

No. _____

**In The
Supreme Court of the United States**

—◆—
DWIGHT BOWLING,

Petitioner,

v.

UNITED STATES,

Respondent.

—◆—
**On Petition For 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

1. Is it a violation of the First and Sixth Amendments of the United States Constitution for a United States District Court Judge to introduce Biblical texts while sentencing a criminal defendant whereby imposing a major upward departure of 132 months from the maximum sentence as provided by the United States Federal Sentencing Guidelines?
2. Has the United States Court of Appeals for the Fifth Circuit misapplied the holding of *Gall v. State* by failing to require a more compelling justification by a Federal District Judge for a major upward departure from the United States Federal Sentencing Guidelines?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1 (b) of the Rules of the Supreme Court of the United States.

1. Dwight Bowling, Petitioner;
2. United States, Respondent.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. It is attached at App. 1-5.

**JURISDICTION**

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on July 8, 2015, Petition for Rehearing En Banc denied August 9, 2015, by a Writ of *Certiorari* under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AMENDMENTS
AND STATUTE INVOLVED****UNITED STATES CONSTITUTION:**

Amendment I provides:

Religion and Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VI provides:

Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTE:

18 U.S.C. § 3553(a) provides:

Imposition of a sentence

(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; (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.



STATEMENT OF THE CASE

On September 22, 2010, Petitioner Dwight Bowling was indicted in a five-count indictment charging him with one count of harassment of a witness under 18 U.S.C. § 1512(2) and four counts of coercion or enticement of a minor under 18 U.S.C. § 2423(a). [ROA.14-60508.27 – ROA.14-60508.30]. Petitioner entered guilty pleas to Obstruction of Justice and two (2) counts of Transportation of a Minor in Interstate Commerce with Intent to Engage in Sexual Activity on April 27, 2011, in the United States District Court for the Northern District of Mississippi. [ROA.14-60508.77].

The Presentence Investigative Report (“PSR”) established Petitioner’s criminal history as I and the offense level as 33, with the appropriate guideline sentence range of 135-168 months. [ROA.14-60508.351].

The United States Government did not formally seek an upward departure, although it is noted in the PSR that the Assistant U.S. Attorney advised the U.S. Probation Officer that the court should consider an upward departure. [ROA.14-60508.354]. Petitioner's court-appointed trial attorney declined to provide factors which would warrant a sentence outside of the advisory guideline range, for either an upward or downward departure, to the U.S. Probation Officer, and she offered no such argument during the sentencing hearing. Petitioner's court-appointed trial counsel failed to make any objections to the PSR or the Assistant U.S. Attorney's recommendation for an upward departure of the Sentencing Guidelines.

On August 22, 2011, the District Court imposed a sentence of three hundred (300) months, a sentence that was 132 months higher than the upper range of the United States Federal Sentencing Guidelines, and is an improper departure from the appropriate sentencing guideline sentence range, thereby violating Title 18 U.S.C. § 3553(a). [ROA.14-60508.86].

During the sentencing hearing, the District Court Judge created constructive aggravating factors to the Sentencing Guidelines by quoting Biblical text, based upon a Biblical code that has not been codified or incorporated into the United States Constitution. By doing so, the District Judge gave significant weight to an irrelevant or improper factor in imposing the court's sentence upon Petitioner.

As part of the sentencing hearing, the District Judge cited specific Biblical text and stated the following to Petitioner:

You mentioned that you have sought and have obtained forgiveness from God. I commend you for that, and I hope that as time goes by, that the harm that has been done to these young men, their families, the community of Smithville, and to the institution of coaching and high school athletics, and just the respect that a high school student would have for a person in authority like you is restored because I'm faced with, on the one hand, what you said, and the scriptures address this. And sometimes the gospels vary on things, but they're remarkably alike in this particular quotation, and it's Matthew 18:6, Mark 9:42, and Luke 17, verse 2: If anyone causes one of these little ones who believes in me to sin, it would be better for him to have a large millstone hung around his neck and he be drowned in the depths of sea. I'm certain you're familiar with that verse.

[ROA.14-60508.231]. The District Court Judge made specific reference to the three cited Bible verses in the same sentencing colloquy wherein he nearly doubled the maximum range of the Sentencing Guidelines in imposing a three-hundred month sentence upon Mr. Bowling. Further, after imposing a sentence that was an extreme upward departure from the Sentencing Guidelines, the District Court Judge stated that:

Mr. Bowling, you told the Court earlier – and I thank you for your remarks; I appreciate them and I think they were heartfelt – you said that you had sought and obtained forgiveness from God. I truly hope you have, sir, and I hope that you have – at some time are able to obtain forgiveness from the victims and the families that you have so deeply offended. My job – and I note that you had not asked for and neither would you get forgiveness from me. It’s not – you haven’t offended this Court. When I say “offended,” I haven’t been violated. It’s not my job to forgive. My job is to do justice, and that is what I have done today to the very best of my ability. Is there anything else we need to do at this time?

