

No. _____

In the
Supreme Court of the United States

CASYE NECOLE RICHARDSON,
ALSO KNOWN AS CASYE NECOLE COTTON,
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

Do Casye Necole Richardson is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, and was the plaintiff-appellee below.

TABLE OF CONTENTS

QUESTION PRESENTED	ii
PARTIES TO THE PROCEEDING	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS	1
LIST OF PROCEEDINGS BELOW	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THIS PETITION.....	9
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	9
CONCLUSION.....	15

INDEX TO APPENDICES

Appendix A Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas.

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	9
<i>Holguin-Hernandez v. United States</i> , __U.S.__, 140 S.Ct. 762 (2020)	13, 14
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007)	9
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996)	14
<i>Rita v. United States</i> , 551 U.S. 338. (2007)	9
<i>United States v. Abu Ali</i> , 528 F.3d 210 (4th Cir. 2008)	10
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	9
<i>United States v. Cisneros-Gutierrez</i> , 517 F.3d 751 (5th Cir. 2008)	9, 12
<i>United States v. Cotten</i> , 650 Fed. Appx. 175 (5th Cir. 2016)	12
<i>United States v. Douglas</i> , 667 Fed. Appx. 508 (5th Cir. 2016)	12
<i>United States v. Funk</i> , 534 F.3d 522 (6th Cir. 2008)	10
<i>United States v. Hernandez</i> , 876 F.3d 161 (5th Cir. 2017)	12
<i>United States v. Jones</i> , 531 F.3d 163 (2d Cir. 2008)	10
<i>United States v. Levinson</i> , 543 F.3d 190 (3d Cir. 2008)	10
<i>United States v. Malone</i> , 828 F.3d 331 (5th Cir. 2016)	12
<i>United States v. Mosqueda</i> , 437 Fed. Appx. 312 (5th Cir. 2011)	12
<i>United States v. Ofray-Campos</i> , 534 F.3d 1 (1st Cir. 2008)	10
<i>United States v. Pugh</i> , 515 F.3d 1179 (11th Cir. 2008)	10
<i>United States v. Richardson</i> , 800 Fed. Appx. 268 (5th Cir. April 7, 2020)	1, 8
<i>United States v. Shy</i> , 538 F.3d 933 (8th Cir. 2008)	10
<i>United States v. Turcios-Rivera</i> , 583 Fed. Appx. 375 (5th Cir. 2014)	12
 Statutes	
18 U.S.C. § 841	4
18 U.S.C. § 846	4
18 U.S.C. § 3553	<i>passim</i>
28 U.S.C. § 1254	1
 Rules	
Fed. R. Crim. P. 51	13

United States Constitution

U.S. Const. Amend. V	3, 11
----------------------------	-------

United States Sentencing Guidelines

U.S.S.G. § 1B1.3	11
U.S.S.G. § 1B1.8	11
U.S.S.G. § 2D1.1	5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Casye Necole Richardson 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. Casye Necole Richardson*, 800 Fed. Appx. 268 (5th Cir. April 7, 2020)

JURISDICTION

The Fifth Circuit issued its written judgment on April 7, 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. Casye Necole Richardson*, 1:18-CR-00071-C-1, United States District Court for the Northern District of Texas, Abilene Division. Judgement and sentence entered on May 3, 2019.

2. *United States v. Casye Necole Richardson*, CA No.19-10592, Court of Appeals for the Fifth Circuit. Judgment affirmed on April 7, 2020.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

In District Court

On November 14, 2018, Cayse Necole Richardson was charged in a four-count indictment. (ROA.11-14).¹ Count One charged a conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. §§ 846 and 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii) and carried an imprisonment range of 10 years to Life. (ROA.11). Count Two charged possession with intent to distribute 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine in violation of 21 U.S.C. §§ 846 and 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(viii) and carried an imprisonment range of 5 – 40 years. (ROA.12). Count Three charged possession with intent to distribute a mixture or substance containing a detectible amount of methamphetamine in violation of 21 U.S.C. §§ 846 and 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and carried an imprisonment range of 0-20 years. (ROA.13). Count Four charged possession with intent to distribute a mixture or substance containing a detectible amount of methamphetamine in violation of 21 U.S.C. §§ 846 and 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and carried an imprisonment range of 0-20 years. (ROA.14).

