

No. 19-\_\_\_\_\_

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

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JOSE ELEUTERIO NAVA  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent,*

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

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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

Jose Eleuterio Nava, is the petitioner, who was the defendant-appellant below. 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The Fifth Circuit's opinion is unpublished but is reprinted in the appendix.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. Jose Eleuterio Nava*, 774 Fed. Appx. 190 (5th Cir. July 26, 2019)

### JURISDICTION

The Fifth Circuit issued its written judgment on July 26, 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 v. Jose Eleuterio Nava*, 4:18-CR-062-A , United States District Court for the Northern District of Texas. Judgement and sentence entered on August 31, 2018.

2. *United States v. Jose Eleuterio Nava*, CA No.18-11209, Court of Appeals for the Fifth Circuit. Judgment affirmed on July 26, 2019.

## STATEMENT OF THE CASE

### I. Facts and Proceedings in District Court

#### In District Court

On March 21, 2018, Jose Eleuterio Nava (Nava) was indicted for one count of unlawful escape from custody, in violation of 18 U.S.C. § 751(a). (ROA.13).<sup>1</sup> On March 27, 2018, a superseding information was returned alleging the same offense but correcting the underlying offense for which Nava was in custody. (ROA.20). On March 27, 2018, an Amended Superseding Information was filed alleging what appears to be the same offense alleged in the first superseding information. (ROA.22).<sup>2</sup> Nava entered a guilty plea to the one-count Amended Superseding Information without a plea agreement (ROA.68-73). Mr. Nava, in a written factual resume, stipulated to facts establishing the elements of the offense. (ROA.28,74-75). Specifically, Mr. Nava stipulated that he had been convicted of a federal offense and had his term of supervised release revoked on October 29, 2008, at which time Nava was sentenced to 24 months BOP. Mr. Nava began serving his 24-month sentence on the supervised release revocation after he had served a 10-year sentence on a case out of Tarrant County, Texas. On June 8, 2017, Mr. Nava was transferred to a halfway house. On

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<sup>1</sup> For the convenience of the Court and the parties, the Petitioner has cited to the page number of the record on appeal below.

<sup>2</sup> The Amended Superseding Information appears to have been filed because the first superseding information had a signature line for the Grand Jury Forman, which was unnecessary.

October 4, 2017, he left the halfway house to go to work and did not return. This was the factual basis for his guilty plea. (ROA.28,74-75).

After the guilty plea, the probation officer prepared a pre-sentence investigation report (PSR). In the PSR, applying the provisions of U.S.S.G. § 2P1.1, the probation officer found that Nava's base offense level was 13. The PSR recommended a 4-level reduction for the defendant escaping from a non-secure halfway house. (ROA.109). With a two-level reduction for acceptance of responsibility, Nava's total offense level was a 7. (ROA.110). The probation officer determined that Nava had a criminal history score of 11, resulting in a criminal history category V. (ROA.115-116). With a total offense level 11 and a criminal history category V, Nava had an advisory Guideline imprisonment range of 12-18 months. (ROA.121). In paragraph 82, the PSR identified an inadequate criminal history score as a ground for an upward departure. (ROA.122). In paragraph 84, the PSR identified the defendant's history of escape and assaultive behavior involving his former wife and former girlfriend. (ROA.123). Neither party objected to the PSR. (ROA.124-125).

At the sentencing hearing, the district court adopted the findings and conclusions in the PSR. (ROA.87). Nava's attorney argued against a sentence above the advisory guideline range, pointing out that Mr. Nava had failed to return to the halfway house because he had started a new job and had not reported that fact to the halfway house. While he was on escape status from the halfway house, he had been caring for his mother and had not committed any new offense. (ROA.89). The district court sentenced Mr. Nava to 36 months imprisonment, a three year term of

supervised release, a \$100 mandatory special assessment, no fine and no restitution. (ROA.94-95)

At the conclusion of the sentencing hearing, Mr. Nava's attorney objected to the sentence as being substantively and procedurally unreasonable. (ROA.97).

### **On Appeal**

On Appeal, Nava argued that the sentence was substantively unreasonable for failing to take into account the mitigating factors presented by the defense and further that the sentence represented a clear error in judgment. The Fifth Circuit also refused to consider Nava's argument that the court's refusal to conduct any reweighing of the sentencing facts conflicts with the demands of due process and the Supreme Court case law. The basis for the Fifth Circuit's refusal to address that argument was that it was raised for the first time in Nava's reply brief. *See United States v. Nava*, 774 F.3d 190 (5th Cir. 2019) *citing* *Yohey v. Collins* 985 F.2d 222, 225 (5th Cir. 1993). Consistent with previous case law, the Fifth Circuit conducted no real reasonableness review of the sentence. *See United States v. Nava*, 774 F.3d at 191.

## 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).

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 an advisory imprisonment range of 12-18 months, yet the district court imposed an upward variant sentence that was twice the top of the advisory guideline

range. The Petitioner properly sought review of that sentence on appeal. However, the court of appeals merely gave the upward variant sentence a presumption of reasonableness without conducting any analysis or weighing of the mitigating factors, stating “It appears that Nava is merely expressing his disagreement with how the district court weighed the § 3553(a) factors, which ‘is not sufficient ground for reversal.’” *United States v. Nava*, 774 Fed. Appx. at 191, *quoting United States v. Malone*, 828 F.3d 331, 342 (5th Cir. 2016). 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 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.

Finally, the Fifth Circuit dismissed the Petitioner’s argument that the case law in which the Fifth Circuit refuses to conduct a meaningful reasonableness review violates due process in this Court’s precedent. The basis for the refusal to consider that argument was because it was raised in the Petitioner’s reply brief. The Fifth Circuit’s reliance on *Yohey* is misplaced. Petitioner did not raise a new claim in his reply brief. He simply responded to the Government’s argument that “Nava’s claim

of error, therefore, amounts to nothing more than a disagreement with the district court's weighing of the Section 3553(a) sentencing factors, which is insufficient to justify reversal." (Government's Brief, p. 8) *citing United States v. Hernandez*, 976 F.3d 161, 167 (5th Cir. 2017) "[Defendant]'s claim amounts to a request that we reweigh the sentencing factors and substitute our judgment for that of the district court, which we will not do.").

Accordingly, because the government has relied on the Fifth Circuit case law in which the court refuses to conduct any re-weighing of the sentencing factors, the Petitioner appropriately responded to that argument in his reply brief, pointing out both the constitutional flaw in the Fifth Circuit case law, as well as its conflict with this Court's precedent. *See Rita v. United States*, 551 U.S. at 359. No new claim was raised.

This case illustrates exactly why this Court should grant review on this issue. The Fifth Circuit has established case law under which it will not conduct any meaningful substantive reasonableness review of the district court's sentence, even when that sentence is a significant variance above the advisory guideline imprisonment range.



## CONCLUSION

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

Respectfully submitted this 24<sup>th</sup> day of October, 2019.

Respectfully submitted,

/s/ Christopher A. Curtis

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