NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2020

TOMMY PEÑA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Stephanie L. Wolf
Assistant Federal Public Defender
506 South Main, Suite 400
Las Cruces, New Mexico 88001
(575) 527-6930
Stephanie_Wolf@fd.org

Service to:
Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave. NW, Room 5616
Washington, D.C. 20530-0001

November 13, 2020

NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2020

TOMMY PEÑA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Mr. Peña's 360-month sentence was an upward variance of 222 months, or 160%, from the high end of the total advisory guideline range of 123-138 months. This 30-year sentence–more than double the guideline range--was substantively unreasonable because it was based on mischaracterizations of Mr. Peña's conduct, history, and potential dangerousness. However, the Tenth Circuit, on appeal, basically abdicated its responsibility to review for reasonableness.

The issue presented in this Petition is whether the Tenth Circuit's toothless standard for reviewing the reasonableness of a upward variance is contrary to this Court's case law, *United States v. Booker*, 125 S. Ct. 738 (U.S. 2005), and its progeny, including *Peugh v. United States*, 569 U.S. 530 (2013), and *Hughes v. United States*,

138 S. Ct. 1765 (2018), requiring that the appellate court review sentences for abuse of discretion.

NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2020

TOMMY PEÑA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2020

TOMMY PEÑA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Stephanie L. Wolf, Assistant Federal Public Defender, declare under penalty of perjury that I am counsel for Petitioner, Tommy Peña, and, pursuant to this Court's Order of April 15, 2020, I personally mailed the Petition for a Writ of Certiorari to this Court by depositing the original in an envelope addressed to the Clerk of this Court, sealed the envelope, and sent it by United States Postal Service, postage prepaid, at approximately 4 p.m. on November 16, 2020.

/s/Stephanie L. Wolf
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

NO._____

SUPREME COURT OF THE UNITED STATES

October Term 2020

TOMMY PEÑA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner Tommy Peña respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of *United States v. Tommy Peña*, 963 F.3d 1016 (10th Cir. June 24, 2020).

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Tommy Peña*, 963 F.3d 1016 (10th Cir. June 24, 2020), is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

The Tenth Circuit's decision was filed June 24, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which grants the United States Supreme

Court jurisdiction to review by writ of certiorari all final judgments of the Courts of Appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Pursuant to Supreme Court Rules 13.1, 13.3, 13.4, and 30, and 28 U.S.C. § 2101(c), and this Court's Order of March 19, 2020, extending the time for filing petitions to 150 days, this Petition is timely if filed on or before November 20, 2020.

APPLICABLE STATUTORY PROVISION

The Question Presented above pertains to the following statute:

I. 18 U.S.C. § 3553 provides in pertinent part:

> (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

***;

(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.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the

> range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.***

STATEMENT OF THE CASE AND THE FACTS

This Petition for Writ of Certiorari is filed following the direct appeal of Mr. Peña's 30-year sentence imposed after the Court granted his motion pursuant to 28 U.S.C. § 2255.

Following a bench trial, on November 17, 2011, the district court sentenced Mr. Peña as an armed career criminal and a career offender to a total of 480 months (40 years) in the custody of the Bureau of Prisons for the offenses of conspiracy, carjacking, using and carrying a firearm during and in relation to a crime of violence,

three counts of felon in possession of ammunition, and possession of methamphetamine. ROA I at 498. This sentence was based on Mr. Peña's status at that time as a career offender, with a guideline range of 30 years to life, with a consecutive sentence of 10 years for his conviction pursuant to 18 U.S.C. § 924(c). Thus, the district court imposed the guideline minimum sentence of 30 years, followed by the consecutive sentence. ROA I at 499-501.

Following the decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Peña moved to correct his sentence pursuant to 28 U.S.C. § 2255. ROA I at 479, 498. He contended that, in light of *Johnson*, his conviction for carjacking was not a crime of violence and therefore his conviction pursuant to 18 U.S.C. § 924(c) had to be vacated; that he was not a career offender under U.S.S.G. § 4B1.1 and U.S.S.G. § 4B1.2; and that he was no longer an armed career criminal for purposes of 18 U.S.C. § 924(e). ROA I at 498-99. The district court granted the motion in part and ordered that Mr. Peña would be resentenced without application of the Armed Career Criminal Act. ROA I at 533. His other claims were denied. ROA I at 533.

