No. 19-_____

In the

Supreme Court of the United States

ZACKARY IKAIKA BRYTON THOMPSON
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

Zackary Ikaika Bryton Thompson (Thonpson), 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 Zackary Ikaika Bryton Thompson 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The Fifth Circuit's opinion is unpublished but is reprinted in the appendix.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. Zackary Ikaika Bryton Thompson*, 776 Fed. Appx. 269 (5th Cir. September 5, 2019)

JURISDICTION

The Fifth Circuit issued its written judgment on September 5, 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. Zackary Ikaika Bryton Thompson*, 4:18-CR-0111-A , United States District Court for the Northern District of Texas. Judgement and sentence entered on October 29, 2018.

2. *United States v. Zackary Ikaika Bryton Thompson*, CA No.18-11444, Court of Appeals for the Fifth Circuit. Judgment affirmed on September 5, 2019.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

In District Court

On May 16, 2018, Zackary Ikaika Bryton Thompson (Thompson) was charged in a one-count indictment with sexual exploitation of children by production of child pornography, a violation of 18 U.S.C. §§ 2251(a) and (e). (ROA.16).[1] On June 21, 2018, Thompson entered a guilty plea to the one-count information without a plea agreement (ROA.39). Thompson, in a written factual resume, stipulated to producing a video on his smart phone using MV1, a five-year-old minor, engaging in sexually explicit conduct. (ROA.41). Thompson stipulated that the smart phone used to produce the image was made in China, and "therefore, was produced using materials that had been mailed, shipped or transported in or affecting interstate commerce by any means." (ROA.42).

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. 2G2.1(a), the probation officer found that Thompson's base offense level was 32. (ROA.124). The probation officer applied the four-level enhancement for the minor being under the age of 12, pursuant to U.S.S.G. §2G2.1(b)(1)(A); a two level enhancement for the offense involving the commission of a sexual act, pursuant to U.S.S.G.

[1] For the convenience of the Court and the parties the Petition has cited to the page number of the record on appeal below.

§2G2.1(b)(2)(A); and a two level enhancement for the minor being in the care, custody or control of the defendant, pursuant to U.S.S.G. §2G2.1(b)(5). (ROA.124). The resulting adjusted offense level was 40. (ROA.124) After a three-level reduction for acceptance of responsibility the total offense level was 37. (ROA.125). The probation officer determined that Thompson had a criminal history score of 0, resulting in a criminal history category I. (ROA.126-127). With a total offense level 37 and a criminal history category I, Thompson had an advisory Guideline imprisonment range of 210-262 months. (ROA.132). In paragraphs 84 and 85, the PSR identified as a grounds for an upward departure or variance the factor that Thompson had also committed the offense of possessing additional images of child pornography that were not charged and were not included as relevant conduct. (ROA.134).

Neither Thompson nor the government filed any objections to the PSR. (ROA.135-138). Thompson's attorney filed a motion for sentencing variance requesting a below guideline sentence. See (Defendant's Motion for Downward Variance).

At the sentencing hearing, the district court adopted the findings and conclusions in the PSR. (ROA.102). Thompson's attorney argued for a sentence below the advisory Guideline imprisonment range based on the mitigating factors that Thompson had served in the military and based upon Mr. Thompson immediately and fully cooperating with law enforcement concerning his involvement in this offense. See (ROA.103-105). He argued these same grounds for a variance in his written motion. See (Defendant's Motion for Downward Variance).

The district court sentenced Mr. Thompson to 262 months imprisonment, a ten-year term of supervised release, a $100 mandatory special assessment, no fine and no restitution. (ROA.106-107).

On Appeal

On Appeal, Thompson 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 in balancing the sentencing factors. The Fifth Circuit also refused to conduct any reweighing of the sentencing factors, stating that Thompson did not overcome the presumption of reasonableness that applies to a guideline sentence. *See United States v. Thompson*, 776 Fed. Appx.at 269. The refusal of the Fifth Circuit to conduct any reweighing of the sentencing factors, particularly when the record fails to reflect that the district court even considered the motion for downward variance, conflicts with the demands of due process and the Supreme Court case law

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 presented mitigating factors in a motion for downward variance. The record fails to reflect that the district court gave consideration to these mitigating

factors and imposed a sentence that was at the top of the advisory guideline range. The Petitioner properly sought review of that sentence on appeal arguing that the sentence was substantively unreasonable. However, the court of appeals merely gave the top-of-the-guideline sentence a presumption of reasonableness without conducting any analysis or weighing of the mitigating factors, stating "Thompson has not overcome the presumption of reasonableness that applies to within-guideline sentences by showing that the sentence failed to account for mitigating factors or represented a clear error of judgment in balancing the sentencing factors." *United States v. Thompson*, 776 Fed. Appx. 269. Again, the Fifth Circuit has made it clear that it prohibits "substantive second-guessing of the sentencing court." *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008). The Fifth Circuit has simply refused to conduct any reasonableness review by re-visiting the weighing of sentencing factors. *See United States v. Malone*, 828 F.3d 331, 342 (5th Cir. 2016).

The problem in this case, and the reason this Court should grant review, is that the Petitioner received no reasonableness review from the court of appeals. The Petitioner presented this issue for abuse of discretion – or reasonableness – review on appeal, and the Fifth Circuit 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 4th day of December, 2019.

Respectfully submitted,

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