

No. _____

In the
Supreme Court of the United States

Francisco Javier Ponce-Mares,
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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QUESTIONS PRESENTED

- I. Whether there is a reasonable probability of a different result in the event that the court below is instructed to reconsider the decision in light of *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020).?

PARTIES TO THE PROCEEDING

Petitioner is Francisco Javier Ponce-Mares, 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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PETITION FOR A WRIT OF CERTIORARI

Petitioner Francisco Javier Ponce-Mares seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Ponce-Mares*, 793 F. App'x 326 (5th Cir. February 11, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on February 11, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3553(a) states:

(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.

18 U.S.C. § 3742(a) provides:

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting

condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

STATEMENT OF THE CASE

A. Trial Proceedings

On May 21, 2016, Petitioner Francisco Javier Ponce-Mares suffered an arrest for Public Intoxication and Possession of a Controlled Substance in an amount less than a gram. (ROA.108). Two days ICE officials encountered him in a local jail for these petty offenses, where they determined he was an alien illegally present in the United States. (ROA.108). They placed an immigration detainer. (ROA.108).

Yet prosecutors did not obtain an indictment for illegally re-entering the country until November 6, 2018, well more than two years after immigration noted his offense. (ROA.7). By that point, he had pleaded guilty to the controlled substance offense, and to a charge for possessing a prohibited item in prison. (ROA.108). Indeed, he had been paroled to ICE. (ROA.108). As a consequence, Mr. Ponce-Mares was not sentenced until April 22, 2019, almost three years after immigration authorities found him. (ROA.93). He thus, lost any opportunity to obtain a concurrent sentence, whether by federal court order, 18 U.S.C. §3584(a), or by simple dismissal of the state charge. And the 35 months spent in state and ICE custody will certainly not be credited against Mr. Ponce-Mares's federal term. 18 U.S.C. §3585(b).

Mr. Ponce-Mares pleaded guilty to one count of illegally re-entering the country. (ROA.64, et seq.). A Presentence Report (PSR) calculated a Guideline range of 10-16 months imprisonment, the product of an offense level of ten and a criminal history category of III. (ROA.116). The defense filed an objection to the PSR, asking the court to consider a downward adjustment to account for time in state custody,

and arguing against an upward variance. (ROA.122-125). The district court, however, imposed a sentence well above the top of the Guidelines: 36 months imprisonment. (ROA.900).

B. Appellate Proceedings

Petitioner appealed, contending that the district court imposed a substantively unreasonable sentence, due to the district court's failure to account for the delay in bringing federal charges. Specifically, he argued that failure to account for the delay in prosecution created a profound risk of arbitrary disparity between Petitioner and other re-entry defendants, increased the aggregate term of imprisonment beyond the needs expressed in 18 U.S.C. §3553(a)(2), and allowed federal prosecutors to compromise the state's legitimate interests in helping to decide the aggregate term.

The Fifth Circuit rejected these arguments with the following commentary:

The district court considered and rejected Ponce-Mares's arguments for leniency via a downward departure based on the government's delay in commencing prosecution. The court then upwardly varied from the advisory range of 10 to 16 months and imposed 36 months. In determining that an upward variance was warranted, the court considered the guideline range, the arguments of the parties, the defendant's allocution, the § 3553(a) factors, and recidivism. Moreover, although the sentence is 20 months above the top of the advisory range, this court has upheld larger upward increases.

United States v. Ponce-Mares, 793 F. App'x 326, 327 (5th Cir. 2020)(citing *United States v. Rhine*, 637 F.3d 525, 528, 529–30 (5th Cir. 2011)); [Appendix A, at 3].

REASONS FOR GRANTING THE PETITION

There is a reasonable probability of a different result in the event that the court below is instructed to reconsider the decision in light of *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020).

Section 3553(a) of Title requires federal district courts to impose a sentence sufficient but not greater than necessary to comply with certain sentencing goals enumerated in 3553(a)(2). This Court instructed courts of appeals to review district court's compliance with that principle for "reasonableness" *See United States v. Booker*, 543 U.S. 220 (2005). Yet the court below has repeatedly held that its review for reasonableness does not embrace a "reweighing" of the sentencing factors, nor a "substantive second guessing" of their application by the district court. *See 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); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008).

The opinion below reflects this view. After reciting general standards governing reasonableness review, the heart of the opinion rejected Petitioner's position because the district court engaged in the appropriate sentencing procedures. Specifically, it "considered the guideline range, the arguments of the parties, the defendant's allocution, the § 3553(a) factors, and recidivism." *United States v. Ponce-*

Mares, 793 F. App'x 326, 327 (5th Cir. 2020); [Appendix A, at 3]. Other than noting that the degree of variance was not unprecedented, the court below did not otherwise engage or defend the substantive compliance of the sentence with 3553(a). It thus appear to be a product of the Fifth Circuit's cramped view of substantive reasonableness review.

To be sure, reasonableness review is deferential. *See Gall v. United States*, 52 U.S. 38, 51 (2007). Nonetheless, 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 in the court below.

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). In the absence of its misguided view of reasonableness review, it is reasonably probable that the court of appeals would have reversed the sentence.

Put simply, it was not reasonable for the district court to assess a radical upward variance from a Guideline range when the aggregate sentence was already swollen by inexplicable, arbitrary, delay in federal prosecution. The date that federal proceedings begin is simply arbitrary. As explained above, Petitioner will likely receive a higher sentence than many or most defendants who receive their federal sentences before the expiration of their state sentences. At a minimum, he has lost a chance to argue for dismissal in state court due to the pendency of a lengthy federal sentence. Yet the date of his federal sentencing does not make him more culpable, more dangerous, or a better example for general deterrence. As such, the refusal to accord mitigating value to the delay in prosecution creates unwarranted sentencing disparity under 18 U.S.C. §3553(a)(6).

Further, the time spent in state custody after the federal offense creates a reduced need for deterrence and incapacitation, required considerations under 18 U.S.C. §3553(a). The total amount of time spent in prison after the defendant's offense is directly relevant to the goals of punishment. *See e.g. Dean v. United States*, ___U.S.__, 137 S.Ct. 1170, 1176 (2017)(“That [defendant] will not be released from prison until well after his fiftieth birthday ... surely bears on whether ... still more incarceration is necessary to protect the public.”). But here the court seems to have given it little weight.

Finally, unless the delay given some weight in the sentencing process, the executive's decision to delay prosecution destroys the chief means for the state to exert control over the aggregate term of imprisonment: dismissal of charges, or

moderation of the state sentence in light of the known federal sentence. *See Setser v. United States*, 566 U.S. 231, 241 (2012) (“... it is always more respectful of the State's sovereignty for the district court to make its decision up front rather than for the Bureau of Prisons to make the decision after the state court has acted. That way, the state court has all of the information before it when it acts.”). The potential for gamesmanship by the federal executive poses danger to public respect for the law, a required consideration under 18 U.S.C. §3553(a)(2)(A).

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.

Respectfully submitted this 10th day of July, 2020.

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