

No. 19-_____

In the
Supreme Court of the United States

PEDRO MUNOZ,
AND PEDRO MUNOZ RUIZ,
*also known as Pedro Carrillo, Luis A. Ruiz, Luis Alberto Ruiz, Pedro Ruiz, Pedro
Martinez
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

Pedro Munoz, is the petitioner, who was the defendant-appellant below. This case is also consolidated with another sentence in which Munoz was named as Pedro Munoz-Ruiz. The United States of America is the respondent, and was the plaintiff-appellee in both cases below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pedro Munoz 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The Fifth Circuit's opinion is unpublished but is reprinted in the appendix. *See United States v. Pedro Munoz, No. 18-10575, consolidated with United States v. Pedro Munoz Ruiz, also known as Pedro Carrillo, Luis A. Ruiz, Luis Alberto Ruiz, Pedro Ruiz, Pedro Martinez, No10583* , 772 Fed. Appx. 119 (5th Cir. June 12, 2019)

JURISDICTION

The Fifth Circuit issued its written judgment on June 12, 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.

LIST OF PROCEEDINGS BELOW

1. *United States Pedro Munoz*, 4:10CR-061-A , United States District Court for the Northern District of Texas. Judgement and sentence entered on August 26, 2010.
2. *United States v. Pedro Munoz*, CA No. 10-10885, Court of Appeals for the Fifth Circuit. Judgment affirmed on August 12, 2011.
3. *Pedro Munoz v. United States*, Supreme Court of the United States, No. 11-6959, certiorari denied on November 28, 2011..
3. *United States Pedro Munoz*, 4:10CR-061-A , United States District Court for the Northern District of Texas. Judgement revoking probation entered on April 30, 2018.
4. *United States v. Pedro Munoz*, CA No. 18-10575, Court of Appeals for the Fifth Circuit. Judgment affirmed on June 12, 2019.
5. *United States v. Pedro Munoz Ruiz, also known as Pedro Carrillo, Luis A. Ruiz, Luis Alberto Ruiz, Pedro Ruiz, Pedro Martinez*, 4:17-CR-00230-A-1, United States District Court for the Northern District of Texas. Judgement entered on May 2, 2018.
6. *United States v. Pedro Munoz Ruiz, also known as Pedro Carrillo, Luis A. Ruiz, Luis Alberto Ruiz, Pedro Ruiz, Pedro Martinez*, CA No. 18-10583, Court of Appeals for the Fifth Circuit. Judgment affirmed on June 12, 2019.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

On April 27, 2018, Pedro Munoz Ruiz (Munoz)¹ was sentenced to 151 months imprisonment for the offense of possession with intent to distribute a controlled substance in cause number 4:17-CR-230-A-1 (CA No. 18-10583) . (RAO.18-10583.45).² On that same day, the district court revoked Munoz's supervised release in cause number 4:10-CR-00061-A-1 (CA No. 18-10575) and imposed a 24 month sentence, to run consecutively to the 151 months sentence in cause number 4:17-CR-230-A-1. (ROA.18-10575.87). Munoz argued on appeal that the two sentences, and the order running the two sentences consecutively, resulting in a total term of imprisonment of 175 months was procedurally and substantively unreasonable.

a) Cause number 4:17-CR-230-A-1 (CA No. 18-10583)

On September 14, 2017, Munoz was arrest and on September 18, 2017 was charged in a federal complaint with possession with intent to distribute cocaine. (ROA.18-10583.7). On November 8, 2017, Munoz was named in an information in cause number 4:17-CR-230-A-1 for the offense of possession with intent to distribute more than 500 grams of a mixture or substance containing cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (5-40 years imprisonment). (ROA.18-10583.21). On

¹ Munoz's name is listed as "Pedro Munoz" in cause number 4:10-CR-00061-A-1 (CA No. 18-10575), and is listed as "Pedro Munoz Ruiz" in cause number 4:17-CR-00230-A-1 (CA No. 18-10583). These two names refer to the same individual and will be referred to as "Munoz" in this brief. Cause number 4:17-CR-00230-A-1 also lists several aliases, which are included in the title page of this petition.

² For the convenience of the Court and the parties, Petitioner has included citation to the page numbers from the two records on appeal below, designating preceded by the case number that is being cited.

November 22, 2018, Munoz waived indictment and pleaded guilty to the information without a plea agreement. (ROA.18-10583.28-32,84-85). In a written factual resume, as a part of the guilty plea, Munoz stipulated that law enforcement officers executed a search warrant at his residence and found 6 brick shaped objects that were cocaine in the shed on Munoz's property, and Munoz admitted to law enforcement officers shortly after the search that the bricks were cocaine. (ROA.18-10583.30-31).