[ROA.14-60508.239].

While there is no significant body of case law speaking directly to a judge being exposed improperly to external influence (i.e., Biblical text) during sentencing, there are cases regarding the Bible as an improper influence on a jury during sentencing, and, more significantly, regarding “[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky, et al.*, 545 U.S. 844, 860, 125 S. Ct. 2722, 162 L.Ed.2d 729 (2005) (citing *Corporation of Presiding Bishop of*

Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335, 107 S. Ct. 2862, 97 L.Ed.2d 273 (1987) (“*Lemons*’ ‘purpose’ requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters”).

Petitioner next complained that the sentence imposed upon him was an unreasonable substantial departure of the United States Federal Sentencing Guidelines, and that the District Court Judge failed to offer a justification sufficiently compelling to support the degree of upward departure from the guidelines. The United States Court of Appeals for the Fifth Circuit, in determining the reasonableness of substantial departures from the United States Federal Sentencing Guidelines, reviews are “highly deferential” and has held that even a significant departure 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.” *United States v. Diehl*, 775 F.3d 714 (5th Cir. 2015) (citing *United States v. McElwee*, 646 F.3d 328, 338 (5th Cir. 2011) (quoting *United States v. Herrera Gardiana*, 519 F.3d 526, 531 (5th Cir. 2008))). However, the United States Court of Appeals for the Seventh Circuit has required greater justification for such a substantial departure as given in Petitioner’s sentencing. *United States v. Bradley*, 675 F.3d 1021 (2012) (citing *United States v. Miller*, 601 F.3d 734, 739 (7th Cir. 2010); *United States v. Johnson*, 612 F.3d 889, 896 (7th Cir. 2010)).

The District Court Judge gave significant weight to an irrelevant and improper factor, i.e., Biblical text, and has not given sufficient justification to support such a harsh and unwarranted upward departure from the guidelines. During the sentencing hearing, the District Court Judge offered mostly boilerplate language to support his substantial upward departure. He stated that:

The Court imposing a sentencing outside the advisory sentencing guideline system; the Court's determination for a sentence outside the advisory guideline system: The sentence imposed is above the guideline range. The sentence imposed pursuant to other than a plea agreement or motion by the parties for a sentence outside the advisory guideline system. The reason for the sentence outside the advisory guideline system: The nature and circumstances of the offense and the history and characteristics of the Defendant pursuant to Title 18 United States Code Section 3553(a)(1), to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense as provided in Title 18 United States Code Section 3553(a)(2)(A). The earlier one was Section – excuse me – was Title 18 United States Code Section 3553(a)(1). Conditional reasons are to protect the public from further crime of the Defendant as contemplated in Title 18 United States Code Section 3553(a)(2)(C).

In explaining the facts justifying a sentence outside the advisory guideline system: In imposing a sentence, the Court considers the factors pursuant to Title 18 United States Code Section 3553(a)(2)(C), and the need to protect the public from further crimes of the Defendant. The offense conduct surrounding this case is completely inexcusable. The Defendant molested a minor multiple times over a period of time of nearly seven years. In addition, not only did the Defendant commit these heinous acts against the minor, he then instructed the minor to lie under oath in an attempt to keep him from getting caught by law enforcement. Due to the extreme nature of this crime, the Court determines that a sentence outside of the advisory guideline system is warranted.

...

The additional facts justifying the sentence in this case: In imposing sentence, the Court has considered the advisory guideline range, the statutory penalties, and the sentencing factors enumerated in Title 18 United States Code Section 3553(a). The Court finds that imposing a sentence outside the advisory guideline system pursuant to Title 18 United States Code Section 3553(a) would better achieve the statutory purposes of sentencing.

[ROA.14-60508.234 – ROA.14-60508.236].

