No. --

IN THE

SUPREME COURT OF THE UNITED STATES

MIGUEL JILBERTO VAZQUEZ-CHAVARRIA,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether substantive reasonableness review requires or permits the courts of appeals to "reweigh the [18 U.S.C. §3553(a)] factors"?

SUBSIDIARY QUESTION: Whether the Court should hold the case pending the resolution of *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting *certiorari*), and potentially grant *certiorari*, vacate the judgment below, and remand in light of that case?

PARTIES

Miguel Jilberto Vazquez-Chavarria 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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MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Miguel Jilberto Vazquez-Chavarria respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Vazquez-Chavarria,* 777 Fed. Appx. 777 (5th Cir. September 26, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment of conviction and sentence was issued January 8, 2019, and is also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on September 26, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 3553(a) 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

A. Proceedings in the District Court

On July 1, 2015, Petitioner Miguel Jilberto Vazquez-Chavarria suffered an arrest for evading arrest during a traffic stop. *See* (ROA.103). He ultimately pleaded guilty to this offense in state court, and received a three-year term of imprisonment on July 24, 2015. *See* (Record in the Court of Appeals, 103).

The day after this arrest, (July 2, 2015), ICE Agents encountered Mr. Vazquez-Chavarria in state custody. *See* (Record in the Court of Appeals, 95). Indeed, ICE placed a detainer on him. *See* (Record in the Court of Appeals, 95). For reasons the record does not reveal, however, federal prosecutors elected not to bring any charges against him for illegally re-entering the country until July 24, 2018, more than three years after his encounter with ICE. *See* (Record in the Court of Appeals, 7). As a consequence, Mr. Vazquez-Chavarria lost any opportunity to obtain a concurrent sentence, whether by federal court order, see 18 U.S.C. §3584(a), or by simple dismissal of the state charge. And the three years spent in state custody will certainly not be credited against Mr. Vazquez-Chavarria's federal term. *See* 18 U.S.C. §3585(b).

Last year, Mr. Vazquez-Chavarria pleaded guilty to one count of illegally re-entering the country. A Presentence Report (PSR) calculated a Guideline range of 51-63 months imprisonment, the product of an offense level of 17 and a criminal history category of VI. *See* (Record in the Court of Appeals, 108). The defense filed a motion for a sentence below the Guidelines, noting that Mr. Vazquez-Chavarria had lost an opportunity for a concurrent sentence due to the federal government's inexplicable delay in bringing charges. *See* (Record in the Court of Appeals, 46-49).

The district court, however, imposed a sentence well in excess of the Guideline range: 72 months imprisonment, with no adjustment for the time spent in state custody after ICE discovered his presence. *See* (Record in the Court of Appeals, 88). In doing so, it noted Mr. Vazquez-Chavarria's multiple re-entries, and a cluster of domestic violence convictions stemming from the middle part of 2011. *See* (Record in the Court of Appeals, 88).

B. Proceedings in the Court of Appeals

On appeal, Petitioner challenged the substantive reasonableness of his sentence. More particularly, he contended that the fact of a three year delay in federal prosecution represented a very significantly mitigating factor under multiple provisions of 18 U.S.C. §3553(a). This fact, he argued created a profound risk of arbitrary disparity between Mr. Vazquez and other re-entry defendants, and increased the aggregate term of imprisonment beyond the needs expressed in 18 U.S.C. §3553(a)(2).

The court of appeals affirmed. Applying plenary reasonableness review,[1] *see* [Appx. A, at p.2], it held that any relief would require it to "reweigh the s[18 U.S.C. §] 3553(a) factors, which [it] will not do," [Appx. A, at p.3].

[1]Thought the court expressly applied plenary reasonableness review, it noted that it generally applies plain error review to claims of substantive unreasonableness that are not accompanied by a timely reasonableness objection below. *See* [Appx. A, at p.2][*United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007)]. This does not, however, show an alternative ground for affirmance that would survive a victory for the defendant in *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting certiorari). The Petitioner in that case asks this Court to hold objections to substantive reasonableness unnecessary.

