

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

IVAN RIVERA-SOLIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTIONS PRESENTED

- I. When conducting their substantive reasonableness review of sentences, can appellate courts reweigh the sentencing factors in 18 U.S.C. § 3553(a), as the First, Eighth, Ninth, and Eleventh Circuits hold, or does this Court's decision in Gall v. United States, 552 U.S. 38 (2007), prohibit appellate courts from reweighing the sentencing factors, as the Fifth and Tenth Circuits hold?
- II. What is the appropriate standard for appellate courts to apply when conducting their substantive reasonableness review of sentences?

PARTIES TO THE PROCEEDINGS

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Ivan Rivera-Solis prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Rivera-Solis's case is attached to this petition as the Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on July 30, 2018. See Appendix. This petition is filed within 90 days after entry of judgment. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553. 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

Petitioner Ivan Rivera-Solis pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326(a) and (b). At sentencing, the district court calculated the advisory Sentencing Guidelines imprisonment range as 21 to 27 months, based on a criminal history category of IV and a total offense level of 12. The court imposed an above-Guidelines sentence of 60 months' imprisonment, to be followed by a three-year term of supervised release. Counsel for Mr. Rivera-Solis objected that the sentence was greater than necessary to achieve the statutory purposes of 18 U.S.C. § 3553(a), calling it an "unreasonable sentence." The court overruled the objection.

Mr. Rivera-Solis timely appealed. On appeal he argued that the 60-month sentence represents a clear error in judgment in balancing the sentencing factors, and is therefore substantively unreasonable, because when imposing that sentence the district court gave undue, significant weight to the seriousness of an unrelated offense, *i.e.*, "criminal sexual conduct," that he had committed many years before (in 2002) in Minnesota. He explained that, unlike the 2002 Minnesota offense, the instant illegal-reentry offense did not involve sexual misconduct or violence; he returned illegally to the United States so that he would be able to "help [his] children so that they could do better in school."

Mr. Rivera-Solis recognized that the Fifth Circuit, "unlike the Eleventh Circuit, will not entertain an appellant's argument that the district court improperly balanced the § 3553(a) factors." However, to preserve the issue for possible further review, he argued that the Fifth Circuit "should follow the Eleventh Circuit's approach in this case and reweigh the § 3553(a) factors in his favor." He explained that, in view of his personal history and

characteristics, which defense counsel discussed at sentencing, he was entitled to a lesser sentence.

The Fifth Circuit affirmed the sentence, stating:

The district court commented on the seriousness of Rivera-Solis's prior offense, but it also noted that Rivera-Solis had been removed from the United States on three previous occasions, but he continued to re-enter the country illegally. The court noted that the age of the prior conviction did not mitigate the court's concern, considering the time Rivera-Solis actually served on the sentence imposed.

The district court also heard Rivera-Solis's assertion that he returned to the country to help his children. Yet the record reflects that the court was not persuaded and that it relied on permissible 18 U.S.C. § 3553(a) factors in determining that an above-guidelines sentence was appropriate. That included the need (1) to promote respect for the law, (2) to provide adequate deterrence, and (3) to protect the public from further crimes. The sentencing court's decision to vary above the advisory guidelines range was based on permissible factors that advanced the objectives set forth in § 3553(a).

We recognize that the 60-month sentence is 33 months greater than the top of the guidelines range, but we have upheld much greater variances. Based on the totality of the circumstances, including the significant deference that is due to a district court's consideration of the § 3553(a) factors, the sentence imposed was reasonable.

United States v. Rivera-Solis, No. 18-40041, 733 Fed. Appx. 207, 207-08 (5th Cir. July 30, 2018) (unpublished) (internal citations omitted). Of particular significance, the Fifth Circuit also noted, "To the extent Rivera-Solis asks this court to reweigh the sentencing factors, he correctly acknowledges that the issue is foreclosed but nevertheless raises the issue only for possible further review." Id. at 207 (citing United States v. Malone, 828 F.3d 331, 342 (5th Cir.), cert. denied sub nom., Green v. United States, 137 S. Ct. 526 (2016)).