The District Court in Petitioner's case has failed to state with particularity the substantive reasonableness of the sentence imposed as he merely provided boilerplate language to support the nearly-double Guidelines sentence imposed upon Petitioner. The mostly-boilerplate language in Petitioner's sentencing colloquy is unreasonable for a 132 month upward departure, and it does not satisfy the mandate that it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Gall v. United States*, 552 U.S. 38, 50, 128 S. Ct. 586, 169 L.Ed.2d 445 (2007). The District Court presumably created constructive aggravating factors to the United States Federal Sentencing Guidelines, based upon a Biblical code that has not been codified or incorporated into the United States Constitution. There is a clear prohibition of intermingling religious issues with the business of the Government. So, in addition to violating Petitioner's Sixth Amendment right to fair and impartial criminal proceedings, the District Court has violated the Establishment Clause of the First Amendment by the sentencing judge considering his religious views, rather than merely considering the law and facts of the case, in imposing an extreme sentence upon Petitioner.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, stating, in pertinent part:

Bowling asserts for the first time on appeal that the sentencing judge referred to Bible verses at the sentencing hearing and,

therefore, the sentence was impermissibly affected by “external influences” and the judge’s religious beliefs. If we assume, without deciding, that the Sixth Amendment prohibition against a jury being exposed to external influences applies, Bowling has not shown that the district court’s sentencing decision was affected by outside factors or otherwise violated due process prohibitions against sentencing based upon impermissible factors. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983). The record reflects that the judge, rather than relying on his religious beliefs, referred to Bible verses, apparently from memory, in response to Bowling’s pervasive invocation of his religion during his allocution; the judge sought to impart to Bowling that his conduct was contrary to his professed beliefs and underscore that he violated a well-established principle that minors should be protected from harm. *See United States v. Lemons*, 941 F.2d 309, 320 (5th Cir. 1991). In any event, the record does not support that the judge sentenced Bowling more severely because of religion. Instead, the judge found that an upward variance was proper due to the heinous nature of Bowling’s crime, which involved the long-term sexual abuse of a minor and an attempt to induce the minor to lie under oath to enable Bowling to evade prosecution. Bowling therefore has not shown plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

Furthermore, Bowling maintains that his sentence was procedurally and substantively unreasonable. He contends that the district court substantially varied from the guidelines range without presenting a sufficient justification. Bowling additionally argues that the district court gave significant weight to an irrelevant and improper factor, i.e., Bible verses. Bowling seemingly failed to preserve the specific arguments that he raises and, thus, plain error would apply. *See United States v. Tang*, 718 F.3d 476, 482-83 (5th Cir. 2013). We do not resolve the applicable standard of review because Bowling's arguments fail under the lesser abuse-of-discretion standard. *See United States v. Rodriguez*, 523 F.3d 519, 525 (5th Cir. 2008).

The record establishes that the district court adequately explained the decision to vary upwardly. The district court, after providing Bowling and his counsel the opportunity to speak and considering the presentence report and applicable guidelines range, reasoned that a variance was appropriate based on specific articulated 18 U.S.C. § 3553(a) factors. The district court also set forth case-specific reasons that merited the variance; the district court noted the extreme nature of the offense and the fact that Bowling sought to conceal the crime by urging the minor to lie. Thus, the district court's explanation was sufficient. *See United States v. Diehl*, 775 F.3d 714, 723-24 (5th Cir. 2015); *United States v. Fraga*, 704 F.3d 432, 439 (5th Cir. 2013).

Likewise, the record supports that Bowling's sentence was substantively reasonable. The district court assessed the facts and arguments and cited case-specific reasons to support its finding that a within-guidelines sentence would not achieve the sentencing goals set forth in § 3553(a). Also, the district court did not give excessive weight to an improper factor; the record does not support that the sentencing decision was based upon the Bible or the judge's religious beliefs but rather on the nature of the offense and the need to protect the public. *See Fraga*, 704 F.3d at 440. Although the variance was significant, we have upheld similar or more substantial variations. *See United States v. McElwee*, 646 F.3d 328, 345 (5th Cir. 2011) (listing cases). Given the deference that is due to a district court's consideration of the § 3553(a) factors, *see Gall v. United States*, 552 U.S. 38, 51 (2007), and the district court's reasons for its sentencing decision, Bowling has not shown that the sentence is substantively unreasonable, *see McElwee*, 646 F.3d at 344-45.

App. 2-4.



REASONS FOR GRANTING THE PETITION**I. CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI VIOLATED THE FIRST AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE DISTRICT COURT JUDGE INTRODUCING BIBLICAL TEXTS WHILE SENTENCING PETITIONER WHEREIN HE IMPOSED A MAJOR UPWARD DEPARTURE OF 132 MONTHS FROM THE MAXIMUM SENTENCE AS PROVIDED BY THE UNITED STATES FEDERAL SENTENCING GUIDELINES.**

The United States Court of Appeals for the Fifth Circuit has incorrectly deduced that the sentencing judge was “impart[ing] to Bowling that his conduct was contrary to his professed beliefs and was underscore[ing] that he violated a well-established principle that minors should be protected from harm.” App. 2.

