No. 19-_____

In the

Supreme Court of the United States

MICHAEL J. GALVAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether substantive reasonableness review necessarily encompasses some degree of reweighing the sentencing factors?

PARTIES

Michael J. Galvan, is the petitioner, who was the defendant-appellant below.

The United States of America is the respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Galvan seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion was unpublished but is reprinted in the appendix.

JURISDICTION

The Fifth Circuit issued its written judgment on November 26, 2018.(Appendix A). This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, 3553(a) of the United States Code provides:

> (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

I. Facts and Proceedings in District Court

On February 15, 2017, the United States indicted Michael J. Galvan (Galvan) on one count of Failure to Register as a Sex Offender, in violation of 18 U.S.C. § 2250). (ROA.18) On August 27, 2013, Appellant pleaded guilty to the indictment without a plea agreement. (ROA.56 *et seq*.) A Presentence Report (PSR) noted a Guideline range of 12-18 months, the result of an adjusted offense level of 12 and a criminal history category of II.[1]

Appellant's base level was a Level 14 (a Tier II SORNA offender). (ROA.118) Appellant was also given a two-point reduction for acceptance of responsibility. (ROA.119.) Only one of Appellant's prior convictions counted toward his criminal history score: a 2016 Colorado conviction--which gave rise to the instant federal SORNA registration requirement--for which Appellant was sentenced to intense supervision and probation from 10 years to Life. (ROA.122)

The PSR suggested that an upward departure might be appropriate due to Appellant's previous criminal history not being reflected within his current criminal history score. (ROA.136) Appellant objected to the PSR's suggestion that there were aggravating factors warranting an upward departure or variance. (ROA.140.)

At sentencing, defense counsel reiterated the written objections and argued that Appellant's criminal history was not overwhelming:

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[1] Citations to the court of appeals record are included in hopes that they are of use to the government in responding to the Petition or to the Court in evaluating it.

> Your Honor, I don't even know if we [are] looking at the same Presentencing report. The criminal history is not remarkable in this case. The Presentence Report that I see is somebody that has fought a life long battle with mental health issues and substance abuse issues.

(ROA.104)

The district court declined to impose an upward departure or variance but sentenced Appellant to 18 months federal imprisonment with that time to run consecutively to the impending Colorado probation revocation sentence in the case giving rise to the SORNA requirement. (ROA.109). Trial counsel immediately objected to the sentence as procedurally and substantively unreasonable and specified what triggered the objection: "I do have one objection to the substantive and procedural reasonableness specifically related to the order of consecutive sentences." (ROA.109)

The court overruled the objection and then explained that it was troubled by the lack of criminal history points assessed against Appellant's previous criminal convictions:

> In particular, I have declined to vary upward on the belief that a consecutive sentence would meet the statutory purposes to both protect the public from future crimes and provide adequate deterrents in this case. In particular, the Defendant has a pretty significant criminal history and much of the criminal history has received a score of 0 in this case. I believe that an upward variance, upward departure, would have been warranted in this case, but I've declined to do that for this reason.

(ROA.109-110).

II. Appeal

Petitioner appealed, contending that the district court abused its discretion by imposing a substantively unreasonable sentence. It gave undue weight to Appellant's

relatively unremarkable criminal history and failed to consider that much of Appellant's past behavior was reflected in his criminal history category and adjusted offense level.

The district court's "consecutive" sentence stemmed from the simple conclusion that Appellant's offense sentencing guidelines were not harsh enough to account for Appellant's stale criminal history and to deter future criminality. But nothing suggests that Appellant's case was anything but a "mine-run" SORNA case and the district court failed to adequately elucidate why a "consecutive" sentence was reasonable and no greater than necessary to achieve the goals set forth in 18 U.S.C. § 3553(a).

The court of appeals affirmed, effectively holding that a defendant simply cannot obtain reversal because the district court unreasonably balanced the factors named at 18 U.S.C. §3553(a):

> Galvan's arguments amount to no more than a disagreement with the district court's choice of sentence, which does not show error.

[Appx. A] *(citing United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010).

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW AND OTHER FEDERAL COURTS OF APPEALS HAVE REACHED SUBSTANTIALLY DIFFERENT CONCLUSIONS REGARDING THE APPROPRIATE LEVEL OF DEFERENCE TO BE ACCORDED THE DISTRICT COURT IN SUBSTANTIVE REASONABLENESS REVIEW.

A. The circuits are in conflict.

The length of a federal sentence is determined by the district court's application of 18 U.S.C. §3553(a). *Unites States v. Booker*, 543 U.S. 220, 261 (2005). A district court must impose a sentence that is adequate, but no greater than necessary, to achieve the goals set forth in 18 U.S.C. §3553(a)(2). *See* 18 U.S.C. §3553(a)(2). The district court's compliance with this requirement is reviewed for reasonableness. *See Rita v. United States*, 551 U.S. 338, 359. (2007).

In *Gall v. United States*, 552 U.S. 38 (2007), this Court emphasized that all federal sentences, "whether inside, just outside, or significantly outside the Guidelines range" are reviewed on appeal "under a deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 41. It expanded further on this theme in *Kimbrough v. United States*, 552 U.S. 85 (2007), holding that district courts enjoyed the power to disagree with policy decisions of the Guidelines where those decisions were not empirically founded. *See Kimbrough*, 552 U.S. at 109.