On January 3, 2019, Richardson pleaded guilty to Count Two of the indictment, pursuant to a written plea agreement and factual resume. (ROA.58-60,61,95-101) In

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

the factual resume, Richardson stipulated to facts that established that on February 27, 2018, she was riding in car that her brother was driving, and police officers stopped the car based on an outstanding warrant for Richardson's brother. *See* (ROA.59). During a search of the vehicle, 52.65 grams of methamphetamine were found in a Victoria's Secret bag. *See id.* Richardson admitted the methamphetamine was hers and that she was going to distribute it. She also consented to a search of her residence and admitted to officers that she started selling methamphetamine shortly after she got out of prison in 2016. *See id.*

After Richardson's guilty plea, the probation officer prepared a pre-sentence report (PSR). The PSR established that on October 10, 2018, another search warrant for Richardson's residence and an arrest warrant for Richardson were executed. (ROA.109). During the search, 60.65 grams of methamphetamine were found. *Id.* Also on October 16, 2018, Richardson consented to an interview in which she admitted that from August 2016 until her arrest in February 2018, she sold methamphetamine and would obtain 1 pound of methamphetamine from her source of supply every 2 to 3 days. (ROA. 110). Based upon Richardson's October 16, 2018 statement, the probation officer attributed 190 pounds (86.18 kilograms) of methamphetamine for guideline purposes. (ROA.110-111).

Based on this quantity of methamphetamine, the probation officer determined the base offense level was a level 38, pursuant to U.S.S.G. §2D1.1(c)(1). (ROA.111). The probation officer included a two level enhancement for firearms that were found at Richardson's residence pursuant to U.S.S.G. § 2D1.1(b)(1). (ROA111).

Richardson's adjusted offense level was a level 40. With a three-level adjustment for acceptance of responsibility, Richardson's total offense level was a level 37. (ROA.111-112).

The probation officer found Richardson had a criminal history score of 5 points and was a Criminal History Category III. (ROA.112-114) At a total offense level 37 and a Criminal History Category III, Richardson's advisory imprisonment range was 262-327 months. (ROA.119).

Richardson's attorney filed a statement of no objections to the PSR. (ROA.122-123). Richardson's attorney also 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 Richardson's cooperation and statements made after her arrest, the advisory imprisonment range of 262-327 months resulted in an unreasonable sentence. Richardson's attorney argued that, absent Richardson's cooperation with and admissions to law enforcement at the time of her arrest, she would have been accountable for only 3.05 kilograms of methamphetamine. Her base offense level and total offense level would have been six levels lower, resulting in a total offense level of 31. At a criminal history category III, her advisory imprisonment range would have been 135-168 months. *See* (ROA.124-126). Specifically, Richardson's attorney argued that in the interest of encouraging and rewarding Richardson's extraordinary forthrightness with law enforcement, the district court should vary downward from the advisory range of 262-327 months. *See* (ROA.122-126). In his motion he asked for a sentence between 168 and 262 months. (ROA.126).

At the sentencing hearing, Richardson's attorney persisted in his argument for a downward variant sentence, and advocated that the defendant be sentenced to 210 months. *See* (ROA.90). When Richardson's attorney tried to further explain his request for a downward variance to 210 months, the district court said, "No, Just a minute. I know what your position is." (ROA.91). The prosecutor stated that he did not oppose a 262 month sentence.

At the sentencing hearing, the district court imposed a 262 month term of imprisonment, a 4-year term of supervised release, a \$100 mandatory special assessment, no fine and no restitution. (ROA.92-93). The district court identified the sentence as a within-guideline sentence. (ROA.130).

On Appeal

On Appeal, Richardson 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. Richardson argued that the sentence resulted in sentencing disparity because it failed to account for the factor that Richardson received a significantly higher sentence than she would have received if she had exercised her right to remain silent and her 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 Richardson had failed to show the sentencing court failed to consider unwarranted sentencing disparities and stating

that Richardson “has not rebutted the presumption of reasonableness or established that the district court abused its discretion by imposing a substantively unreasonable sentence.” *United States v. Richardson*, 800 Fed. Appx. at 269. 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 Richardson’s case involves a plausible claim of unreasonableness under §3553(a). Richardson presented a compelling mitigating factor in a sentencing memorandum and at the sentencing hearing. Specifically, had Richardson refused to cooperate with

law enforcement and either refused to speak with the officers or waited until she was appointed an attorney to cooperate, then she would have been looking at an advisory guideline range of imprisonment of 135-168 months. By cooperating immediately with the officers, Richardson is being punished almost 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 guarantees a criminal defendant the right against compelled self-incrimination. *See* U.S. Constitution, Fifth Amendment. Thus, Richardson 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 her sentence. Even if Richardson had waited until she 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 Richardson's guideline imprisonment range would have been significantly reduced had she 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. Richardson 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 4th day of September, 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