

No. 19-_____

In the
Supreme Court of the United States

ANTOLIN TORRES ABONZA,
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

Antolin Torres Abonza, 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 Antolin Torres Abonza 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The Fifth Circuit's opinion was unpublished but is reprinted in the appendix. *See United States v. Antolin Torres Abonza*, 769 Fed. Appx. 165 (5th Cir. May 3, 2019)

JURISDICTION

The Fifth Circuit issued its written judgment on May 3, 2019. (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 June 20, 2017, Appellant, Antolin Torres Abonza (Abonza), along with two other co-defendants, was charged in a one-count indictment with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. (ROA.7). On December 5, 2017, Abonza pleaded guilty without a plea agreement. (ROA.27-31).¹

After the guilty plea, a pre-sentence report (PSR) was prepared. The probation officer applied the career offender guideline, USSG §4B1.1(b)(3) based upon one prior 2009 federal conviction for conspiracy to possess cocaine and another 2010 conviction for use of a communication facility in furtherance of a drug offense, conspiracy to possess with intent to distribute cocaine. (ROA.141-142). Pursuant to the career offender guidelines, Mr. Abonza's total offense level was a 29, and his criminal history category was VI. (ROA.142,147). His advisory imprisonment range was 151-188 months. (ROA.154).

Mr. Abonza objected to the application of the career offender guideline provisions. The basis of his objection was that his 2010 conviction for use a communication facility to facilitate the underlying offense of possession with intent to distribute a controlled substance, was a part of the same offense that represented his 2009 conviction for conspiracy to possess with intent to distribute a controlled substance.

¹ For the convenience of the Court and the parties, Petitioner is citing to the page number of the record on appeal below.

(ROA.219-222). Mr. Abonza also filed a motion for downward departure and variance setting forth the same argument. (ROA.44-45). The probation officer filed an PSR addendum rejecting this objection. (ROA.225-226).

At the sentencing hearing, Mr. Abonza persisted in the above objection to the PSR. (ROA.92). The district court identified that the issue was not whether the two prior convictions qualified as drug trafficking crimes but, instead, was whether they should have been treated as related cases rather than two separate cases. (ROA.92-105). The district court overruled the objection. (ROA.104-107). The district court denied Mr. Abonza's motion for downward departure and downward variance. (ROA.108-127). The district court applied the career offender guideline (ROA.107-108) and sentenced Mr. Abonza to a 151-month sentence. (ROA.127). The defendant objected to the sentence as procedurally and substantively unreasonable. (ROA.132).

II. On Appeal

On Appeal, Abonza argued that the application of the career offender guideline, and the 151-month sentence, resulted in an unreasonable sentence for the reason that the sentence did not take into account that the two prior predicate drug trafficking offense actually arose from the same offense conduct. The Fifth Circuit, simply applying the mantra that a within-guideline sentence is due a presumption of reasonableness, did not even address the factor which Abonza contends resulted in an unreasonable sentence. *See* Appendix A. Consistent with previous case law, the Fifth Circuit conducted no real reasonableness review of the sentence.

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). The decision below from the Fifth Circuit summarily rejected Petitioner's

reasonableness challenge to the application of the Career Offender guideline section, simply relying the mantra that a within-guideline sentence is due a presumption of reasonableness. *See* Appendix 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 application of the career offender guideline in a case in which the two predicate drug trafficking convictions were both for conduct that was a part of the same drug transaction, resulted in an unreasonable increase to Petitioner's advisory guideline range from 57-71 months to 151-188 months. This was 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.

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 the career offender guideline should not apply when his two predicate offense were actual two convictions arising from the same criminal conduct, that is, arising from the same drug trafficking 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 to apply the 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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