Following briefing and an evidentiary hearing, the district court found on October 2, 2018, that Mr. Peña should be resentenced under the 2016 United States Sentencing Guidelines, his offense level was 22 and his criminal history category was IV, and his advisory guidelines sentencing range was 63-78 months for the offenses

excluding the § 924(c) count. ROA I at 599. The Court also found that the appropriate sentence for the § 924(c) conviction was 60 months. ROA I at 599. The total adjusted advisory sentencing guideline range, including the consecutive sentence for the § 924(c) conviction, was 123-138 months. ROA I at 599. The Court reserved judgment on the Government's request for a substantial upward variance to a total sentence of 360 months, or 30 years. ROA I at 599.

On November 18, 2018, the district court issued a Memorandum Opinion and Order Granting United States' Request for Upward Variance. ROA I at 675-717. Mr. Peña filed objections to the district court's Memorandum Opinion and Order. ROA I at 718-729. On March 18, 2019, the district court overruled Mr. Peña's objections, ROA I at 732-733, and sentenced him to 30 years in the custody of the Bureau of Prisons, ROA I at 736. The Amended Judgment in a Criminal Case was filed on April 24, 2019.

The Tenth Circuit Court of Appeals affirmed the District Court's decision on June 24, 2020. The Tenth Circuit's decision is attached hereto as Appendix A.

REQUEST FOR WRIT OF CERTIORARI

I. This Court Should Grant the Petition

The Tenth Circuit's ineffectual substantive reasonableness review accords near-complete deference to sentencing courts, thus misapplying this Court's decisions; depriving defendants of their statutory right to review of the reasonableness of their sentences; deepening circuit conflicts on the nature of reasonableness review; and exacerbating unwarranted sentencing disparities.

The Tenth Circuit misapplied this Court's precedents and abandoned its responsibility to review the substantive reasonableness of the sentence when it accorded near complete deference to the District Court's consideration and weighing of the 18 U.S.C. § 3553(a) sentencing factors. The panel opinion's extreme deference to the sentencing court effectively deprived Mr. Peña of his statutory right to review of the reasonableness of an extreme upward variance to 30 years – much more than double the high end of the advisory guideline range – imposed on a defendant who, although convicted of carjacking and use of a firearm in connection with a crime of violence, had not physically injured anyone.

A. Development of Appellate Reasonableness Review

A central purpose of the Sentencing Reform Act of 1984 (SRA) was to "eliminate the unwarranted disparities perceived to be caused by sentencing judges'

unbridled discretion." Note, *More Than a Formality: the Case for Meaningful Substantive Reasonableness Review*, 127 Harv. L. Rev. 651, 653 (2014). The mandatory nature of the guidelines and the appellate review provided for in 18 U.S.C. § 3742 were intended to ensure greater consistency and fewer unwarranted disparities in sentencing. *Id.* at 954. *See also United States v. Booker*, 543 U.S. 220, 292 (2005) (Stevens, J., dissenting) ("The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim."). *Booker* rendered the Guidelines advisory and stated that appellate courts should review sentences for unreasonableness in light of the § 3553(a) factors. 543 U.S. at 226-27, 261. This Court's decisions since *Booker* provide that appellate courts *must* apply the abuse-of-discretion standard of review, taking into account the totality of the circumstances, including the extent of any variance from the Guidelines range, and ensure the sentence is "reasonable." *Gall v. United States*, 552 U.S. 38, 46 (2007). A "major departure" or variance from the Guideline range must be "supported by a more significant justification than a minor one." *Id.* at 51. The reviewing court "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.*

B. The Tenth Circuit's Reasonableness Review Conflicts with This Court's Precedents

The panel in Mr. Peña's case abdicated its responsibility under *Booker* and *Gall* to consider the extent of the 160-percent upward deviation from the Guideline range – to 360 months – and the substantive reasonableness of the resulting sentence, which is longer than that imposed on some people convicted of homicide. *See, e.g., United States v. Gomez*, 824 Fed. Appx. 577 (10th Cir. 2020)(unpublished) (defendant with lengthy criminal history sentenced to 60 months for involuntary manslaughter after stabbing victim).