Mr. Rivera-Solis now seeks to have this Court settle the circuit split on how courts

of appeals should review sentences for substantive reasonableness.

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals have adopted divergent approaches to substantive reasonableness review of sentences.

Congress has instructed district courts, when imposing sentence, to consider the sentencing factors listed in 18 U.S.C. § 3553(a). Appellate courts review those sentences, as established by this Court in Gall v. United States, 552 U.S. 38 (2007), first for procedural reasonableness and then for “[t]he substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” Gall, 552 U.S. at 51. Since Gall, the courts of appeals have struggled with defining the scope of substantive reasonableness review and have adopted divergent interpretations of the standard.

The Fifth Circuit will not entertain an argument that the district court erred in balancing the § 3553(a) factors. See, e.g., Rivera-Solis, 733 Fed. Appx. at 207 (citing Malone, 828 F.3d at 342); United States v. Hernandez-Núñez, 705 Fed. Appx. 317 (5th Cir.) (unpublished) (same), cert. denied, 138 S. Ct. 1570 (2018). Put another way, the Fifth Circuit will “not reweigh the § 3553(a) factors.” United States v. Romero, 621 Fed. Appx. 303 (5th Cir. 2015) (unpublished) (citing Gall, 552 U.S. at 51-52). According to the Fifth Circuit, Gall prohibits reweighing of the sentencing factors. See, e.g., United States v. Zuniga-Navarra, 667 Fed. Appx. 448, 449 (5th Cir. 2016) (unpublished).

The Tenth Circuit takes the same approach as Fifth Circuit. It will “not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them.” United States v. Solis-Alvarez, 563 Fed. Appx. 622, 626 (10th Cir. 2014) (unpublished) (quoting United States v. Smart, 518 F.3d 800, 808 (10th Cir.

2008)). Like the Fifth Circuit, the Tenth Circuit views Gall as barring that inquiry. See Smart, 518 F.3d at 807-08 (citing Gall).

By contrast, the Eleventh Circuit's substantive reasonableness review expressly includes reweighing the § 3553(a) factors:

[E]ven though we afford due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance, we may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence. *We are therefore still required to make the calculus ourselves, and are obliged to remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors* by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.

United States v. McQueen, 727 F.3d 1144, 1156 (11th Cir. 2013) (emphasis added) (quoting United States v. Pugh, 515 F.3d 1179, 1191 (11th Cir. 2008)). And, contrary to Fifth and Tenth Circuits' interpretation of Gall, the en banc Eleventh Circuit has concluded that Gall "actually confirms that appellate courts, with the proper measure of deference, should review the reasonableness of the weight placed on a § 3553(a) factor by the sentencing court." United States v. Irey, 612 F.3d 1160, 1192 n.18 (11th Cir. 2010) (en banc).

The First, Eighth, and Ninth Circuits have adopted approaches that are similar to the Eleventh Circuit's. The First Circuit invites appellants to "persuade us that the district judge was unreasonable in balancing pros and cons despite the latitude implicit in saying that a sentence must be 'reasonable.'" United States v. Madera-Ortiz, 637 F.3d 26, 30 (quoting United States v. Navedo-Concepción, 450 F.3d 54, 59 (1st Cir. 2006)); see also United States v. Ofray-Campos, 534 F.3d 1, 43 ("While the factors identified by the court

may have justified a substantial upward variance, they simply do not support the imposition of a statutory maximum sentence of forty years, that is so far above the guidelines range.”).

The Eighth Circuit considers whether the district court committed a clear error of judgment in weighing appropriate factors. United States v. Feemster, 572 F.3d 455, 561 (8th Cir. 2009) (en banc); see also United States v. Martinez, 821 F.3d 984 (8th Cir. 2016) (holding that “the district court gave undue weight to Martinez’s violent past to justify its extreme deviation from the guideline range”).

