

No. _____

In the
Supreme Court of the United States

Gregory Wind,

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

- I. Did the district court impose a substantively unreasonable sentence upon Mr. Wind?

PARTIES TO THE PROCEEDING

Petitioner is Gregory Wind, 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 Gregory Wind 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. Gregory Wind*, 797 Fed. Appx. 887 (5th Cir. Mar. 18, 2020). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 18, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On March 19, 2020, the Court extended the 90-day deadline to file a petition for certiorari to 150 days.

STATUTORY AND RULES PROVISIONS

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—
 - ...
- (5) any pertinent policy statement—
 - ...
- (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 RELATED PROCEEDINGS

1. *United States v. Gregory Wind*, 4:18-CR-302-A-1. United States District Court, Northern District of Texas. Judgment entered May 26, 2019.
2. *United States v. Gregory Wind*, CA No. 19-10613, United States Court of Appeals for the Fifth Circuit. Opinion and judgment affirming the sentence entered March 18, 2020.

STATEMENT OF THE CASE

On December 12, 2018, Petitioner Gregory Wind was charged in a one-count indictment with use of a false document, a violation of 18 U.S.C. § 1001(a)(3). (ROA.18–19). Pursuant to a plea agreement, (ROA.148–52), on February 8, 2019, Wind entered a guilty plea. (ROA.35, 74–114). After two addenda, Wind’s Presentence Report (“PSR”) ultimately calculated Wind’s guideline sentencing range to be 30 to 37 months’ imprisonment. (ROA.194) (after denying a reduction for acceptance of responsibility that had been calculated as a part of the initial PSR).

On April 26, 2019, Wind filed a motion for downward departure and variance, asking the court to sentence Wind below his advisory range. (ROA.50–55). Wind argued that the court should consider a downward departure or variance because Wind was a military veteran who was decorated with several honors before his honorable discharge from his assignment in intelligence operations. (ROA.50–52). Moreover, Wind argued that his military service played a role in his instant offense, leading to the post-traumatic stress disorder that rendered necessary the treatment for which he submitted fraudulent mileage reports. (ROA.53–54).

The district court, however, prior to the sentencing hearing, entered an order stating that, “having reviewed the presentence report pertaining to the defendant, GREGORY WIND, and other sentencing items, the court tentatively has concluded that a sentence of imprisonment above the top of the advisory guideline imprisonment range would be appropriate . . .”. (ROA.56).

At sentencing, after the court reminded Wind that it had tentatively concluded that an upward variance was warranted, Wind’s counsel reiterated his arguments in favor of a downward variance from the guideline range. (ROA.124–27). The district court, however, did not directly address Wind’s mitigation arguments, but reiterated its belief that a sentence above the guideline range was warranted. (ROA.128).

On appeal, Wind argued that his sentence was procedurally and substantively unreasonable. The Fifth Circuit disagreed, stating only that, “the district court took his arguments for a downward departure into account but simply found them unavailing.” App. A, at 2. This petition follows.

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. Ofrey-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 a strong vehicle to consider this conflict, as Petitioner’s case involves a plausible claim of unreasonableness under § 3553(a). Specifically, the Petitioner had valid grounds for a downward variance that he presented in a written motion and at sentencing. These were factors that should have been specifically

weighed and balanced in the district court's sentence and under the reasonableness review standard on appeal. Instead, the district court did not directly address Wind's mitigation arguments, instead focusing on Wind's criminal history as justification for the sentence. The court of appeals summarily affirmed the sentence. *See Appendix A.* As a result, the Petitioner received a 60 month sentence from the district court and no true reasonableness review from the court of appeals.

The problem in this case, and the reason this Court should grant review, is that the district court did not directly address several compelling mitigating factors presented at sentencing. The Petitioner presented this issue for abuse of discretion – or reasonableness – review on appeal, and the Fifth Circuit summarily affirmed the sentence without conducting meaningful reasonableness analysis. 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 17th day of August, 2020.

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