The Court acknowledged that, under *Gall*, the standard of review was for "abuse of discretion." *Peña*, 963 F.3d at 1024 (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). It then stated that, under this standard, it gave "substantial deference" to the district court and would "only overturn a sentence that is 'arbitrary, capricious, whimsical, or manifestly unreasonable.'" *Id.* (citations omitted). Although it seemingly recognized it should not "rubber stamp" the lower court's sentence and that it should "'determine if the district court's proffered rationale, on aggregate, justifies the magnitude of the sentence'" *id.* (citation omitted), it proceeded to merely rubber stamp the sentence imposed. The Court later stated:

> "If [the district court] decides that an outside-Guidelines sentence is warranted, [the court] must consider the extent of the deviation and ensure that the justification is

> sufficiently compelling to support the degree of the variance." On review, we must "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."

Peña, 963 F.3d at 1028-29 (quoting *Gall*, 552 U.S. at 50, 51).

The Court then utterly failed to consider the extent of the variance. It concluded that:

> Although the variance from the guidelines here is large, the district court addressed each of the § 3553(a) factors, provided compelling reasons for the upward variance, and thereby maintained the connection between Mr. Peña's conduct and the sentence imposed. Given the district court's detailed explanation of Mr. Peña's sentence, he cannot meet his burden of showing the sentence is arbitrary, whimsical, or substantively unreasonable.

Id. at 1030. The Court's language reveals that a procedural standard has been substituted for a substantive one: Mr. Peña could not meet his burden of showing substantive unreasonableness, the Court reasons, simply because the district court provided a "detailed explanation." It is no substantive review at all if the only requirement is that the sentencing court was aware of all relevant factors and provided a lengthy discourse on why a within-guidelines sentence was insufficient, without consideration for whether the sentencing court was reasonable in coming to that conclusion and imposing the sentence it did.

The Tenth Circuit's decision is contrary to this Court's instructions. "[T]he substantive reasonableness inquiry determines if the length of a sentence conforms with the sentencing goals set forth in 18 U.S.C. § 3553(a) and asks whether the district judge 'abused his discretion in determining that the § 3553(a) factors supported' the sentence imposed." *United States v. Perez-Rodriguez*, 960 F.3d 748, 753 (6th Cir. 2020) (quoting *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020)). A sentence that is too long is substantively unreasonable. *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). As the Eighth Circuit has stated, "[i]f anything remains of substantive reasonableness review in the courts of appeals, our court cannot ignore its duty to correct" errors in weighing the § 3553(a) factors. *United States v. Kane*, 639 F.3d 1121, 1136 (8th Cir. 2011). Another circuit observed, "Because of the substantial deference district courts are due in sentencing, we give their decisions about what is reasonable wide berth and almost always let them pass. There is a difference, though, between recognizing that another usually has the right of way and abandoning one's post." *United States v. Irey*, 612 F.3d 1160, 1225 (11th Cir. 2010) (en banc). The Eleventh Circuit also recognized that "substantive review exists, in substantial part, to correct sentences that are based on unreasonable weighing decisions." *Id.* at 1194.

Other circuits recognize that merely citing to the sentencing factors is insufficient to support a massive upward variance. In *United States v. Warren*, 771 Fed. Appx. 637 (6th Cir. 2019)(unpublished), the defendant pled guilty to being a felon in possession of a firearm. *Id.* at 638. Although the advisory guideline range was fifty-one to sixty-three months' imprisonment, the district court imposed the statutory maximum sentence of 120 months. *Id*. The Sixth Circuit vacated the sentence even though the district court "engaged in a thorough discussion of several factors set forth in 18 U.S.C. § 3553(a), *id.* at 641, "the district court's only discussion of whether the selected sentence avoids unwarranted sentencing disparities hinges on criminal history factors addressed by the Guidelines, [and therefore] the district court insufficiently distinguished Warren from other offenders in the same criminal history category." *Id.* at 642. The Court explained that "[b]y 'relying on a problem common to all' defendants within the same criminal history category as Warren—that is, that they have an extensive criminal history—the district court did not give a sufficiently compelling reason to justify imposing the greatest possible deviation from the Guidelines-recommended sentence in this case." *Id.* (quoting *United States v. Poynter*, 495 F.3d 349, 354 (6th Cir. 2007)). The Court further observed that "reliance on Warren's criminal history without a fuller consideration of whether the selected sentence avoids unwarranted sentencing disparities was insufficient to justify such a

