No. _____

In the

Supreme Court of the United States

Desmond Bowen,

Petitioner,

v.

United States of America,

Respondent.

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

Fifth Circuit Case No. 19-60218

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. 18 U.S.C. § 3553(a) states: "The court shall impose a sentence sufficient, but not greater than necessary." Indeed, there are factors found in § 3553(a)(2) that sentencing courts must consider, but nothing concrete that defines this ambiguous mandate. The discretion to impose a sentence sufficient, but not greater than necessary, is left to each individual judge across the country. When appellate courts tackle claims of substantively unreasonable sentences, there is no guidance from *Gall*, *Rita*, *Booker*, or other cases on how to review such claims and many, if not all, cases are "rubber stamped" as affirmed. Mr. Bowen asks this Court to clarify this novel issue.

PARTIES TO THE PROCEEDING

Petitioner is Desmond Bowen, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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Petitioner Desmond Bowen seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The petitioner, Mr. Desmond Bowen, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 21, 2019. The Opinion and Judgment are attached hereto as composite Appendix 1. The opinion of the Court of Appeals for the Fifth Circuit is not reported in the Federal Reporter, but can be found in the Westlaw electronic database at *United States v. Bowen*, 781 Fed. App'x 367 (5th Cir. 2019). A copy of the unpublished Opinion is attached as Appendix 3.

The district court entered a Judgment reflecting this sentence on April 1, 2019. A copy of the Judgment is attached hereto as Appendix 2.

JURISDICTION

Petitioner, Desmond Bowen, entered a plea of guilty to Title 18, United States Code, § 922(g)(1). Mr. Bowen was sentenced to 120 months' imprisonment by the Honorable Michael P. Mills, United States District Judge for the Northern District of Mississippi.

The United States Court of Appeals for the Fifth Circuit affirmed in an unpublished *per curiam* opinion filed on October 21, 2019. No petition for rehearing was sought.

This Petition for Writ of Certiorari is filed within 90 days after entry of the

Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves one federal statute: 18 U.S.C. § 3553(a). The statutes provide, in relevant part:

18 U.S.C. § 3553(a)

(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.[1]

(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

On April 27, 2018, Mr. Bowen made a stupid, terrible life-changing decision. Mr. Bowen was attending a private party at the Lyric Theatre in Oxford, MS. ROA.48. At some point, a fight broke out among the crowd in the middle of the Lyric. ROA.48. Attempting to dissolve the fight, Mr. Bowen pulled out a firearm, pointed the gun upwards, and fired a shot. ROA.48. The bullet, regrettably, ricocheted off a steel beam above Mr. Bowen and the shrapnel scratched an individual's arm. ROA.48. Mr. Bowen was arrested in August 2018 and charged with being a felon-in-possession of a firearm, pursuant to 18 U.S.C. § 922(g). ROA.5, 49.

At sentencing, Mr. Bowen apologized for firing a gun in a public space and would use this as a learning experience. ROA.54. The Presentence Report (PSR) calculated the sentencing range at 46-57 months, due to a base offense level of 14, a five-point enhancement for discharging a firearm, a three-point enhancement for causing injury from the shrapnel, and a three-point reduction for pleading guilty, totaling a base offense level of 19. ROA.74-75, PSR ¶¶16, 17, 18, 24, 25, 26. Defense counsel attempted to minimize the actual conduct by pointing to the fact that Mr. Bowen fired the shot upwards, and not at anyone or into the crowd intentionally. ROA.55-56.

The prosecution disagreed, asking for a sentence near the high end of the Guidelines range. ROA.56-57.

After adopting the PSR without change, the district court noted Mr. Bowen's total offense level of 19, his criminal history category of IV, and his sentencing Guidelines range of 46-57 months. ROA.57. The district court, however, stated it was going to impose a sentence above the Guidelines range "based on [Mr. Bowen's] criminal

history." ROA.57. From there, the district court went through all of Mr. Bowen's criminal history, noting each time a firearm was present and how much time was served in each case. ROA.59-60. Mr. Bowen spoke in response to the court's summary, by saying he had been shot before several times and thinking his life was always in danger. ROA.60. The district court acknowledged Mr. Bowen had been shot three different times. ROA.60.

