No. _____

In the

Supreme Court of the United States

DO KYUN KIM,
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

Do Kyun Kim , 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 Do Kyun Kim 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The Fifth Circuit's opinion is unpublished but is reprinted in the appendix.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. Do Kyun Kim*, 791 Fed. Appx. 490 (5th Cir. January 28, 2020)

JURISDICTION

The Fifth Circuit issued its written judgment on January 28, 2020. (Appendix A). The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on March 19, 2020. 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.

The Fifth Amendment to the United States Constitution provides the following:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LIST OF PROCEEDINGS BELOW

1. *United States v. Do Kyun Kim*, 4:18-CR-00233-A-1, United States District Court for the Northern District of Texas. Judgement and sentence entered on March 4, 2019.

2. *United States v. Do Kyun Kim*, CA No.19-10289, Court of Appeals for the Fifth Circuit. Judgment affirmed on January 28, 2020.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

In District Court

On September 19, 2018, Do Kyun Kim (Kim) was charged in a one-count indictment with distribution of heroin, in violation of 18 U.S.C. §§ 841(a)(1) and (b)(1)(C) (ROA.6-7).[1] On November 19, 2019, Kim pleaded guilty to the one-count indictment without a plea agreement. (ROA.34) As a part of his guilty plea, Kim entered into the following stipulation of facts:

On July 26, 2017, at a location in Tarrant County, Texas, defendant Do Kyun Kim distributed a mixture and substance containing a detectible amount of heroin, a Schedule I Controlled Substance, to an undercover Task Force Officer with the Drug Enforcement Administration. Negotiations between defendant Kim and the UC officer began July 19, 2017, for a quantity of hydrocodone and heroin and on July 26, 2017, defendant Kim delivered a plastic baggie containing a black-like substance to the undercover officer in exchange for cash payment of $750. Analysis of the substance conducted by the DEA South Central Laboratory revealed heroin in the amount of 11.93 grams. (ROA.35-36).

After Kim's guilty plea, the probation officer prepared a pre-sentence report (PSR). The officer included in the offense conduct the drug amounts from 13 sales of heroin, hydrocodone, morphine, and hydromorphone that Kim sold to a confidential

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

source and an undercover officer, the sales all occurring between September 16, 2019, through July 26, 2017. (ROA.103-104).

The probation officer included as offense conduct, drug amounts of 49.38 grams of methamphetamine (actual), 6.03 grams of heroin, 16.7 grams of cocaine, 2 grams of cocaine base, and 4.3 grams of benzocaine found at Kim's donut shop during the execution of a search warrant on August 2, 2018. (ROA.104).

Also, after his arrest, Kim cooperated with law enforcement officers and admitted in a statement that he had been regularly distributing drugs for approximately two years, including at various times marijuana, cocaine and crack cocaine, methamphetamine and heroine. (ROA.105). The probation officer included these drug amounts in his guideline calculations. (ROA.105-106).

Based upon all of these drug amounts, including the amounts that were not recovered but were admitted to by Kim, the PSR came up with a drug amount, converted to marijuana, of 3,081 kilograms of marijuana. (ROA.106).

Based on those drug quantities, the base offense level was a level 32, pursuant to U.S.S.G. §2D1.1(c)(4). (ROA.107). The probation officer included a two-level enhancement for firearms that were found in Kim's vehicle, at the donut shop, at Kim's residence and at Kim's gaming room business, pursuant to U.S.S.G. § 2D1.1(b)(1). (ROA107). The probation officer also included a two-level enhancement for maintaining a place for the purpose of distributing drugs, pursuant to U.S.S.G. §2D.1.1(b)(12). (ROA.107-108).

Kim's adjusted offense level was a level 36. With a three-level adjustment for acceptance of responsibility, Kim's total offense level was a level 33. (ROA.108). The probation officer found Kim had a criminal history score of 3 points and was a Criminal History Category III. (ROA.109-110) At a total offense level 33 and a Criminal History Category III, Kim's advisory imprisonment range was 151-188 months. (ROA.117).

Kim's attorney filed objections to the PSR in which he argued that Mr. Kim incorrectly received two criminal history points for being under a criminal justice sentence when he committed the instant offense. (ROA.121-122). Both the government and the probation officer agreed that Kim was correct. *See* (ROA.124-125,128). The probation officer filed an addendum adjusting Kim's criminal history score to 1 point and his Criminal History Category to I. (ROA.128). Based on a total offense level 33 and a Criminal History Category I, Kim's advisory imprisonment range was 135-168. (ROA.129).

Kim's attorney filed a motion for downward variance in which he argued that by including in the guideline calculations drug amounts that were only made known to law enforcement through Kim's cooperation and statements made after his arrest, the advisory imprisonment range of 135-168 months resulted in sentencing disparity and an unreasonable sentence. *See* (Defendant's Sentencing Memorandum and Request for Downward Variance, pp. 1-2). Specifically, Kim's attorney pointed out that had Kim waited to cooperate until he had been appointed an attorney, who would have requested and implicated the protections of U.S.S.G. §1B1.8, Kim's total offense

level would have been 25. With a Criminal History Category I, Kim's advisory imprisonment range would have been 57-71 months (ROA.2). In other words, Kim's willingness to cooperate immediately with law enforcement, without invoking his Fifth Amendment privilege and without requesting an attorney and waiting to provide that information until he received a Section 1B1.8 agreement, raised his advisory imprisonment range from 57-71 months to 135-168 months. This resulted in a severe sentencing disparity between Kim's case and other similarly situated defendants. *See* (Defendant's Sentencing Memorandum and Request for Downward Variance, pp. 1-2). At the sentencing hearing, Kim's attorney persisted in his argument for a downward variant sentence. *See* (ROA.89-91).