stark departure from the Guidelines" and the Court thus had "the definite and firm conviction that . . . the trial court imposed a sentence that was 'greater than necessary' in roughly doubling the recommended sentence." *Id.* at 642-43. Similarly, in *United States v. Smith*, 959 F.3d 701 (6th Cir. 2020), prior to passing of the Fair Sentencing Act and the First Step Act, the defendant had pled guilty to distributing more than 50 grams of crack cocaine. *Id.* at 702. He faced a guideline range of 168-210 months and a statutory minimum sentence of 240 months. *Id.* He was sentenced to 240 months. *Id.* After passage of these two Acts, the defendant's guideline range was 77-96 months with a 120-month minimum sentence. *Id.* However, the district court refused to reduce the defendant's sentence based on the seriousness of the crime and the defendant's criminal history. *Id.* at 703-04. Unlike the Tenth Circuit, the Sixth Circuit meaningfully reviewed the proffered reasons for the variance and held that the sentencing court "failed to provide a sufficiently compelling justification for maintaining a sentence that is now more than twice the guideline range set by Congress." *Id.* at 704.

Unlike these Courts, which meaningfully reviewed above-guideline sentences by comparing the extent of the variance to the cited justification, the Tenth Circuit abandoned its responsibility for substantive reasonableness review in this case. It declined to consider whether the district court's explanation could support the extent

of the variance imposed, and instead looked only to whether the district court had gone through the motions of offering an explanation. *See Peña,* 963 F.3d at 1030 (saying "the district court offered significant explanation for the sentence imposed and determined that a within-guidelines sentence would be 'woefully inadequate to accomplish the goals of sentencing'" without addressing the extent of the variance) (citation omitted). This overly deferential review represents a return to the unbridled discretion that district judges enjoyed before the SRA, and it fails to promote uniformity in sentencing, particularly in outlier cases such as Mr. Peña's that involve a massive upward variance to more than double the high end of the properly calculated guideline range and 27 years longer than the sentence imposed on the codefendant. The guideline range took into account all the relevant differences between the codefendant's situation and Mr. Peña's, which were that the codefendant pled guilty and testified at Mr. Peña's trial and the codefendant had less criminal history. At the same, the codefendant fully participated in the criminal spree and in fact was the actual perpetrator of some of the most egregious acts, including waving a firearm at a pregnant woman and young child, which the district court cited in support of the upward variance in Mr. Peña's case. ROA at 753.

Avoiding unwarranted disparity is a central goal of the federal sentencing scheme, even after *Booker*, and a listed factor in the sentencing statute. 18 U.S.C. §

3553(a)(6). A sentence that is so dramatically higher than the properly calculated guideline range is likely to create the very disparity that the statute instructs sentencing courts to avoid. And under this Court's decisions, it is the Court of Appeals' responsibility to ensure that the sentence is not unreasonable in light of the § 3553(a) factors. The panel in Mr. Peña's case abdicated that responsibility and refused to review the extent of the upward variance, in disregard of this Court's instructions in *Booker* and its progeny.

C. The Tenth Circuit's Toothless Review Deepens a Circuit Split

The Tenth Circuit's ineffectual review conflicts with the more robust review of sentence reasonableness practiced by other circuits, discussed above, which further promotes disparity and undermines uniformity, and also exposes defendants in the Tenth Circuit to the vagaries of individual judges in a way unlike defendants in other circuits. *See, e.g., Smith*, *supra*; *United States v. Singh,* 877 F.3d 107, 115-16 (2d Cir. 2017) (reversing 60-month sentence in illegal reentry case, where the sentence was almost three times the high end of the Guidelines range and stating, "Though the standard for finding substantive unreasonableness is high, this Court has not shied away from doing so when appropriate."). As detailed in one survey, "[s]ome circuits vest an inordinate amount of discretion at the district court level, which is unreviewable in practice," while "some circuits vest much more discretion at the

appellate level." Carrie Leonetti, *De Facto Mandatory: A Quantitative Assessment of Reasonableness Review after* Booker*,* 66 DePaul L. Rev. 51, 60 (2017). The combination of "advisory guidelines with weak appellate review increases unwarranted sentencing disparities." *Id.* at 59-60. Another study describes "confusion in the circuit courts over the scope of their mandate to review the substance of sentences" and divisions "over the level of deference owed to sentences both within and outside the Guidelines." *More than a Formality*, *supra*, at 962.