Petitioner urges this Court to review the cited Bible verses and quote,¹ in that, it is not about

¹ It is not clear from the record which version of the Bible the district judge relied upon. The verses provided in this footnote are from the New International Version. *Matthew* 18:6 provides that “[i]f anyone causes one of these little ones – those who believe in me – to stumble, it would be better for them to have a large millstone hung around their neck and to be drowned in the depths of the sea.” *Matthew* 18:6 (New International). *Mark* 9:42 states that “[i]f anyone causes one of these

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protecting minors from harm, but, rather, most specifically, about the severe punishment (i.e., having a large millstone hung around his neck and being drowned in the depths of the sea) for the harm to the minor. Further, there is nothing in the record to suggest that the Bible verses were quoted from memory, as stated by the Fifth Circuit in its decision – quite to the contrary, the District Court Judge gave specific reference to three Bible verses describing a specific punishment for a particular crime. Furthermore, it is of no consequence that Petitioner had invoked his own religious beliefs when addressing the court as the district judge owes a duty to those standing before him for sentencing to refrain from conduct which gives the appearance of advocating a particular religion.

In *McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky, et al.*, this Court stated that “[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *McCreary County, Kentucky, et al. v.*

little ones – those who believe in me – to stumble, it would be better for them if a large millstone were hung around their neck and they were thrown into the sea.” *Mark 9:42* (New International). *Luke 17:2* states that “[i]t would be better for them to be thrown into the sea with a millstone tied around their neck than to cause one of these little ones to stumble.” *Luke 17:2* (New International).

American Civil Liberties Union of Kentucky, et al., 545 U.S. 844, 860, 125 S. Ct. 2722, 162 L.Ed.2d 729 (2005) (citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 107 S. Ct. 2862, 97 L.Ed.2d 273 (1987) (“*Lemons*’ ‘purpose’ requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters”)).

In *McCreary*, with respect to unconstitutional government action, this Court stated:

The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. In *Wallace*, for example, we inferred purpose from a change of wording from an earlier statute to a later one, each dealing with prayer in schools. 472 U.S. at 58-60, 105 S.Ct. 2479. and (sic) in *Edwards*, we relied on a statute’s text and the detailed public comments of its sponsor, when we sought the purpose of a state law requiring creationism to be taught alongside evolution. 482 U.S. at 586-588, 107 S.Ct. 2573. In other cases, the government action itself bespoke the purpose, as in *Abington*, where the object of required Bible study in public schools was patently religious, 374 U.S. at 223-224, 83 S.Ct. 1560; in *Stone*, the Court held that the “[p]osting of religious texts on the wall serve[d] no . . . educational function,” and found that if “the posted copies of the Ten Commandments [were] to have any effect at all, it [would] be to induce the

schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.” 449 U.S. at 42, 101 S.Ct. 192. In each case, the government’s action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government action.

McCreary County, Kentucky, 545 U.S. at 862, 125 S. Ct. 2722 (citing *Wallace v. Jaffree*, 472 U.S. 38, 58-60, 105 S. Ct. 2479, 86 L.Ed.2d 29 (1985); *Edwards v. Aguillard*, 482 U.S. 578, 586-588, 107 S. Ct. 2573, 96 L.Ed.2d 510 (1987); *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 223-224, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963); *Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192, 66 L.Ed.2d 199 (1980)).

Petitioner urges this Court to note that the judge expressly quoted Bible scripture, which described the equivalent of a death sentence for the crimes for which Petitioner had pled guilty. In relying on the Bible, instead of the proscribed Sentencing Guidelines, the District Court Judge’s purpose was to pronounce a much more severe punishment, likened to that called upon in the quoted verses. Arguably, if the District Court Judge had quoted a “well-established principle that minors should be protected from harm,” as the Fifth Circuit decided in its opinion, App. 2, one would likely expect to see a quote regarding the law prohibiting the harm to the minor and not specific Bible verses.