And the Ninth Circuit will reverse a sentence as substantively unreasonable if the court’s review of the record leaves it with a “definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors.” United States v. Ressam, 679 F.3d 1069, 1087 (9th Cir. 2012) (en banc) (quoting United States v. Amezcua-Vasquez, 567 F.3d 1050, 1055 (9th Cir. 2009)); see also Ressam, 679 F.3d at 1087 (rejecting the dissent’s position that the appellate court’s re-weighing of the sentencing factors violates Gall).

In addition to this circuit split, the Fourth, Sixth, and Seventh Circuits have adopted a different approach to substantive reasonableness review. They focus on the reasons given by the district court and evaluate whether those reasons are sufficiently compelling to support the sentence. See United States v. Howard, 773 F.3d 519, 530 (4th Cir. 2014) (determining “whether the district court’s proffered justification for imposing a non-guidelines sentence is sufficiently compelling to support the degree of the variance”) (quoting United States v. Abu Ali, 528 F.3d 210, 261 (4th Cir. 2008)); United States v. Aleo, 681 F.3d 290, 300 (6th Cir. 2012) (determining “if the district court provided

compelling reasons” for a sentence that went “so far beyond the guidelines range”); United States v. Bradley, 675 F.3d 1021 (7th Cir. 2012) (determining “whether the district court offered justification ‘sufficiently compelling to support the degree of variance’”).

The Third Circuit shares the focus on the district court’s reasons, but with a twist. A sentence that passes procedural review is substantively reasonable in the Third Circuit “unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.” United States v. Tomko, 562 F.3d 558, 568 (3d Cir. 2009) (en banc).

Finally, under the Second Circuit’s unique interpretation of Gall, the Second Circuit will “not consider what weight we would ourselves have given a particular factor,” but the court will consider “whether a factor relied on by a sentencing court can bear the weight assigned to it.” United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (en banc); see also United States v. Jenkins, 854 F.3d 181, 187 (2d Cir. 2017) (“We conclude that the factors upon which the district court relied . . . cannot bear the weight of the sentence the district court imposed.”).

Given this post-Gall landscape, the Court should grant Mr. Rivera-Solis’s petition for certiorari to resolve these divergent, and inconsistent, approaches to substantive reasonableness review. See Sup. Ct. R. 10(a).

II. This Court has provided the courts of appeals with very little guidance on how to conduct their important substantive reasonableness review.

As mentioned above, the Court in Gall established a bifurcated process of appellate review of federal sentences. First, the appellate court considers whether the sentence is procedurally reasonable. Gall, 552 U.S. at 51. This component of the review process was well-defined by the Court in Gall, which delineated “significant procedural errors” of “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.” Id.

If a sentence passes procedural evaluation, the appellate court then considers whether the sentence is substantively reasonable. Id. But the Court’s decision in Gall provided much less guidance on the scope of substantive reasonableness review than it did on procedural reasonableness review, to the point where one court of appeals has characterized Gall as providing “mixed messages.” United States v. Levinson, 543 F.3d 190, 197 (3d Cir. 2008); see also Feemster, 572 F.3d at 462 n.4 (quoting Levinson). Another commentator has observed that the Court’s lack of guidance on substantive reasonableness review has left “courts in the same indeterminate muddle as before” Gall. Laura I. Appleman, Toward a Common Law of Sentencing: Gall, Kimbrough, and the Search for Reasonableness, 21 Fed. Sent’g Rep. 1, 3 (2008). Yet another (a Third Circuit judge) has lamented, “Ultimately, it seems that the limited definition of reasonableness review outlined by the Supreme Court has created more questions than answers, particular in the realm of substantive reasonableness.” D. Michael Fisher, Still in Balance? Federal

District Court Discretion and Appellate Review Six Years After *Booker*, 49 Duq. L. Rev. 641, 652 (2011).

In fact, the Sentencing Commission has also acknowledged the struggle of the courts of appeals to implement substantive reasonableness review: “The appellate courts lack adequate standards and uniform procedures in spite of a number of Supreme Court rulings addressing them, and the ultimate outcome of the substantive review of a sentence may depend in part on the circuit in which the appeal is brought.” United States Sentencing Commission, Report of the Continuing Impact of *United States v. Booker* on Federal Sentencing (2012), available at <http://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing>.

