation, if in your wisdom, when he’s released, you do an assessment and you think that they are not appropriate, we can always modify them.”

Because Hendrickson objected to the condition, we review for an abuse of discretion. *United States v. Gordon*, 838 F.3d 597, 604 (5th Cir. 2016). District courts have broad discretion to impose special conditions of supervised release. *United States v. Alvarez*, 880 F.3d 236, 239 (5th Cir. 2018). But a district court abuses its discretion when it imposes a discretionary condition of supervised release that deviates from the requirements of 18 U.S.C. § 3583(d). *United States v. Woods*, 547 F.3d 515, 517 (5th Cir. 2008). Section 3583(d) requires that the condition be “reasonably related” to one of the statutory factors in 18 U.S.C. § 3553(a), as follows:

(1) the nature and characteristics of the offense and the history and characteristics of the defendant, (2) the deterrence of criminal conduct, (3) the protection of the public from further crimes of the defendant, and (4) the provision of needed educational or vocational training, medical care, or other correctional treatment to the defendant.

Alvarez, 880 F.3d at 239-40 (citation omitted); *see also* 18 U.S.C. §§ 3583(d)(1), 3553(a). “A special condition cannot involve a ‘greater deprivation of liberty than is reasonably necessary for the purposes’ of the last three statutory factors and must be ‘consistent with any pertinent policy

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statements issued by the Sentencing Commission.’” *Alvarez*, 880 F.3d at 240 (quoting 18 U.S.C. § 3583(d)(2), (3)). Those pertinent policy statements indicate that “mental health treatment is appropriate if the court has reason to believe that the defendant is in need of psychological or psychiatric treatment.” *Id.* (citation omitted); *see also* U.S.S.G. § 5D1.3(b)(3)(E). The district court is required to set forth factual findings to justify special conditions of supervised release. *Alvarez*, 880 F.3d at 240 (citing *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014)).

The district court here did not even attempt to provide clear factual findings to justify a special condition for mental health treatment. Instead, the district court erroneously said it was a “standard condition.” The record contains no evidence that Hendrickson was ever diagnosed with or treated for a mental health condition. His sister explicitly said that she did not believe he had ever been diagnosed with a mental health condition. The sister’s opinion on whether Hendrickson had ever been depressed does not substitute for a medical diagnosis of the need for psychological or psychiatric treatment. Further, while Hendrickson disputed that he was diagnosed with ADHD as a child and said that his sister stated she did not even tell the probation officer he was, there is no suggestion that he ever received treatment for such a condition in childhood or beyond. Even if Hendrickson was diagnosed with ADHD as a child, there was no evidence as to how it was reasonably related to any of the statutory factors or how it necessitated psychological or psychiatric treatment.

Additionally, during all of the discussion by the government and the district court about how much time Hendrickson had previously served, there was no evidence offered to indicate that he was ever diagnosed with or treated for a mental health condition during any of that time. Moreover, the probation officer clarified that the mental health condition was recommended “*should*” he ever need it—not because he had ever been

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diagnosed with or treated for a mental health condition or there was any legitimate concern about his mental health. Neither the probation officer nor the government offered any specific facts to indicate any mental health condition. The district court confirmed that the condition was being imposed just in case Hendrickson ever needed it, not because he was already in need of it, in its statement that the condition could be modified *if* probation ever decided to do an assessment to determine whether it was necessary. This contradicts controlling authority providing that a mental health condition should not be imposed in the absence of record evidence indicating a questionable mental health history or a particular diagnosis requiring mental health treatment. *See United States v. Bree*, 927 F.3d 856, 860-61 (5th Cir. 2019); *see also Alvarez*, 880 F.3d at 241; *Gordon*, 838 F.3d at 604.⁵

There was simply no justification for imposing the special condition of mental health treatment and then adding the burden of requiring Hendrickson to contribute monetarily for the services that the record fails to establish were necessary. That is the equivalent of imposing drug treatment on a defendant with no history of substance abuse just in case he ever develops a problem and then saying that it can always be modified later if he does not develop such a problem. Accordingly, we conclude that the district court's imposition of the mental health condition is not reasonably related to any of the statutory factors and cannot be inferred from the record in this matter and was clearly an abuse of discretion. We vacate the special condition of supervised release for mental health treatment for purposes of resentencing.

IV. CONCLUSION

⁵ Notably, many of the applicable cases found plain error in similar situations with even more evidence than exists here.

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Because the district court abused its discretion in granting an upward variance that was substantively unreasonable and in imposing a special condition of supervised release requiring mental health treatment, we VACATE and REMAND for resentencing consistent with this opinion.