The pre-sentence report (PSR) attributed 5.9 kilograms of cocaine to Munoz. (ROA.18-10583.114). Munoz's base offense level was 30. With a two level increase for maintaining a premises for the purpose of storing the cocaine, and with a three-level adjustment for acceptance of responsibility, his total offense level was 29. (ROA.18-10583.115). Munoz's criminal history score was 8, resulting in a criminal history category IV. (ROA.18-10583.120). At an offense level 29 and a criminal history category IV, Munoz's advisory imprisonment range was 121-151 months. (ROA.18-10583.126).

Munoz's attorney filed no objections to the PSR but did file a sentencing memorandum and motion for downward variance. (ROA.18-10583.40,91). The district court denied Munoz's request for a downward variance, citing Munoz's criminal history for its reasons, (ROA.18-10583.93-95) and denied Munoz's request to run his two sentences concurrently. (ROA.18-10583.95-6). The district court sentenced Munoz to 151 months imprisonment, to run consecutively to his revocation sentence, and a four year term of supervised release. (ROA.18-10583.95-6).

b) cause number 4:10-CR-00061-A-1 (CA No. 18-10575)

Cause number 4:10-CR-00061-A-1 (CA No. 18-10575) involves the revocation of supervised release on a 2010 illegal re-entry after deportation case. This revocation took place immediately following the sentencing in the possession with intent to distribute cocaine in cause number 4:17-CR-230-A-1. (ROA.18-10583.96)(ROA.18-10575.243).

On April 4, 2010, Pedro Munoz was indicted for the offense of illegal re-entry, a violation of 8 U.S.C. § 1326(a), in cause number 4:10-CR-061-A (CA No. 18-10575). (ROA.18-10575.9). Munoz pleaded guilty to that offense and on August 25, 2010, was sentenced to 60 months imprisonment and a three year term of supervised release. (ROA.18-10575.47-48). Munoz's term of supervised release commenced on October 17, 2014. (ROA.18-10575.79). A petition for offender under supervision was filed on September 28, 2017, alleging that Munoz violated his supervised release as evidenced by his arrest on September 14, 2017 for the offense of possession with intent to distribute cocaine, which was the offense charged in cause number 4:17-CR-230-A-1 (CA No. 18-10583). A warrant for Munoz's arrest on the violation of supervised release was issued on September 28, 2017. (ROA.18-10575.70). The government filed a motion to revoke supervised release on April 28, 2018, alleging Munoz violated his supervised release as evidenced by his September 14, 2017 arrest for possession with intent to distribute cocaine; by his illegal re-entry into the United States; and by his failing to report to his probation officer upon return to the U.S. (ROA.18-10575.79-81).

On April 27, 2018, after imposing the 151 month sentence in cause number 4:17-CR-360-A-1, the district court held a hearing on the motion to revoke supervised release during which Munoz pleaded true to the allegations in the government's motion. (ROA.18-10575.243-249). While the district court was admonishing Munoz regarding the potential punishment for his revocation, he advised the client that the sentence would run consecutively to the sentence already imposed, not recognizing or acknowledging any discretion to run the two sentences concurrently. (ROA.18-10575.246-247). At the conclusion of the hearing, the district court imposed a sentence of 24 months imprisonment, the statutory maximum sentence, to run consecutively to the previously imposed sentence of 151 months, along with a 12 month term of supervised release to be served concurrently with the four year term imposed in the earlier case. (ROA.18-10575.251).

II. On Appeal

On Appeal, Munoz argued that the sentence was procedurally unreasonable because the district court passed over Munoz's argument for a downward variance. Munoz also argued that the sentence was substantively unreasonable for failing to take into account the mitigating factors presented by Munoz. The Fifth Circuit, found there was no procedural error. In finding that the sentence was not substantively unreasonable, The Fifth Circuit simply applied the mantra that a within-guideline guideline sentence is due a presumption of reasonableness. *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 on 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 Petitioner had valid grounds for a downward variance that he presented in a written motion and at sentencing. These were factors that should have been weighed and balanced in the district court's sentence and under the reasonableness review standard on appeal. Instead, the district court did not address Munoz's mitigation arguments at all, only referring to the Petitioner's criminal history as justification for the sentence. The court of appeals summarily affirmed the sentence, refusing to conduct any weighing or balancing of the relevant sentencing factors. *See* Appendix A. As a result, the Petitioner received a 151 month sentence in cause number 4:17-CR-360-A-1 and a consecutive sentence of 24 months on his supervised release revocation in cause number 4:10-CR-00061-A-1, for a total combined sentence of 121 months. The Petitioner received no reasonableness review from the court of appeals.

The problem in this case, and the reason this Court should grant review, is that the district court simply did not take into account several compelling mitigating factors presented at sentencing. The Petitioner presented this 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 this 6th day of September, 2019.

Respectfully submitted,

/s/ Christopher A. Curtis

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