No. 19-_____

In the

Supreme Court of the United States

RODOLFO PEREZ-JIMENEZ
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

CHRISTOPHER A. CURTIS
Counsel of Record

FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET, ROOM 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753
CHRIS_CURTIS @FD.ORG

QUESTION PRESENTED

Whether substantive reasonableness review necessarily encompasses some degree of reweighing the sentencing factors?

PARTIES

Rodolfo Perez-Jimenez, is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, and was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodolfo Perez-Jimenez 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The Fifth Circuit's opinion is unpublished but is reprinted in the appendix.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. Rodolfo Perez-Jimenez*, 781 Fed. Appx. 381 (5th Cir. October 24, 2019)

JURISDICTION

The Fifth Circuit issued its written judgment on October 24, 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. Rodolfo Perez-Jimenez*, 3:18-CR-0354-B-1, United States District Court for the Northern District of Texas. Judgement and sentence entered on January 31, 2019.

2. *United States v. Rodolfo Perez-Jimenez*, CA No.19-10123, Court of Appeals for the Fifth Circuit. Judgment affirmed on October 24, 2019.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

In District Court

On July 18, 2018, Rodolfo Perez-Jimenez (Perez-Jimenez) was charged in a one count indictment with having been found illegally in the United States after having been deported and removed, a violation of 8 U.S.C. § 1326(a). (ROA.7-8).[1]

Perez-Jimenez entered a guilty plea, without a written plea agreement, to the one-count indictment on October 2, 2018. (ROA.38-39). As a part of the guilty plea, Perez-Jimenez signed a factual resume in which he admitted to the following:

> On or about September 07, 2019, in the Dallas Division of the Northern District of Texas, RODOLFO PEREZ-JIMENEZ, an alien, was found in the United States of America. Mr. Perez-Jimenez had been previously removed therefrom on or about May 15, 2013. He had not received the express consent of the Attorney General of the United States of America or the Secretary of the Department of Homeland Security to reapply for admission since the time of his previous removal. Accordingly, he admits that his conduct is in violation of 8 U.S.C. § 1326(a).

(ROA.36-37).

The Pre-sentence report (PSR) set the base offense level at 8, pursuant to U.S.S.G. §2L1.2(a), and added an eight-level enhancement for being convicted of a felony for which he received a sentence of two years or more, prior to his being deported for the first time, pursuant to U.S.S.G. §2L1.2(b)(2)(B), resulting in an

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

adjusted offense level of 16. (ROA.98-99). The PSR reduced the offense level by three levels for acceptance of responsibility, resulting in a total offense level 13. (ROA.99). Perez-Jimenez had a criminal history score of 5 and thus was in criminal history category III. (ROA.103). At a total offense level 13 and a criminal history category ILI, his advisory imprisonment range was 18-24 months. (ROA.105). The PSR also found no grounds for an upward variance or departure, finding only that there were grounds for a downward departure. *See* (ROA.107-108).

The government filed an objection to the PSR finding that the ex post facto clause prohibited the court from using the 2018 version of the Sentencing Guidelines. (ROA.109-112). Perez-Jimenez filed a similar objection. (ROA.116-117). The probation officer filed an addendum rejecting the objection. (ROA.114). Under the 2016 version, Perez-Jimenez's total offense level would have been a level 10, and his imprisonment range would have been 10-16 months. (ROA.115).

Prior to sentencing, Perez-Jimenez filed a sentencing memorandum requesting a sentence at the low end of the correct sentencing range. (Defendant's Sentencing Memorandum, Document 31). In the Memorandum, Perez-Jimenez pointed out several mitigating factors:

1) Perez-Jimenez was not arrested or taken into custody as a result of committing a new offense. He was arrested on a probation revocation warrant. Because he had been deported, it was impossible for him to comply with his previously imposed conditions of probation.

2) The Guidelines did not take into account that Perez-Jimenez only had one prior removal. This was his first prosecution for illegal re-entry. Prez-Jimenez had only been removed once in May 2013.

3) Perez-Jimenez had been in custody from September 7, 2016, and was only

earing credit on this federal case since July 31, 2018. He spent nearly 21 months on his state case prior to being released to federal officials on this case. Perez-Jimenez also spent 49 days in ICE custody prior to being brought into federal court for prosecution on this present case. Both the 21-month delay and the 49-day delay were caused by the federal government not taking Mr. Perez-Jimenez into custody for federal prosecution. These facts present grounds for a downward departure under U.S.S.G. §2L1.2, application note 8.

4) Mr. Perez-Jimenez had one prior felony conviction.

5) Mr. Perez-Jimenez now had a place to live and work in Mexico City.

6) The Guidelines already adequately accounted for Perez-Jimenez's criminal history.

(Defendant's Sentencing Memorandum, Document 31).

At the sentencing hearing, the district court sustained the objections to the PSR and found that the offense level was 10, with a criminal history category III, and an advisory imprisonment range of 10-16 months. *See* (ROA.81-85). At the sentencing hearing, Mr. Perez-Jimenez's attorney argued for a within-Guideline sentence, and again set forth the above mitigating factors. *See* (ROA.85-87). The district court varied upward, imposing a 24-month sentence with no additional supervised release. The reasons given by the Court was that Perez-Jimenez had been "here and out three times" and the seriousness of the one prior felony conviction. (ROA.90). The district court did not address or even acknowledge the ground for downward departure that Perez-Jimenez had been in state custody for 21 months before being brought into federal custody and that he had spent another 49 days in ICE custody before being brought to court on the current criminal charges.

On Appeal

On Appeal, Perez-Jimenez argued, *inter alia*, 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 affirmed the sentence without conducting any reweighing of the sentencing factors, stating that "the eight month upward variance imposed is well within the range of variances that we have upheld in the past," and "[t]he possibility of reasonable disagreement with how the district court balanced sentencing factors does not establish that the sentence is unreasonable." *United States v. Perez-Jimenez,* 781 Fed. Appx. at 382. The failure of the Fifth Circuit to conduct any reweighing of the sentencing factors 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 an appropriate 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 sentencing memorandum and at the sentencing hearing. The PSR even set forth grounds that

warranted a downward departure. The record fails to reflect that the district court gave consideration to these mitigating factors and the ground for downward departure and imposed a sentence that was at 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 upward variant sentence a presumption of reasonableness without conducting any analysis or weighing of the mitigating factors. 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 22nd day of January, 2020.

Respectfully submitted,

/s/ Christopher A. Curtis
CHRISTOPHER A. CURTIS
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET. ROOM 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753
Chris_curtis@fd.org