Announcing its sentence, the district court imposed the statutory maximum 120 months' imprisonment based on his criminal history, even though his sentencing Guidelines range was only 46-57 months. ROA.61. The sentence imposed was more than double the high end of the sentencing Guidelines range, nearly triple that of the lower end. Defense counsel objected to the sentence as being unreasonable and that the Guidelines took into consideration his criminal record in determining the range. ROA.62.

On appeal, Mr. Bowen challenged his sentence as substantively unreasonable in two ways. First, the district court erroneously focused on Mr. Bowen's criminal history, a factor already taken into consideration by 18 U.S.C. § 3553(a). Second, and more relevant to this request for certiorari, Mr. Bowen asks this Court to provide guidance on what constitutes a "sufficient, but not greater than necessary" sentence? Courts of appeals must review cases under a reasonableness standard, but with such a "highly deferential" standard, how can one convince a higher court that the sentence was unreasonable? *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008). Indeed, at least one Judge from the Fifth Circuit is requesting assistance from this Court. Judge Edith Jones, in *United States v. Neba*, disavowed the 900 months'

imprisonment, calling it excessive, but affirming the district court based on Supreme Court precedent. 901 F.3d 260, 266-68 (5th Cir. 2018) (concerning a within-Guidelines range sentence).

Other Circuits, too, have opined that clarification is needed when presented with substantive reasonableness claims. *See e.g.*, *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) ("The practical result of this court's affirmance of Feemster's sentence establishes, effectively, a standard of no appellate review at all. We adopt a posture today that is so deferential that, so long as the district court gives lip service and a bit of discussion to the relevant 18 U.S.C. § 3553(a) factors, a sentence will almost never be reversed, procedurally or otherwise."); *United States v. Gardellini,* 545 F.3d 1089, 1090 (D.C. Cir. 2008) ("As the case law in courts of appeals since *Gall* demonstrates, it will be the unusual case when a district court sentence – whether within, above, or below the applicable Guidelines range – as substantively unreasonable.").

Mr. Bowen, Petitioner, now seeks review by this Court to clarify *Gall* and *Rita* and what establishes a "sufficient, but not greater than necessary" sentence.

REASONS FOR GRANTING THIS PETITION

II. Courts below are requesting guidance from this Court on how to define a substantively reasonable sentence.

It is nearly impossible to overturn an upwardly varied, non-Guidelines sentence as substantively unreasonable, as noted by the lack of cases reversed by this Court and Circuit Courts when presented with sentences outside the Guidelines' range.

In Mr. Bowen's case, the 120 months', statutory maximum sentence imposed by the district court was greater than necessary to meet § 3553(a)'s requirements and therefore unreasonable. The Fifth Circuit had to follow Supreme Court precedent and its own precedent in affirming the conviction. However, the precedent at issue lacks clarity and guidance is needed.

The Eighth Circuit faced a strikingly similar case in *United States v. Johnson*, where it affirmed Mr. Johnson's sentence that was three times his Guidelines range, but discussed the problematic sentencing precedent established in *Gall* and *Rita*. 2019 WL 847197 *4 (8th Cir. 2019) (Grasz, J., concurring) (stating that Mr. Johnson's "sentenced appeared to be generally driven by Johnson's criminal history").

In a reluctant concurrence due to *Gall's* and *Rita's* guidance, Judge Grasz was forced to agree that the sentence was proper – however, he stated the sentence was "excessive" and not one the judge agreed with. *Id*. at *3, 5. He stated that criminal history is a factor that has already been taken into consideration by the Sentencing Guidelines. *Id*. at *4-5 ("The Guidelines accounted for Johnson's criminal history, but not to the district court's satisfaction.").

Even Justice Alito expressed concerns about "reasonableness" appellate review

in a post-*Booker* world in *Gall*:

> *Booker* could be read so "that sentencing judges must still give the Guidelines' policy decisions some significant weight and that the courts of appeals must still police compliance" (what he called the "better reading" of *Booker*) or it could be read "to mean that district judges, after giving the Guidelines a polite nod, may then proceed essentially as if the Sentencing Reform Act had never been enacted." 552 U.S. at 62 (Alito, J., dissenting).

