

No. _____

In the
Supreme Court of the United States

ROBERT ALLEN VESTAL,
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

Robert Allen Vestal 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 CONSTITUTIONAL PROVISIONS.....	1
LIST OF PROCEEDINGS BELOW	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THIS PETITION.....	7
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	7
CONCLUSION.....	11

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

	Page(s)
Federal Cases	
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	7, 8
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007)	7
<i>Rita v. United States</i> , 551 U.S. 338. (2007)	7
<i>United States v. Abu Ali</i> , 528 F.3d 210 (4th Cir. 2008)	8
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	7
<i>United States v. Cisneros-Gutierrez</i> , 517 F.3d 751 (5th Cir. 2008)	7, 9
<i>United States v. Cotten</i> , 650 Fed. Appx. 175 (5th Cir. 2016) (unpublished)	10
<i>United States v. Douglas</i> , 667 Fed. Appx. 508 (5th Cir. 2016) (unpublished)	10
<i>United States v. Funk</i> , 534 F.3d 522 (6th Cir. 2008)	8
<i>United States v. Hernandez</i> , 876 F.3d 161 (5th Cir. 2017)	10
<i>United States v. Jones</i> , 531 F.3d 163 (2d Cir. 2008)	8
<i>United States v. Levinson</i> , 543 F.3d 190 (3d Cir. 2008)	8
<i>United States v. Malone</i> , 828 F.3d 331 (5th Cir. 2016)	10
<i>United States v. Mosqueda</i> , 437 Fed. Appx. 312 (5th Cir. 2011) (unpublished)	10

<i>United States v. Ofray-Campos</i> , 534 F.3d 1 (1st Cir. 2008).....	8
<i>United States v. Pugh</i> , 515 F.3d 1179 (11th Cir. 2008)	8
<i>United States v. Shy</i> , 538 F.3d 933 (8th Cir. 2008)	8
<i>United States v. Turcios-Rivera</i> , 583 Fed. Appx. 375 (5th Cir. 2014)	10
<i>United States v. Vestal</i> , 833 Fed. Appx. 599 (5th Cir. 2021)	6, 9
Federal Statutes	
18 U.S.C. § 922(g)	4
18 U.S.C. § 3553.....	6, 9
18 U.S.C. § 3553(a)	1, 7, 8, 9
18 U.S.C. § 3553(a)(2)	7
18 U.S.C. § 3553(a)(2)(6).....	9
21 U.S.C. § 841(a)(1)	4
21 U.S.C. § 841(b)(1)(C)	4
26 U.S.C. § 5861(d)	4
26 U.S.C. § 5871.....	4
28 U.S.C. § 1254(1)	1
U.S.S.G. § 2D1.1	4
U.S.S.G. § 2D1.1(b)(1).....	4, 5
Constitutional Provisions	
U. S. CONST. amend. V.....	3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Allen Vestal 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. Robert Allen Vestal*, 833 Fed. Appx. 599 (5th Cir. January 19, 2021)

JURISDICTION

The Fifth Circuit issued its written judgment on January 19, 2021. (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. Robert Allen Vestal*, 5:19-CR-00107-H-BQ-1, United States District Court for the Northern District of Texas, Fort Worth Division. Judgement and sentence entered on March 13, 2020.

2. *United States v. Robert Allen Vestal*, CA No.20-10325, Court of Appeals for the Fifth Circuit. Judgment affirmed on January 19, 2021.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

In District Court

On September 11, 2019, Robert Allen Vestal was charged in a three-count indictment. (ROA.7) Count One charged distribution and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(C). (ROA.7). Count Two charged possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). (ROA.8). Count Three charged possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5861(d) and 5871. (ROA.9). On November 18, 2019, Vestal pleaded guilty to Count One of the indictment, pursuant to a written plea agreement. (ROA.33). In a written factual resume, Vestal stipulated to facts showing that he sold .78 grams of methamphetamine to a confidential source on December 14, 2018. (ROA.31). On that same date, special agents (SA) with Texas Department of Public Safety (DPS) executed a search warrant at Vestal's residence where the agents found a sawed-off Savage .22 rifle, very small quantities of methamphetamine and marijuana, and some scales and other paraphernalia. (ROA.30-32).

In the pre-sentence report (PSR), applying U.S.S.G. §2D1.1, the probation officer found the base offense level was 16, based upon a finding that the offense involved 14.88 grams of methamphetamine. *See* (ROA.109). The offense level was enhanced by two levels for possession of a firearm, pursuant to U.S.S.G. §2D1.1(b)(1), resulting in an adjusted offense level of 18. *See id.* After a three level reduction for

acceptance of responsibility the total offense level was 15. *See id.* Vestal's criminal history score was 14, resulting in a criminal history category VI. (ROA.109-112). Based upon a total offense level 15 and a criminal history category VI, the advisory imprisonment range was 41-51 months. (ROA.119). The PSR also identified no grounds for an upward departure or upward variance. *See* (ROA.122).

Vestal filed written objections to the paragraphs in the PSR on the basis that 14 grams of the amount included as methamphetamine was actually including the weight of the glass bowl in which a very small amount had been found. *See* (ROA.125-131). Both the government and the probation officer agreed with the objection. *See* (ROA.133-138). The probation officer filed an addendum recalculating Vestal's offense level based on a total amount of methamphetamine of 1.78 grams, resulting in a total offense level 12. (ROA.134). With a criminal history category VI, the correct advisory imprisonment range was 30-37 months. (ROA.135).

At the sentencing hearing, the district court, without any prior notice, imposed a sentence that was an upward variance of 11 months. *See* (ROA.86-88). The court also ordered the sentence to run consecutively to a pending 6-year sentence on a state charge for 2.2 grams of methamphetamine, which also had already been counted in Vestal's criminal history score. *See* (ROA.88,112). The district court essentially referred to Vestal's criminal history in justifying the variance. *See id.* The court also noted that Vestal was on bond for the state drug charge for the 2.2 grams of methamphetamine when he committed the instant offense. *See* (ROA.87).

Vestal’s attorney objected to the upward variance for lack of notice and objected to the upward variant sentence as substantively unreasonable because the sentence failed to take into account that the offense only involved 1.79 grams and “the sentence is disproportionate in light of that fact.” (ROA.92).

On Appeal

On Appeal, Vestal argued that the sentence was substantively unreasonable. The 48-month sentence in this case, which was an upward variance of 11 months, and which was ordered to run consecutively to a 6 year state sentence, was greater than necessary to achieve the sentencing purposes of 18 U.S.C. §3553. The case involved merely 1.79 grams of methamphetamine.

Consistent with its deeply ingrained practice, the Fifth Circuit conducted no reasonableness review of its own. *See United States v. Vestal*, 833 Fed. Appx. 599, 600 (5th Cir. 2021). 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 Vestal’s case involves a plausible claim of unreasonableness under §3553(a). Vestal 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 48-month

sentence was a sentence that was an upward variance of 11 months above the advisory guideline range of 30-37 months. The upward variant 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. The case involved only 1.79 grams of methamphetamine, and Mr. Vestal was already serving a 6 year state sentence for a very small amount of methamphetamine (2.2 grams). Vestal preserved this issue at the trial court and asked the Fifth Circuit for review of the sentence under the reasonableness standard. However, again, the Fifth Circuit conducted no re-weighing or balancing of the sentencing factors, stating merely “Vestal does not show that the district court failed to consider a factor that should have received significant weight, gave significant weight to an improper factor, or made a clear error of judgment in balancing the sentencing factors.” *United States v. Vestal*, 833 Fed. Appx. at 600.

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. Vestal 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 17th day of June, 2021.

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