No. _____

In the

Supreme Court of the United States

EDUARDO PENA-GARCIA,
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

Eduardo Pena-Garcia 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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TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eduardo Pena-Garcia 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The Fifth Circuit's opinion is unpublished but is reprinted in the appendix.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. Eduardo Pena-Garcia*, 825 Fed. Appx. 222 (5th Cir. October 9, 2020)

JURISDICTION

The Fifth Circuit issued its written judgment on October 9, 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. Eduardo Pena-Garcia*, 4:19-CR-00294-Y-1, United States District Court for the Northern District of Texas, Fort Worth Division. Judgement and sentence entered on February 28, 2020.

2. *United States v. Eduardo Pena-Garcia*, CA No.20-10240, Court of Appeals for the Fifth Circuit. Judgment affirmed on October 9, 2020.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

In District Court

On October 9, 2019, Eduardo Pena-Garcia (Pena-Garcia) was charged in a one-count indictment with illegal re-entry after deportation. (ROA.7).[1] On November 26, 2019, Pena-Garcia pleaded guilty to the one-count indictment. (ROA.38-43). In a written factual resume, Pena-Garcia stipulated that, being a citizen of Mexico who was previously deported on April 11, 2019, he was found in the United States on July 18, 2019, without having applied for or received permission to re-enter the United States. (ROA.40).

In the pre-sentence report (PSR), the probation officer found that Pena-Garcia's total offense level was 6, and his criminal history category was III, resulting in an advisory Guideline imprisonment range of 2-8 months. (ROA.153). The PSR also identified a ground for upward pursuant to U.S.S.G. §4A1.3(a)(1), stating:

> As outlined in Other Criminal Conduct and Pending Charges sections, the defendant engaged in criminal conduct not accounted for in the guideline calculations. Specifically, he has two prior voluntary returns to Mexico and three prior deportations. Additionally, the pending charge is assaultive in nature.

(ROA.155). The Probation officer also found ground for an upward variance based on the same grounds. *See* id.

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

Pena-Garcia filed written objections to the paragraphs in the PSR in which the probation officer found grounds for an upward departure or upward variance. (ROA.158). In an addendum to the PSR, the probation officer rejected Pena-Garcia's objection to an upward departure or variance. (ROA.161). Pena-Garcia also filed a sentencing memorandum, arguing against an upward departure or variance, and arguing for a four-month sentence. *See* (Defendant's Sentencing Memorandum). In the sentencing memorandum, the defendant pointed out several mitigating factors, including the fact that he had returned to the United States to be with and care for his young children; that he had already served seven months in state custody and would likely serve additional time on the pending state charges; that he had made arrangements to work and live in Coahuila, Mexico upon his deportation; and that his criminal history was properly scored in the PSR and was relatively minor with only one prior illegal re-entry misdemeanor. *See* id. at 1-4.

At the sentencing hearing, the district court overruled Pena-Garcia's sole objection and adopted the PSR. (ROA.131). Pena-Garcia's attorney reiterated the arguments he had made in his sentencing memorandum. (ROA.132-133). The court imposed a sentence of 15 months imprisonment, to run consecutively to any sentence imposed in the pending state case, and a one-year term of supervised release. (ROA.135,65). The district court identified the sentence as an upward departure pursuant to U.S.S.G. §4A1.3 (ROA.134), stating:

> [b]ecause reliable information indicates that the defendant's criminal history category substantially underrepresents his criminal history and the likelihood that he will commit other crimes. Specifically, the defendant has two prior voluntary returns to Mexico and three prior deportations. Additionally, he has

> a pending case that is assaultive in nature. In determining the extent of the departure, the Court used as reference the criminal history category applicable, the defendant's – his criminal history or likelihood to recidivate most closely resembles that of the defendant which is Category IV, Category IV.

(ROA.136-137).

The court later corrected the record to reflect that he meant to say that the most reflective criminal history was a category V. (ROA.139).