On March 1, 2019, the district court entered a judgement, imposing a 135-month term of imprisonment, a 3-year term of supervised release, a $100 mandatory special assessment, no fine and no restitution. (ROA.47-50,92-95). Kim's attorney objected to the sentence as substantively and procedurally unreasonable. (ROA.95)

On Appeal

On Appeal, Kim 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. Kim argued that the sentence resulted in Sentencing disparity because it failed to account for the factor that Kim received a significantly higher sentence then he would have received if he had exercised his right to remain silent and his right to an attorney before cooperating with law enforcement. The Fifth

Circuit affirmed the sentence without conducting any reweighing of the sentencing factors, stating that Kim had failed to show the sentencing court failed to consider unwarranted sentencing disparities and stating that Kim's "disagreement with the propriety of the sentence imposed does not suffice to rebut the presumption of reasonableness that attaches to a within-[G]uidelines sentence." *United States v. Kim,* 791 Fed. Appx. at 391, *quoting United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010). 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). *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 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 Mr. Kim's case involves a plausible claim of unreasonableness under §3553(a). Kim presented a compelling mitigating factor in a sentencing memorandum and at the sentencing hearing. Specifically, had Kim refused to cooperate with law enforcement

and either refused to speak with the officers or waited until he was appointed an attorney to cooperate, then he would have been looking at an advisory guideline range of imprisonment of 57-71 months. By cooperating immediately with the officers, Kim is being punished more than twice as severely as a defendant who refused to cooperate with law enforcement at all or who at least remained silent until he was appointed an attorney. This results in unacceptable sentencing disparity. This results in an unreasonable sentence.

Of course, The Fifth Amendment guarantee's a criminal defendant the right against compelled self-incrimination. *See* U.S. Constitution, Fifth Amendment. Thus, Kim had a constitutional right to refuse to cooperate with Law enforcement officers and to refuse to provide the information that was later used to drastically increase his sentence. Even if Kim had waited until he was represented by an attorney to cooperate with Law enforcement, U.S.S. G. §1B1.8 provides for protection against incriminating statements provided in connection with an agreement to cooperate with the government from being used to increase a defendant's guideline range. *See* U.S.S.G. §1B1.3(a). There simply is no question that Kim's guideline imprisonment range would have been significantly reduced had he refused to cooperate with law enforcement at the time of his arrest.

Title 18 U.S.C. § 3553(a) requires that. "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." Section 3553(a) also requires a district court to consider, "[T]he need to avoid unwarranted sentencing disparities among defendants

with similar records who have been found guilty of similar conduct . . .” 18 U.S.C. § 3553(a)(2)(6). This Court has instructed courts of appeals to review a district court’s compliance with Section 3553 by the “reasonableness” standard.

However, 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 at 767. 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); *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. 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).

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. Kim fully preserved the sentencing issue at the trial court and presented this issue for abuse of discretion – or reasonableness – review on appeal. 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, and to resolve the division in the circuit courts in applying reasonableness review.

Moreover, this Court's recent decision in *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), makes clear that the task of reasonableness review is precisely to reweigh the sentencing factors, though under a deferential standard of review. In *Holguin-Hernandez*, the defense requested a sentence of fewer than 12 months for violating the terms of his release. *See Holguin-Hernandez*, 140 S.Ct. at 764. When he did not object to a greater term as unreasonable, the Fifth Circuit applied plain error review to his substantive reasonableness claim on appeal. *See id*. at 765.

This Court, however, found that no such objection was necessary. *See id*. at 764. Federal Rule of Criminal Procedure 51 states that "[a] party may preserve a claim of error by informing the court ... of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action and the grounds for that objection." Fed. Rule Crim. Proc. 51(b). Applying this standard, this Court held that a request for a lesser sentence presented the same claim to the district court that a defendant might assert in an appellate reasonableness claim. Both forms of advocacy claimed that the sentence exceeded what is necessary to satisfy the §3553(a) factors. *See Holguin-Hernandez*, 140 S. Ct. at 766–767. As this Court explained, "[a] defendant who, by advocating for a particular sentence, communicates to the trial judge his view that a longer sentence is 'greater than necessary' has thereby informed

the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence." *Id*. at 766-767.

The core of the *Holguin-Hernandez* holding is thus that the defendant asserting a reasonableness claim is doing the same thing in the court of appeals that he or she does when requesting leniency in the district court– arguing the weight of the 3553(a) factors. If the courts of appeals faithfully undertake reasonableness review, then, they must to some extent "reweigh the sentencing factors", "substantively second guess" the district court, and entertain mere "disagreement with the district court's weighing of the § 3553(a) factors." As noted, this overturns the view of substantive reasonableness review applied below.

As an alternative remedy, this Court could 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). In the absence of its misguided view of reasonableness review, it is reasonably probable that the court of appeals would have reversed the sentence.

CONCLUSION

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

Respectfully submitted this 28th day of April, 2020.

Respectfully submitted,

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