This Court, however, has shown when it will deem a sentence as substantively unreasonable – when the sentence imposed is significantly *below* the Sentencing Guidelines range. In *Hoffman*, one of the defendants received a sentence of five years' probation where his range was 168-210 months'. *United States v. Hoffman*, 901 F.3d 523, 555 (5th Cir. 2018). The Fifth Circuit believed "[the] chasm between the Guidelines' view of the appropriate sentence and the district court's, with its ramifications for the sentencing disparities that Congress instructs courts to avoid, *see* 18 U.S.C. § 3553(a)(6), is an important factor in considering whether the district court exceeded its discretion," citing *Gall*, 552 U.S. at 49–50, and noting it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one." Just recently, the Second Circuit vacated and remanded a 17-year sentence as substantively unreasonable because it was 80% less than what the Guidelines called for. *See United States v. Mumuni Saleh*, 2019 WL 7196814 (2d Cir. Dec. 27, 2019).

The Court reiterated *Gall's* observation that "custodial sentences are qualitatively more severe than probationary sentences of equivalent terms." 552 at 43, 48, 59-60. While this seems obvious, it is telling that sentences thought to be too lenient are overturned more regularly than sentences thought to be too harsh.

When a defendant argues that a sentence is greater than reasonably necessary to satisfy the § 3553 factors, the odds of winning a reversal are about as good as winning the lottery. Ever since *Booker*, in 2005, it appears that these are the only two cases from the Fifth Circuit that have been vacated as substantively unreasonable when the sentence is outside the Guidelines' range. *See United States v. Chandler*, 732 F.3d 434 (5th Cir. 2013) (vacating sentence ten years more than Guidelines' range as substantively unreasonable when court focused on socioeconomic status and status as police officer); *see also United States v. Gerezano-Rosales*, 692 F.3d 393 (5th Cir. 2012) (vacating sentence where court believed defendant was being disrespectful as a clear error of judgment for improper balancing of the sentencing factors).

There have been even less cases reversed as substantively unreasonable when the sentence is one imposed within a properly calculated Guidelines range. *Gall* and *Rita* set forth boundaries for reasonableness arguments, but with a standard of review that defers to the sentencing court, it is difficult, nearly impossible, to get a sentence reversed as being "substantively unreasonable."

While the *Gall* Court instructed appellate courts to consider "the extent of any variance from the Guidelines range," it also seemingly contradicted itself by stating that due deference must be given to the district court's determination that the § 3553(a) factors justify the extent of the variance. *Feemster*, 572 F.3d at 461. In fact, Judge Colloton and Judge Beam both opined that with a deferential abuse-of-discretion standard of review, appellate review is similar to a rubber stamp affirmance, likening sentences outside the Guidelines' range to a pre-Guidelines days of federal sentencing. *Id*. at 470-71 ("The practical result of this court's affirmance of Feemster's sentence

establishes, effectively, a standard of no appellate review at all. We adopt a posture today that is so deferential that, so long as the district court gives lip service and a bit of discussion to the relevant 18 U.S.C. § 3553(a) factors, a sentence will almost never be reversed, procedurally or otherwise.").

Without a realistic chance of having a sentence overturned as substantively unreasonable when a sentence is outside the Guidelines, appellate review has become nothing more than a mere formality. Post-*Gall*, Circuit courts are struggling to determine what would satisfy an abuse-of-discretion standard of review. As the case law in courts of appeals since *Gall* demonstrates, it will be the unusual case when a district court sentence – whether within, above, or below the applicable Guidelines range – as substantively unreasonable." *Gardellini,* 545 F.3d at 1090.

While Mr. Bowen's case involves a non-Guidelines sentence, Judge Jones has similarly requested guidance in a similar circumstance where the sentence imposed is within-Guidelines, making the sentence presumptively reasonable. *Neba*, 901 F.3d at 266-68. Ms. Neba was sentenced to 900 months' imprisonment for Medicare fraud, but this Court affirmed the sentence because it was within her Guidelines range. *Id.* While concurring in the decision, Judge Jones disavowed the sentence, calling it excessive, but affirming based on precedent. *Id.* Judge Jones points to two reasons why more guidance is needed relating to challenges about substantive reasonableness: inflated sentences because of an impossible standard of review and disproportionate sentences for different crimes. *Id*. at 267-68.

Mr. Bowen cites to Judge Jones's *Neba* concurrence in hopes of shedding light on the difficulty in overcoming a greater than reasonably necessary imposed sentence.

Therefore, Mr. Bowen should prevail on the merits of his argument.

CONCLUSION

This Court should grant review for one compelling reasons: Circuit Courts are asking for clarity and guidance in cases where the appellate issue concerns the substantive reasonableness of the sentence. Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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