In distinction, the District Court Judge, acting as the face of the United States Government, specifically quoted and relied upon Biblical text, which prescribes a specific “sentence,” that sentence being a harsh and cruel death of drowning. With that influence, the trial court then proceeded to enter into a major upward departure, thereby following the example of the more harsh – although not death by drowning, admittedly – upward departure of 132 months, which is equal to eleven (11) years. There is only one conclusion which can be drawn to support the District Court Judge’s purpose in specific citing and quoting of the scripture: the District Court Judge relied on the specific scripture to support the upward departure. The District Court Judge was improperly influenced, in the same way that the jury was improperly influenced, by an external influence, i.e., the Bible, in *Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008).

Moreover, the District Court Judge, in his capacity as a governmental official, may accommodate the free exercise of religion (i.e., Bowling calling on his own religious beliefs while addressing the district court), but such accommodations are not to “supersede the fundamental limitations imposed by the Establishment Clause.” *Lee v. Weisman*, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655, 120 L.Ed.2d 467 (1992). As “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not . . . act in a way which ‘establishes a state religion or religious faith, or tends to do so.’” *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

This Court should review this case because the District Court Judge's recitation of Biblical texts as part the imposition of sentence upon Petitioner clearly superseded the fundamental limitations imposed by the Establishment Clause of the First Amendment, in addition to denying Petitioner his Sixth Amendment right to fair and impartial criminal proceedings. The affirmance by the United States Court of Appeals for the Fifth Circuit should be reversed, and this case should be remanded to the United States District Court for the Northern District of Mississippi for resentencing.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS MISAPPLIED THE HOLDING OF *GALL V. STATE* BY FAILING TO REQUIRE A MORE COMPELLING JUSTIFICATION BY A FEDERAL DISTRICT JUDGE FOR A MAJOR UPWARD DEPARTURE FROM THE UNITED STATES FEDERAL SENTENCING GUIDELINES WHEREAS THE SEVENTH CIRCUIT HAS APPLIED A MORE STRINGENT STANDARD IN SIMILAR REVIEWS OF MAJOR UPWARD DEPARTURES.

In *United States v. Booker*, 543 U.S. 220, 260-262, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), this Court invalidated the statutory provision that made the Sentencing Guidelines mandatory. Post-*Booker*, the

“[g]uidelines are advisory, and appellate review of sentencing decisions is limited to determining whether they are ‘reasonable.’” *Gall v. United States*, 552 U.S. 38, 46, 128 S. Ct. 586, 595, 169 L.Ed.2d 445 (2007) (citing *Booker*, 543 U.S. at 260-262, 125 S. Ct. 738).

In assessing the application of a proper sentence, the following factors must be considered: (1) whether the district court correctly calculated the applicable Guidelines range; (2) after each party has had an opportunity to make argument regarding each party’s sentencing position, “the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party; (3) if the district judge “decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance[;]” and (4) “[a]fter settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Id.* at 49-50 (citing *Rita v. United States*, 551 U.S. 338, 347-351, 127 S. Ct. 2456, 168 L.Ed.2d 203 (2007)). “[I]t [is] uncontroversial that a major departure should be supported by a more significant justification than a minor one.” *Id.* Further, “[a]n ‘unusually lenient or an unusually harsh sentence’ requires the district court to explain its decision as appropriate in a particular case with sufficient justifications. *United States v. Aguilar-Rodriguez*, 288

Fed.Appx. 918, 920 (5th Cir. 2008) (quoting *Gall*, 128 S. Ct. at 594).

According to *Gall*, there is a two-step evaluation of sentences on appellate review. The appellate court must:

First ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.

Gall, 552 U.S. at 51, 128 S. Ct. at 597.

Petitioner’s complaint is that the sentence imposed upon him was an unreasonable substantive departure of United States Federal Sentencing Guidelines, and that the District Court Judge failed to offer a justification that was sufficiently compelling to support the degree of upward departure from the

guidelines. As outlined *supra*, the District Court Judge has given significant weight to an irrelevant and improper factor, Bible verses, and has not given sufficient justification to support such a harsh and unwarranted upward departure from the Guidelines.

During the sentencing hearing, the District Court Judge offered mostly boilerplate language to support his upward departure. He stated:

The Court imposing a sentencing outside the advisory sentencing guideline system; the Court's determination for a sentence outside the advisory guideline system: The sentence imposed is above the guideline range. The sentence imposed pursuant to other than a plea agreement or motion by the parties for a sentence outside the advisory guideline system. The reason for the sentence outside the advisory guideline system: The nature and circumstances of the offense and the history and characteristics of the Defendant pursuant to Title 18 United States Code Section 3553(a)(1), to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense as provided in Title 18 United States Code Section 3553(a)(2)(A). The earlier one was Section – excuse me – was Title 18 United States Code Section 3553(a)(1). Conditional reasons are to protect the public from further crime of the Defendant as contemplated in Title 18 United States Code Section 3553(a)(2)(C).