Appellate judges and other participants in the federal criminal system have noted the lack of standards and called on this Court to clarify the rules for reasonableness review. *See, e.g., United States v. Neba*, 901 F.3d 260, 268 (5th Cir. 2018) (Jones, J., concurring) (noting "courts' inability to assess 'substantive reasonableness'" and concluding "I think it fair to ask whether the Court should next begin to consider articulating some rules for 'substantive reasonableness'"); *Prepared Testimony of Judge Patti B. Saris Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security* (Oct. 12, 2011), at 15, available at https://www www.ussc.gov › testimony › 20111012_Saris Testimony (Chair of the Sentencing Commission describing a perceived "lack of clarity regarding the standard to be applies when reviewing a sentence for substantive reasonableness and the resulting deference to the district court's discretion."); *Statement of Matthew Axelrod at U.S.*

Sentencing Commission, Hearing on the Current State of Federal Sentencing (Feb. 16, 2012), at 8, available at www.ussc.gov › 20120215-16 › Testimony_16_Axelrod (Associate Deputy Attorney General addressing "differences in the way circuit view . . . their role in overseeing sentencing practice and policy" and stating that "[m]any appellate courts have taken a 'hands off' approach to their review of district court sentencing decisions and the guidelines; others are scrutinizing the guidelines more closely.").

The varying approaches among the circuits and the pleading of appellate judges for clearer standards of reasonableness review show that the issue requires this Court's attention, as it is the only body that can reconcile the differences and provide the necessary guidance to the lower courts.

This single-issue case is an appropriate vehicle for certiorari because only this Court can resolve the circuit conflicts and clarify the standard for substantive reasonableness review. It has attempted to do in *Gall, Rita v. United States*, 551 U.S. 338 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007). Thirteen years and thousands of cases later, the divergence of interpretation of this trio of cases in the circuits is well entrenched and cries out for this Court's intervention.

The majority in *Booker* believed that reasonableness review "would tend to iron out sentencing differences." *Booker*, 543 U.S. at 236. Instead, the state of affairs foretold by Justice Scalia in his dissent is what exists. He predicted:

> [A] court of appeals might handle the new workload by approving almost any sentence within the statutory range that the sentencing court imposes, so long as the district judge goes through the appropriate formalities, such as expressing his consideration of and disagreement with the Guidelines sentence. What I anticipate will happen is that "unreasonableness" review will produce a discordant symphony of different standards, varying from court to court and judge to judge, giving the lie to remedial majority's sanguine claim that "no feature" of its avant-garde Guidelines system will "ten[d] to hinder" the avoidance of "excessive sentencing disparities."

Booker, 543 U.S. at 312 (Scalia, J., dissenting).

Mr. Peña's case is only one example of many in which a court of appeals has affirmed a sentence as "reasonable" after merely satisfying itself that the district court "considered" the § 3553(a) factors and refusing to reconsider the district court's weighing of them. The perfunctory nature of this review is apparent from an entirely typical passage from *United States v. Huffstatler*, 571 F.3d 620, 624 (7th Cir. 2009) (per curiam): "Finally, Huffstatler's [450-month] sentence, though above the Guidelines range, was reasonable. The sentencing judge correctly calculated the guidelines range and then reviewed the § 3553(a) factors . . . in some detail before announcing that a longer sentence was justified. We require nothing more." The

Federal Reporters are replete with similarly truncated analyses of whether a sentence is unreasonable, at least in those appellate courts that forego the more search review undertaking in other circuits.

This case is a clear example of the Tenth Circuit's unreasonable deference to the district court's decision to upwardly vary and its refusal to seriously consider the reasonableness of an upward variance to 30 years where the guideline sentence was less than fifteen. This Court should grant the petition to address the disparate and unreasonably deferential approaches to sentences taken by the Tenth Circuit and other circuits.

CONCLUSION

Weak and ineffectual appellate review of whether a sentence is substantively reasonable renders that review an empty formality in too many cases in too many circuits, and leads directly to unwarranted sentence disparities that are fundamentally unfair and greater than necessary to satisfy the purposes of sentencing. After more than a decade of allowing the appellate courts to wrestle with this standard, it is incumbent on this Court to provide guidance and clarify the nature and scope of substantive reasonableness review.

/
/
/
/

Respectfully submitted,

Margaret Katze
FEDERAL PUBLIC DEFENDER

/s/Stephanie L. Wolf
Stephanie L. Wolf
Assistant Federal Public Defender
506 S. Main St., Suite 400
Las Cruces, NM 88001
(575) 527-6930