Nonetheless, the courts of appeals have taken divergent positions regarding the extent of deference owed district courts when federal sentences are reviewed for reasonableness. The Fifth Circuit flat-out prohibits "substantive second-guessing of the sentencing court." *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008). Following this approach, the decision below rejected Petitioner's

reasonableness challenge to the consecutive sentencing decision by flatly refusing to re-consider how the § 3553(a) factors would apply to the facts. [Appx. A].

This approach contrasts sharply with the position of several other courts of appeals. The Second Circuit has emphasized that it is not the case that "district courts have a blank check to impose whatever sentences suit their fancy." *See United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008). The Eleventh and Third Circuits have likewise read *Gall* to "leave no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished." *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008); *accord United States v. Levinson*, 543 F.3d 190, 195-196 (3d Cir. 2008). These cases conform to the consensus among the federal circuits that it remains appropriate to reverse at least some federal sentences after *Gall* as substantively unreasonable. *See United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008)*; United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008); *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008); *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008).

These approaches cannot be squared. The Fifth Circuit understands *Gall* to prohibit substantive second guessing; the majority of other circuits have issued opinions that understand their roles as to do precisely that, albeit deferentially.

B. The present case is the appropriate vehicle.

The present case is a strong vehicle to consider this conflict, as Petitioner's case involves a plausible claim of unreasonableness under §3553(a). Specifically, the district court overvalued the defendant's history, and ordered this sentence to run consecutive to the probation violation sentence out of Colorado that was based on the same conduct of failing to register. The Petitioner is being punished twice for the same conduct, which is a factor that should have been weighed and balanced in the district court's sentence and under the reasonableness review standard on appeal. Instead, the court of appeals summarily affirmed the sentence, refusing to conduct any weighing or balancing of the relevant sentencing factors.

In the Petitioner's case, the district court abused its discretion by imposing a substantively unreasonable sentence. While the court imposed a within-range sentence as far as the Guidelines were concerned, it explicitly stated that it was foregoing an upward variance in favor of a consecutively-imposed sentence. (ROA.109)("I have declined to vary upward on the belief that a consecutive sentence would meet the statutory purposes to both protect the public from future crimes and provide adequate deterrents in this case.") Thus, the "consecutive-ness" levied here was the lower court's functional equivalent of an upward variance.

The record unambiguously demonstrates that the court's consecutive sentence was imposed due to Appellant's stale criminal record, *i.e.*, the fact that ancient criminal convictions failed to garner criminal history points. The question, of course, is: "did this concern lead to imposition of an unreasonable sentence?"

The answer is "yes." When beginning to arrive at that answer, it's important to keep in mind that any advisory sentencing range does not arise in a vacuum: it reflects the Sentencing Commission's institutional expertise, which takes into account the defendant's personal characteristics, deterrent concerns, and concerns for society's safety, criminal history scoring and other factors. Thus, any district court's explanations of a variance sentence—and here at least, the "consecutive" sentence is the functional equivalent of a variance sentence--must indicate not only why it rejects that institutional expertise but also explain why it arrived at the sentence that it did.

Here's the district court's explanations, *see* ROA.109, (mentioning deterrent effect, the fact that Appellant's minimal scoring of his criminal history under the Guideline regimen) certainly appear significant upon first glance. But upon even a casual reflection, all of these considerations are expressly taken into account by the Sentencing Commission's calculi: said another way, these are exactly the factors that underscore the Guidelines themselves.

Furthermore, nothing else in the Appellant's circumstances take him out of the Heartland of guideline orthodoxy. For example, as anyone familiar with federal criminal practice will attest, in every SORNA case, there is going to be an underlying sex conviction from which the defendant's obligation to register arises. That is axiomatic. Thus the fact that Appellant had such a conviction in the first place is itself unremarkable. And the fact that it scored a low criminal history attribution is, too.

Equally so: the fact that certain offenses "age out" and do not receive criminal history points–or that various conducts do not score points in the first place: the Guidelines regimen *attributes and proscribes* points based upon *recency and remoteness* precisely by design. Thus, for a sentencing court to decry certain previous offenses for not receiving criminal history points is simply to say that the court takes issue with 35 years of federal sentencing practice. That's fine as far as it goes. More than a rote explanation of simply being dissatisfied with a criminal history score is required.

The problem in this case, and the reason this Court should grant review, is that the Petitioner objected at the trial and preserved an argument that his criminal history did not justify the district court imposing a sentence that ran consecutively to the Colorado probation revocation based upon the same conduct that is the basis for his federal offense. The Petitioner presented that issue for abuse of discretion – or reasonableness – review on appeal, and the Fifth Circuit summarily affirmed the sentence without conducting any kind of reasonableness analysis or weighing of the sentencing factors. Accordingly, the outcome of the case likely turns on an appellate court's refusal to engage in meaningful review of the reasonableness of a criminal sentence. Review is warranted to address the practice of the Fifth Circuit to refuse apply reasonableness review required by this Court.

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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