REASONS FOR GRANTING THE PETITION

I. The Court should hold the case pending the resolution of *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting certiorari), and potentially grant certiorari, vacate the judgment below, and remand in light of that case.

The length of a federal sentence is determined by the district court's application of 18 U.S.C. §3553(a). *See United 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 dictate 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 51. This review "take(s) into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id*. And "a major departure should be supported by a more significant justification than a minor one." *Id*. at 50.

Fifth Circuit precedent imposes several important barriers to relief from substantively unreasonable sentences. By forbidding the "substantive second guessing" of the district court, it very nearly forecloses substantive reasonableness review entirely. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008). To similar effect is its oft-repeated unwillingness to "reweigh the [18 U.S.C. §] 3553(a) factors." [Appx. A, at p. 3]; *accord. United States v. McElwee*, 646 F.3d 328, 343-44 (5th Cir. 2011);*United States v. Hernandez*, 876 F.3d 161, 167 (5th Cir. 2017); *United States v. Cotten*, 650 Fed. Appx. 175, 178 (5th Cir. 2016)(unpublished); *United States v. Vasquez-Tovar*, 2012 U.S. App. LEXIS 21249, at *4 (5th Cir. 2012)(unpublished); *United States v. Mosqueda*, 437 Fed. Appx. 312, 312 (5th Cir. 2011)(unpublished); *United States v. Turcios-Rivera*, 583 Fed. Appx. 375, 376-377 (5th Cir. 2014); *United States v. Douglas*, 667 Fed. Appx. 508, 509 (5th Cir. 2016)(unpublished). Although *Gall* plainly affords the district court extensive latitude, it is difficult

to understand what substantive reasonableness review is supposed to be, if not an effort to reweigh the sentencing factors, vacating those sentences that fall outside a zone of reasonable disagreement.

Notably, other circuits have declined to abdicate their roles in conducting substantive reasonableness review. 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).

This Court may have occasion to consider the proper scope of substantive reasonableness review in *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting certiorari). In that case, the Court has agreed to decide whether a defendant must preserve substantive reasonableness claims with a distinct post-sentence objection. Certainly, if the Court exercises its discretion to decide the case – and not merely the standard of review – the way that it performs this task will create binding precedent on the operation of substantive reasonableness review.

But even if this Court decides only the standard of review, this may shed significant light on the proper role of appellate courts in the substantive reasonableness context. The Petitioner in *Holguin-Hernandez* has argued that no separate objection to an unreasonable sentence is necessary when a party has already requested a different sentence and grounded that request in §3553(a). *See Petition for Certiorari in Holguin-Hernandez v. United States*, No. 18-7739, at pp.12-13 (January

22, 2019), *available at https://www.supremecourt.gov/DocketPDF/18/18-7739/81300/20190122153932318_holguinWOCe.pdf, last visited December 19, 2019.* A party who has done this much, argues the Petitioner, has made the same request of the district court that it would make of the court of appeals in substantive reasonableness review: to weigh the factors as he or she desires. *See id.* Embrace of that principle by this Court would demonstrate error in the Fifth Circuit's precedent, which maintains precisely that the court of appeals is not empowered to do what the district court does: weigh the sentencing factors.

This Court may grant *certiorari*, vacate the judgment below, and remand for reconsideration (GVR) in light of developments following an opinion below when those developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation..." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Further, it will hold Petitions that may be affected by the decisions of upcoming cases. *Lawrence*, 516 U.S. at181 ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.")(Scalia, J., dissenting). *Holguin-Hernandez* pertains directly to the proper conduct of substantive reasonableness review, the sole issue before the court below. This Court should hold the Petition, and then, potentially, grant certiorari, vacate the judgment below and remand.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 26th day of December, 2019.

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