On Appeal

On Appeal, Pena-Garcia argued that the sentence was substantively unreasonable. The 15-month sentence in this case, which was a departure of almost twice the top of the advisory guideline range of 2-8 months, was greater than necessary to achieve the sentencing purposes of 18 U.S.C. §3553. The district court increased Pena-Garcia's criminal history category from III to a category V. However, Pena-Garcia's criminal history was relatively minor, and he had received five criminal history points for these relatively minor convictions. The only prior cases for which he had received no criminal history points were a disorderly conduct for which he was sentenced to a $250 and a public intoxication for which he does not appear to have received any sentence. Even if the district court treated the pending state charge as a conviction, that would have only raised Pena-Garcia's criminal history category to a IV, resulting in an advisory imprisonment range from 2-8 months to 6-12 months. The 15-month sentence represented a clear error in judgement in balancing the sentencing factors and was unreasonable and an abuse of discretion.

The Fifth Circuit affirmed the sentence without conducting any reweighing of the sentencing factors, stating simply that the Petitioner failed to show that the district court erred in considering the information in the PSR or the information related to Petitioners prior voluntary returns and deportations. *See United States v. Pena-Garcia*, 825 Fed. App'x. 222, 223 (5th Cir. 2020). The Court stated further:

> [W]e are satisfied that the reasons given by the district court for upwardly departing advance the objectives of § 3553(a)(2) . . . and we conclude that the reasons are justified by the facts."

Id.

However, the Petitioner specifically did not argue that the district court committed procedural error in imposing the upward departure. The Petitioner argued that the sentence was substantively unreasonable, an abuse of discretion. Consistent with its deeply ingrained practice, the Fifth Circuit conducted no reasonableness review. 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 Pena-Garcia's case involves a plausible claim of unreasonableness under §3553(a). Pena-Garcia presented compelling mitigating factors and also pointed out, by a specific objective measure, that the extent of departure was unreasonable. In the present

case, the 15-month sentence was a sentence that was an upward departure of almost twice the top of the advisory guideline range of 2-8 months. The district court identified the sentence as an upward departure based upon U.S.S.G. §4A1.3. (ROA.134,136-137). The district court stated that Pena-Garcia's criminal history more resembled a category V rather than a category III, noting his pending charge for an assault offense. However, even if the district court had taken into account the pending assault charge, Pena-Garcia's criminal history score would only have increased from 5 points to 8 points, resulting in his criminal history category increasing from a category III to a category IV.[2] This would have resulted in his advisory imprisonment range increasing from 2-8 months to 6-12 months.

Moreover, Pena-Garcia's criminal history score of 5 points resulted from relatively minor offenses. He received one point for a DWI conviction for which he was sentenced to 35 days; 2 points for an unlawful carrying a weapon offense for which he was sentenced to 90 days; and 2 points for an illegal entry offense for which he was sentenced to 180 days. (ROA.150). Mr. Pena-Garcia received no points for a disorderly conduct offense for which he received a $250 fine and received no points for public intoxication offense. (ROA.149-151). There is nothing reflected in the criminal history that suggests that Pena-Garcia's score of 5 and a category III

[2] The district court also mentioned Pena-Garcia's previous removals and deportations. (ROA.136-137). However, there certainly is not sufficient reliable information in the PSR that indicates Pena-Garcia could or should have received criminal history points for these incidents. *See* (ROA.148,151).

"substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S.S.G. §4A1.3.

The upward departure sentence in this case was unreasonable and an abuse of discretion because the sentence represents a clear error in judgement in balancing the sentencing factors. Mr. Pena-Garcia had a relatively minor criminal history, yet received 5 criminal history points, resulting in a category III. Even if the court were to assume that Pena-Garcia was convicted of the pending criminal case, that would have only increased his criminal history category from a III to a IV and his imprisonment range from 2-8 months to 6-12.

However, again, the Fifth Circuit completely ignored the argument that the sentence was unreasonable, simply finding there was no procedural error in the basis for the upward departure. Title 18 U.S.C. § 3553(a) requires that, "[t]he 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.

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. Pena-Garcia 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.

CONCLUSION

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

Respectfully submitted this 8th day of March, 2021.

Respectfully submitted,

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