In explaining the facts justifying a sentence outside the advisory guideline system: In imposing a sentence, the Court considers the factors pursuant to Title 18 United States Code Section 3553(a)(2)(C), and the need to protect the public from further crimes of the Defendant. The offense conduct surrounding this case is completely inexcusable. The Defendant molested a minor multiple times over a period of time of nearly seven years. In addition, not only did the Defendant commit these heinous acts against the minor, he then instructed the minor to lie under oath in an attempt to keep him from getting caught by law enforcement. Due to the extreme nature of this crime, the Court determines that a sentence outside of the advisory guideline system is warranted.

...

The additional facts justifying the sentence in this case: In imposing sentence, the Court has considered the advisory guideline range, the statutory penalties, and the sentencing factors enumerated in Title 18 United States Code Section 3553(a). The Court finds that imposing a sentence outside the advisory guideline system pursuant to Title 18 United States Code Section 3553(a) would better achieve the statutory purposes of sentencing.

[ROA.14-60508.234 – ROA.14-60508.236].

This does not offer a justification for an unreasonable 132 month upward departure from the maximum found in the Sentencing Guidelines and does not satisfy the mandate that it is “uncontroversial that a major departure should be supported by a more significant justification than a minor one.” *Gall*, 552 U.S. at 50, 128 S. Ct. at 597.

The Fifth Circuit cited *United States v. Diehl*, 775 F.3d 714 (5th Cir. 2015); *United States v. Fraga*, 704 F.3d 432 (5th Cir. 2013); and *United States v. McElwee*, 646 F.3d 328 (5th Cir. 2011), to state that the district court’s case-specific reasons merited the extreme upward variance. The factual scenarios regarding the sentencing colloquy in each of the above-referenced cases are distinguishable from Bowling’s sentencing. In each of the above-referenced cases, the Court noted that the district court had spent a significant portion of the sentencing pronouncement reviewing evidence, questioning the defendants and making detailed statements regarding the sentences imposed.

In *Diehl*, the Court noted that:

The district court spent a significant amount of time at the sentencing hearing reviewing the relevant trial evidence, hearing new evidence presented by the parties, and listening to the arguments of counsel regarding the correct Guidelines range. Although the district court ultimately imposed a non-Guidelines sentence, it expressly stated that “I have fully and thoroughly considered all

ramifications of the guidelines.” The record fully supports this statement.

Diehl, 775 F.3d at 723. In *Fraga*, the district court judge questioned Fraga regarding his objections to the PSR, gave Fraga an opportunity to explain why he felt a lesser sentence than the one recommended in the PSR would be appropriate, and explained with detail her justification of the upward variance of the Guidelines. *Fraga*, 704 F.3d at 436-437. Likewise, in *McElwee*, the district court judge engaged in an “extensive colloquy” at sentencing regarding all three defendants. *McElwee*, 646 F.3d at 338, 343, 347.

From the excerpt from Petitioner’s sentencing hearing, it is clear that the district court did not spend much time reviewing evidence, hearing new evidence, or listening to arguments regarding the Sentencing Guidelines. The district court, in Petitioner’s case, has failed to state with particularity the substantive reasonableness of the sentence imposed as he merely provided mostly the statutory language to support the nearly-double Guidelines’ sentence imposed upon Petitioner.

Most importantly, Petitioner urges this Court to address the Fifth Circuit’s method of review of the reasonableness of the substantial departure. The better analysis may be found in the United States Court of Appeals for the Seventh Circuit.

The Seventh Circuit requires *compelling* justification for major upward variance of the Sentencing

Guidelines. In *United States v. Bradley*, 675 F.3d 1021 (7th Cir. 2012), the Seventh Circuit stated that:

When reviewing a sentence, we must determine whether the district court offered justification “sufficiently compelling to support the degree of variance. . . . [A] major departure should be supported by a more significant justification than a minor one.” *United States v. Miller*, 601 F.3d 734, 739 (7th Cir. 2010) (quoting *Gall*, 552 U.S. at 50, 128 S.Ct. 586). We have stated that “[i]f the sentence imposed is outside the guidelines range, the district court must provide a justification that explains and supports the magnitude of the variance.” *United States v. Carter*, 538 F.3d 784, 789 (7th Cir. 2008) (citing *United States v. Omole*, 523 F.3d 691, 967-98 (7th Cir. 2008)). The greater the departure, the more searching our review will be. *Higdon*, 531 F.3d at 564 (“[T]he greater the departure, the more searching will be the appellate review of the judge’s exercise of his sentencing discretion.”); *see also Johnson*, 612 F.3d at 896 (“above-guideline sentences must be supported with ‘compelling justification’”); *Gall*, 552 U.S. at 51, 128 S.Ct. 586 (district court must “justify the extent of the variance”).

