No. _____

In the

Supreme Court of the United States

ZAVION NUNLEY,
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 statistics demonstrating that judges in the sentencing district impose above-guideline-range sentences much more frequently than their peers in other district are relevant to an appellate court's evaluation of the reasonableness of a sentence.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

RELATED PROCEEDINGS

United States v. Nunley, No. 4:19-CR-197 (N.D. Tex.)

United States v. Nunley, No. 20-10087 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Zavion Nunley asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion below was not selected for publication in the Federal Reporter. It can be found at 831 F. App'x 119 and is reprinted on pages 1a–3a of the Petition Appendix.

JURISDICTION

The Fifth Circuit entered judgment on December 8, 2020. On March 19, 2020, this Court extended the deadline to file petitions for certiorari in all cases to 150 days from the date of the judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the interpretation and application of 18 U.S.C. § 3553(a):

> (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.

STATEMENT

While investigating a complaint about vehicle burglary, Grapevine, Texas Police Officers discovered that Petitioner Zavion Nunley was carrying a handgun in his waistband. Mr. Nunley could not lawfully possess that gun because he had a previous felony conviction.

1. Mr. Nunley pleaded guilty to possessing a firearm after felony conviction in violation of 18 U.S.C. § 922(g)(1). Pet App. 1a. His Presentence Investigation Report revealed a long history of convictions for low-level offenses, mostly for vehicle burglary. 5th Cir. R. 145–154.[1] The advisory sentencing guideline range for his offense was 63–78 months, but the probation officer suggested that the district court might want to consider an upward departure or variance because of Mr. Nunley's criminal history. 5th Cir. R. 169, 171–172.

2. In response, Mr. Nunley pointed out that the longest sentence he had ever served was 8 months of incarceration. He urged the court not to sentence above the guideline range, and he pointed to several mitigating factors that would likely

[1] The U.S. Probation Office filed Mr. Nunley's PSR under seal, so it is not included in the Petition Appendix. The same is true of Mr. Nunley's sentencing memorandum. When referring to those documents, the petition will use the pagination in the Fifth Circuit's electronic record on appeal.

have led to a below-guideline sentence in most of the country. Mr. Nunley has lived a life of unspeakable trauma beyond most people's understanding. When he was just nine months old, three women kidnapped him and his teen-aged mother and stuffed them into the trunk of a car. 5th Cir. R. 217. She asphyxiated and died. *Ibid.* He survived, but with brain damage. 5th Cir. R. 196. Just a few months later, his father was sentenced to serve more than 24 years in prison for a drug crime. 5th Cir. R. 218.

3. His maternal grandmother attempted to raise him, but she was bipolar, schizophrenic, and an alcoholic. 5th Cir. R. 218. She was drunk every day and often assaulted family members. 5th Cir. R. 218–219. The family had to dim the lights at night because of neighborhood violence and shootings. *Ibid.* At age nine, his grandmother gave up—she took him to Child Protective Services and dropped him off without even telling them his name. 5th Cir. R. 219. He was shuttled all over the state of Texas in futile attempts to find a steady foster home. *Ibid.* He dropped out of school and ran away at age 17. *Ibid.* He has been shot (twice), stabbed, and bitten by a copperhead snake and a venomous spider. 5th Cir. R. 166–167, 220.

4. On his own, in a tough neighborhood, Mr. Nunley turned to low-level crime. The PSR reports ten convictions for automobile burglary, plus some other crimes like assault and evading arrest. 5th Cir. R. 144–154. While he was convicted of several crimes, his longest previous jail sentence was 8 months. 5th Cir. R. 151.

5. The current federal offense arose from his possession of guns taken during more vehicle break-ins. 5th Cir. R. 140–142. In addition to the pistol, he also admitted that he participated in a drive-by shooting with a rifle. 5th Cir. R. 141. The

PSR took his criminal record and the current offense into account and came up with a guideline range of 63–78 months—substantially longer than he had ever served before. 5th Cir. R. 169. Even so, the district court decided that 78 months wasn't long enough. The court varied upward to 96 months in prison, followed by three years of supervised release. Pet. App. 1a–2a. Regarding the substantial (and atypical) mitigating facts, the court acknowledged only that Mr. Nunley had "a rough background and some of that undoubtedly explains your conduct." 5th Cir. R. 113–114.

6. On appeal, Mr. Nunley challenged the substantive reasonableness of the above-guideline-range sentence. Pet. App. 1a–2a. After laying out the compelling mitigation case described above, Mr. Nunley urged the Fifth Circuit to consider the fact that judges in the Northern District of Texas issue above-guideline-range sentences much more often than judges elsewhere. He provided the following chart comparing the percentage of cases sentenced above the guideline range in the Northern District of Texas with the national percentage:

Percentage of Cases Sentenced Above the Guideline-Range (Upward Departure or Upward Variance)[2]		
	Nationwide	N.D. Texas
FY2017	2.9%	5.5%
FY2018	2.6%	6.2%
FY2019	2.4%	7.1%

[2] The data for this table came from Table 8 of the U.S. Sentencing Commission Statistical Information Packet for the Northern District of Texas for Fiscal Years

7. The Fifth Circuit refused to consider these statistics when evaluating the reasonableness of the above-guideline range sentence:

> Further, Nunley does not show that he received a higher sentence than other criminal defendants nationwide who were similarly situated in terms of offense conduct, acceptance of responsibility, criminal history, or guidelines calculations. *See United States v. Guillermo Balleza*, 613 F.3d 432, 435 (5th Cir. 2010); *United States v. Candia*, 454 F.3d 468, 476 (5th Cir. 2006).