Because of the lack of adequate standards, “a troubling consensus is emerging that substantive reasonableness review is unworkable or even undesirable.” Note, More Than a Formality: The Case for Meaningful Substantive Reasonableness Review, 127 Harvard L. Rev. 951, 951 (January 2014); see also id. at 958 (“The workability of substantive reasonableness review has been the subject of withering criticism from the bench, the academy, and the Sentencing Commission itself.”).

Accordingly, the Court should grant Mr. Rivera-Solis’s petition for certiorari to provide much needed guidance on the important question of how courts of appeals should review prison sentences for substantive reasonableness. See Sup. Ct. R. 10(c).

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to resolves the circuit split on the important question of how courts of appeals should review sentences for substantive reasonableness.

Date: October 5, 2018

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By 

SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

733 Fed.Appx. 207 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.

Ivan RIVERA-SOLIS, Defendant-Appellant

No. 18-40041

Summary Calendar

Filed July 30, 2018

Appeal from the United States District Court for the Southern District of Texas, USDC No. 7:17-CR-1400-1

Attorneys and Law Firms

Lauretta Drake Bahry, Carmen Castillo Mitchell, Assistant U.S. Attorneys, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff-Appellee

Marjorie A. Meyers, Federal Public Defender, Kayla R. Gassmann, Scott Andrew Martin, Assistant Federal Public Defenders, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant

Before SMITH, WIENER, and WILLETT, Circuit Judges.

Opinion

PER CURIAM: *

Defendant-Appellant Ivan Rivera-Solis appeals the 60-month above-guidelines sentence imposed in connection with his conviction for illegal reentry after deportation. He challenges the substantive reasonableness of his sentence, urging that the district court gave undue significant weight to the seriousness of a prior conviction for criminal sexual conduct. He notes that the prior offense occurred several

years ago, was unrelated to the instant offense, and the instant offense of illegal reentry was nonviolent.

In reviewing a non-guidelines sentence for substantive reasonableness, we consider “the totality of the circumstances, including the extent of any variance from the Guidelines range, to determine whether as a matter of substance, the sentencing factors in section 3553(a) support the sentence.” *United States v. Gerezano-Rosales*, 692 F.3d 393, 400 (5th Cir. 2012) (internal quotation marks and citation omitted). To the extent Rivera-Solis asks this court to reweigh the sentencing factors, he correctly acknowledges that the issue is foreclosed but nevertheless raises the issue only for possible further review. See *United States v. Malone*, 828 F.3d 331, 342 (5th Cir. 2016).

The district court commented on the seriousness of Rivera-Solis's prior offense, but it also noted that Rivera-Solis had been removed from the United States on three previous occasions, but he continued to re-enter the country illegally. The court noted that the age of the prior conviction did not mitigate the court's concern, considering the time Rivera-Solis actually served on the sentence imposed.

The district court also heard Rivera-Solis's assertion that he returned to the country to help his children. Yet the record reflects that the court was not persuaded and that it relied on permissible 18 U.S.C. § 3553(a) factors in determining that an above-guidelines sentence was appropriate. That included the need (1) to promote respect for the law, (2) to provide adequate deterrence, and (3) to protect the public from further crimes. The sentencing court's decision to vary above the advisory guidelines range was based on permissible factors that advanced the objectives set forth in § 3553(a). See *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006).

We recognize that the 60-month sentence is 33 months greater than the top of the guidelines range, but we have upheld much greater variances. See, e.g., *United States v. Key*, 599 F.3d 469, 475-76 (5th Cir. 2010); *United States v. Brantley*, 537 F.3d 347, 348-50 (5th Cir. 2008). Based on the totality of the circumstances, including the significant deference that is due to a district court's consideration of the § 3553(a) factors, the sentence imposed was reasonable. See *Gall v. United States*, 552

U.S. 38, 50-53, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).
AFFIRMED.

All Citations

733 Fed.Appx. 207 (Mem)

Footnotes

- * 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.

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