Bradley, 675 F.3d at 1025 (citing *United States v. Higdon*, 531 F.3d 561, 564 (7th Cir. 2008); *United States v. Johnson*, 612 F.3d 889, 896 (7th Cir. 2010)). In *Bradley*, the sentencing judge, in justifying the imposed sentence, stated that because “Bradley

‘traveled roughly 2000 miles to have sex with a boy that he knew was 15-years-old,’ and that ‘this sentence is based on Paul Bradley’s desire to have sex with a child, which he acted on.’” *Id.* The Seventh Circuit stated that:

The problem with this rationale is that it provides little more than what is implicit in the instant offense. 18 U.S.C. § 2423(b) proscribes interstate travel with intent to engage in sexual conduct with a minor. And the district court did not articulate either at sentencing or in its addendum why Bradley’s journey required more thought than any other person crossing a state border with intent to commit the instant offense. “An above-guidelines sentence is more likely to be reasonable if it is based on factors that are sufficiently particularized to the individual circumstances of the case rather than factors common to offenders with like crimes.”

Id. at 1025-1026. According to the Seventh Circuit test of compelling justification, the judge must articulate factual support for his sentencing over and above the facts that constituted the crime itself. Stated differently, the judge must base the major upward departure on facts and circumstances over and above those necessary to constitute elements of the crime.

In Bowling’s case, the district court stated that:

In explaining the facts justifying a sentence outside the advisory guideline system: In imposing a sentence, the Court considers the

factors pursuant to Title 18 United States Code Section 3553(a)(2)(C), and the need to protect the public from further crimes of the Defendant. The offense conduct surrounding this case is completely inexcusable. The Defendant molested a minor multiple times over a period of time of nearly seven years. In addition, not only did the Defendant commit these heinous acts against the minor, he then instructed the minor to lie under oath in an attempt to keep him from getting caught by law enforcement. Due to the extreme nature of this crime, the Court determines that a sentence outside of the advisory guideline system is warranted.

[ROA.14-60508.235]. This is akin to the justification in *Bradley*, which provides little more than what is implicit in the offense for which Bowling had pled guilty. In Petitioner's case, the only other justification that the district court articulated were those based upon a Biblical code that have not been codified or incorporated into the United States Constitution and which prescribes a specific punishment for a particular crime. The only outside influence, other than the facts of the crimes themselves, was the Bible, and the district court has presumably created constructive aggravating factors to the sentence.

The Fifth Circuit and Seventh Circuit are seemingly split on this issue, and this Court has not addressed or pronounced which application should be used when analyzing such a substantial major departure from the United States Federal Sentencing

Guidelines. As such, Bowling urges this Court to pronounce that the law would require the *compelling* justification test be used in evaluating the district court's justification for this major upward departure of the Sentencing Guidelines.

Even while implementing a requisite "plain error" analysis, the United States Court of Appeals for the Fifth Circuit was in error in its affirmance of the District Court's sentencing Petitioner in such an extreme major upward departure with no recorded compelling justification for doing so. The affirmance by the United States Court of Appeals for the Fifth Circuit should be reversed, and this case should be remanded to the United States District Court for the Northern District of Mississippi for resentencing.



CONCLUSION

In this case, the United States District Court for the Northern District of Mississippi has presumably created constructive aggravating factors to the United States Federal Sentencing Guidelines, based mainly upon a Biblical code that has not been codified or incorporated into the United States Constitution. There is a clear prohibition of intermingling religious issues with the business of the Government. So, in addition to violating Petitioner's Sixth Amendment right to fair and impartial criminal proceedings, the district court has violated the Establishment Clause of the First Amendment by the sentencing judge

considering his religious views, rather than merely considering the law and facts of the case, in imposing an extreme sentence upon Petitioner. Given due consideration of each of these plain-error factors, together with the insufficient justification for such an unreasonable upward variance from the United States Federal Sentencing Guidelines and the totality of the circumstances, the affirmance by the United States Court of Appeals for the Fifth Circuit of the sentence of the United States District Court for the Northern District of Mississippi must be reversed and the case remanded to the District Court for resentencing.