Pet. App. 2a. The Fifth Circuit affirmed the sentence. Pet. App. 3a.[3] This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD GRANT THE PETITION AND HOLD THAT THE FREQUENCY OF ABOVE-GUIDELINE-RANGE SENTENCES WITHIN A PARTICULAR DISTRICT IS RELEVANT TO EVALUATING THE REASONABLENESS OF ABOVE-GUIDELINE-RANGE SENTENCES.

Circuit courts review sentences imposed under the advisory-guideline regime for reasonableness. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020). The question is whether the district judge "'abused his discretion in

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2017, 2018, and 2019. These Tables are reprinted on pages __ of the Petition Appendix. The full reports are available at the following links:

2017: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2017/txn17.pdf

2018: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/txn18.pdf

2019: (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2019/txn19.pdf

[3] Mr. Nunley also challenged the district court's decision to order the sentence for the instant offense to run consecutively to two related state court prosecutions. Pet. App. 2a–3a. The state courts ultimately dismissed those charges.

determining that the [18 U.S.C. § 3553(a) factors supported' the sentence imposed." *Id.* (quoting *Gall v. United* States, 552 U.S. 38, 56 (2007)). This petition concerns appellate review of a challenge that the sentencing judge failed to give adequate weight to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

When it enacted the Sentencing Reform Act of 1984,[4] "Congress sought to diminish unwarranted sentencing disparity. It sought a Guidelines system that would bring about greater fairness in sentencing through increased uniformity." *Rita v. United States*, 551 U.S. 338, 354 (2007). Consistent with that goal, Congress insisted that the district court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

In *Gall*, this Court held that a sentencing judge who correctly calculated the guideline range "necessarily gave significant weight and consideration" to this factor because the Sentencing Commission set the Guideline ranges with the goal of avoiding unwarranted disparities. 552 U.S. at 54. But *Gall* did not involve evidence that a specific judge (or judges within a specific district) habitually sentenced defendants *above* the applicable Guideline range. This case is one of many where the Fifth Circuit has treated that evidence as *irrelevant* to appellate review of the reasonableness of a sentence.

[4] Pub. L. 98-473 ch. II, 98 Stat.1987 (1984).

A. The Fifth Circuit has held that nationwide statistics are irrelevant to evaluating unwarranted disparities.

In the Fifth Circuit's view, "[n]ational averages of sentences that provide no details underlying the sentences are unreliable to determine unwarranted disparity because they do not reflect the enhancements or adjustments for the aggravating or mitigating factors that distinguish individual cases." *United States v. Willingham*, 497 F.3d 541, 544 (5th Cir. 2007). The court decided that nationwide averages "are basically meaningless in considering whether a disparity with respect to a particular defendant is warranted or unwarranted." *Id.* at 545.

That view has some intuitive appeal when dealing with compilations of *sentence length*, which (as the court pointed out in *Willingham*) might not account for differences in sentencing factors deemed relevant under the Guidelines. But Mr. Nunley focused on above-guideline-range sentences. If the Guidelines are designed to avoid unwarranted disparity, and if they take into account all or even most of the factors that should be considered under § 3553(a), then the frequency of above-guideline-range sentences is a more relevant metric for appellate review.

The Fifth Circuit disagrees. The court refuses to consider national statistics, even those that take into account all the Guideline adjustments. Pet. App. 2a; *see also United States v. Naidoo*, __ F.3d __, 2021 WL 1526426, at *9 (5th Cir. Apr. 19, 2021) ("Accordingly, Naidoo's arguments based on broad nationwide statistics are irrelevant.").

B. It is impossible to obtain the data the Fifth Circuit demands to show unwarranted disparity.

There are two reasons why Mr. Nunley could not point to a specific defendant or defendants to demonstrate unwarranted disparity. One of those is specific to his case: the confluence of traumatic events from his childhood is surely unprecedented. When he was a baby, his mother asphyxiated to death while they were both locked in the trunk of a car. 5th Cir. R. 217–218. His father was imprisoned and his grandmother was bipolar, schizophrenic, abusive, and, on top of all that, an alcoholic. 5th Cir. R. 218–219. She completely abandoned him when he was just nine years old, and he bounced around the state, from one foster home to another, without roots and without anyone who could show him the right way to live. No one emerges from that kind of childhood unscathed. This was not, as the district court mused, simply a "rough background." 5th Cir. R. 113–114. So of course he will not be able to prove how other sentencing courts would account for his compelling mitigating circumstances.

But the second problem is universal, and it prevents anyone in the Fifth Circuit from succeeding on a challenge that the court gave inadequate weight to § 3553(a)(6). The Fifth Circuit insists that defendants provide proof of details from other cases that are confidential. The federal system purposefully conceals the specific details that generate guideline ranges within sealed filings. Of course Mr. Nunley failed to prove the underlying facts about other defendants' criminal record, acceptance of responsibility, and guideline calculations. Pet. App. 2a. Those facts are private. He has no way of knowing them. But the Sentencing Guidelines *do* take all of those facts into account to produce the Guideline range. If those ranges are designed to avoid

unwarranted disparities, then it surely matters if a particular judge (or judges in a particular location) impose above-guideline-range sentences with much greater frequency than their peers.

II. THE QUESTION PRESENTED WARRANTS SUPREME COURT REVIEW.

Mr. Nunley is not asking this Court to address the reasonableness of his sentence. That is the Court of Appeals's responsibility. Here merely asks this Court to correct the Fifth Circuit's mistaken view that national averages that take into account guideline adjustments are nonetheless "irrelevant." *Naidoo*, 2021 WL 1526426, at *9; Pet. App. 2a. Because this question relates to the *manner* of performing reasonableness review, it has national application and importance. If a particular judge (or judges in a particular location) impose above-guideline-range sentences more frequently, then that is some evidence that the court is not giving adequate weight to the need to avoid unwarranted disparities.

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits.

Respectfully submitted,

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