Respectfully submitted,

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App. 1

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 14-60508
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DWIGHT BOWLING,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:10-CR-137-1

(Filed Jul. 8, 2015)

Before JONES, BENAVIDES, and GRAVES, Circuit
Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Dwight Bowling pleaded guilty to one count of obstruction of justice and two counts of transportation of a minor in interstate commerce with intent to engage in sexual activity. He challenges his 300-month sentence, which was an upward variance from the applicable guidelines range. Bowling also argues that his trial counsel was ineffective on various grounds.

Bowling asserts for the first time on appeal that the sentencing judge referred to Bible verses at the sentencing hearing and, therefore, the sentence was impermissibly affected by “external influences” and the judge’s religious beliefs. If we assume, without deciding, that the Sixth Amendment prohibition against a jury being exposed to external influences applies, Bowling has not shown that the district court’s sentencing decision was affected by outside factors or otherwise violated due process prohibitions against sentencing based upon impermissible factors. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983). The record reflects that the judge, rather than relying on his religious beliefs, referred to Bible verses, apparently from memory, in response to Bowling’s pervasive invocation of his religion during his allocution; the judge sought to impart to Bowling that his conduct was contrary to his professed beliefs and underscore that he violated a well-established principle that minors should be protected from harm. *See United States v. Lemons*, 941 F.2d 309, 320 (5th Cir. 1991). In any event, the record does not support that the judge sentenced Bowling more severely because of religion.

Instead, the judge found that an upward variance was proper due to the heinous nature of Bowling's crime, which involved the long-term sexual abuse of a minor and an attempt to induce the minor to lie under oath to enable Bowling to evade prosecution. Bowling therefore has not shown plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

Furthermore, Bowling maintains that his sentence was procedurally and substantively unreasonable. He contends that the district court substantially varied from the guidelines range without presenting a sufficient justification. Bowling additionally argues that the district court gave significant weight to an irrelevant and improper factor, i.e., Bible verses. Bowling seemingly failed to preserve the specific arguments that he raises and, thus, plain error would apply. *See United States v. Tang*, 718 F.3d 476, 482-83 (5th Cir. 2013). We do not resolve the applicable standard of review because Bowling's arguments fail under the lesser abuse-of-discretion standard. *See United States v. Rodriguez*, 523 F.3d 519, 525 (5th Cir. 2008).

The record establishes that the district court adequately explained the decision to vary upwardly. The district court, after providing Bowling and his counsel the opportunity to speak and considering the presentence report and applicable guidelines range, reasoned that a variance was appropriate based on specific articulated 18 U.S.C. § 3553(a) factors. The district court also set forth case-specific reasons that merited the variance; the district court noted the

extreme nature of the offense and the fact that Bowling sought to conceal the crime by urging the minor to lie. Thus, the district court's explanation was sufficient. *See United States v. Diehl*, 775 F.3d 714, 723-24 (5th Cir. 2015); *United States v. Fraga*, 704 F.3d 432, 439 (5th Cir. 2013).

Likewise, the record supports that Bowling's sentence was substantively reasonable. The district court assessed the facts and arguments and cited case-specific reasons to support its finding that a within-guidelines sentence would not achieve the sentencing goals set forth in § 3553(a). Also, the district court did not give excessive weight to an improper factor; the record does not support that the sentencing decision was based upon the Bible or the judge's religious beliefs but rather on the nature of the offense and the need to protect the public. *See Fraga*, 704 F.3d at 440. Although the variance was significant, we have upheld similar or more substantial variations. *See United States v. McElwee*, 646 F.3d 328, 345 (5th Cir. 2011) (listing cases). Given the deference that is due to a district court's consideration of the § 3553(a) factors, *see Gall v. United States*, 552 U.S. 38, 51 (2007), and the district court's reasons for its sentencing decision, Bowling has not shown that the sentence is substantively unreasonable, *see McElwee*, 646 F.3d at 344-45.

Bowling did not assert his ineffective-assistance claims in the district court. Accordingly, the instant record is not sufficiently developed to allow for a fair consideration of the claims. *See United States v.*

Isgar, 739 F.3d 829, 841 (5th Cir.), *cert. denied*, 135 S. Ct. 123 (2014).

Accordingly, the judgment of the district court is
AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60508

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

DWIGHT BOWLING,
Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING

(Filed Aug. 19, 2015)

Before JONES, BENAVIDES, and GRAVES, Circuit
Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing
is [Denied].

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides

UNITED STATES
CIRCUIT JUDGE
