

NO. _____

IN THE
Supreme Court of the United States

MARLON SISNERO-GIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petition should be granted because the Court of Appeals' decision holding that Petitioner's sentence was not substantively unreasonable conflicts with decisions of other circuits which prohibit a single-minded approach to sentencing?

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America
Marlon Sisnero-Gil

STATEMENT PURSUANT TO RULE 14(1)(b)(iii)

United States v. Dominguez (Sisnero-Gil), 1:15-cr-605-4, is the trial court docket in the Southern District of New York, from which this case originates.

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In the
Supreme Court of the United States
October Term, 2021

Marlon Sisnero-Gil ,
Petitioner,
v.
United States of America,
Respondent.

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

To secure and maintain the uniformity of judicial decisions, it is up to this Court, Petitioner's last resort, to remedy the lower courts' decision which is in conflict with the Constitutional provisions of the United States Constitution and the decisions of other circuits. Such conflicts warrant the grant of the writ.

Opinion Below

The Summary Order of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A1).

Jurisdictional Statement

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued an opinion affirming Petitioner's conviction on February 1, 2022.

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the protection of the Due Process Clause of the Fifth Amendment:

“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.”

STATEMENT OF THE CASE

Petitioner pled guilty pursuant to a plea agreement to conspiracy or agreement to distribute 5 kilograms or more of cocaine, possession with the intent to distribute 500 grams or more of cocaine, and failing to appear in court. Petitioner seeks review of the Second Circuit that his sentence was substantively reasonable. In Petitioner’s case, the Second Circuit held that Petitioner’s sentence fell within the range of permissible decisions and was not substantively unreasonable. There is a split among the Circuits on this issue as the First Circuit, Fourth Circuit, and Eleventh Circuit, have all held that sentencing courts should avoid a single-minded approach when sentencing defendants.

REASONS FOR THE GRANTING OF THE WRIT

THE COURT OF APPEALS’ DECISION HOLDING THAT PETITIONER’S SENTENCE WAS NOT SUBSTANTIVELY UNREASONABLE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO RESOLVE THE CONFLICT AND ENSURE UNIFORMITY ACROSS THE CIRCUITS.

On September 28, 2019, Petitioner admitted his guilt of conspiracy to distribute 5 kilograms or more of cocaine, possession with the intent to distribute

500 grams or more of cocaine, and failing to appear in court. While serious crimes, these offenses were not violent and the Court's sentence, twenty-nine months above the stipulated guidelines range, was unreasonable. The Court's sentence was unreasonable because the Court considered Petitioner's unfortunate post-arrest conduct of bail jumping disproportionately, giving insufficient weight to other important sentencing factors, conflicting with the decisions of other circuits who have all found that sentencing courts should avoid a single-minded approach when sentencing defendants.

While a Court has discretion to impose a sentence, the Court should take great care and extra precaution when doing so, taking into account all relevant factors. The government in the instant case advocated for a lesser sentence than the one imposed by the District Court and for a sentence within the stipulated guidelines range: 121 to 151 months. The Probation Department calculated Petitioner's guidelines range of 121 to 151 months incarceration and a recommended sentence of 121 months on Counts One and Two, and 120 months on Count Three, all to run concurrently. The Probation Department's recommendation was almost *five years* lower than the term of imprisonment imposed by the District Court.

The Court analogized Petitioner's role in the offense to his codefendant Dominguez, who received a sentence of 70 months' imprisonment (S. 35-36). The Court found that Petitioner and Dominguez's culpability were equivalent. Since Petitioner was sentenced to 180-months imprisonment, it is clear that Petitioner

received an additional 110-months' imprisonment for fleeing the jurisdiction. This is an excessive punishment for post arrest, non-violent, non-threatening conduct. The government's suggested sentence of 121 to 151 months took into consideration the serious offense of bail jumping. The Court's sentence of nearly 30 months over the government's recommended sentence disproportionately focused on Petitioner's post-arrest conduct rather than taking all of the factors into consideration as a whole. The Court had a "single-minded" focus on one factor to the detriment of the other relevant sentencing factors, demonstrating that Petitioner's sentence was unreasonable. While Petitioner did unfortunately flee for a significant time, after he felt pressured to follow his counsel's advice, he did attend several proffers in an effort to provide information to the government regarding drug trafficking and armed robberies in a good faith attempt to cooperate.

An appellate court is able to find a sentence substantively unreasonable where the sentence imposed would damage the administration of justice because it is shockingly high, shockingly low, or otherwise unsupportable as a matter of law. *United States v. Babar*, 512 F. App'x 78, 79 (2d Cir. 2013). Here, given the stipulated guidelines range, 121 to 151 months, and the recommended range of 121 and 120 months to run concurrently by the Probation Office, Petitioner was sentenced to a term far in excess of what would have been sufficient punishment for his non-violent offense. The excessive term of imprisonment imposed by the District Court damages the administration of justice as the sentence is far in excess of what would have been appropriate and sufficient.

In imposing a sentence, 18 U.S.C. § 3553(a)(2)(A) requires the district court to consider “the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” While Petitioner did participate in narcotics offenses and fail to appear in court, his violations were not violent. No one was directly physically injured by Petitioner’s offenses. The Court stated during sentencing that Petitioner “does not have a serious criminal history.” However, Petitioner had but a single arrest that had “no cause.” Therefore, he has no criminal history (PSR: 68-72).

Furthermore, while Petitioner did flee and while no excuse, prior counsel advised Petitioner to leave the jurisdiction and when combined with Petitioner’s lack of education (he only completed up to the tenth grade), Petitioner felt pressured to leave. An attorney is an individual that clients look to for advice and heavily rely on for their knowledge. Petitioner felt compelled to follow his counsel’s advice.

Moreover, Petitioner has been legally employed for the majority of his adult life. He was employed as a construction worker for about five years (2011 to 2016) and in 2011 he worked as a superintendent and also remodeled apartments. In 2009 and 2010, Petitioner also worked for a granite flooring company. Further Petitioner has always been an integral part of his eight childrens’ lives and has worked to support them. The District Court’s overemphasis on Petitioner’s flight was unreasonable because it was to the detriment of his children who need him, work history, attempt to assist the government, and lack of any criminal history. *United States v. Lecroy*, 822 F. App’x 968, 975 (11th Cir. 2020)(citing *United States v. Irely*,

612 F.3d 1160, 1189 (11th Cir. 2010) (en banc); *see United States v. Crisp*, 454 F.3d 1285, 1292 (11th Cir. 2006) (explaining that a sentencing court's "single-minded[]" focus on one factor to the detriment of other relevant sentencing factors "is a symptom of an unreasonable sentence" (internal quotation marks omitted)); *United States v. Dominguez*, 296 F.3d 192, 198 (3d Cir. 2002)(It is "essential that the District Court consider the impact of a defendant's family circumstances on the purposes underlying sentencing.").

The Second Circuit's decision to affirm the judgment of the District Court finding that Petitioner's sentence was not substantively unreasonable conflicts with the decisions of other circuits such as the First Circuit, Fourth Circuit, and Eleventh Circuit, who have all found that sentencing courts should avoid a single-minded approach when sentencing defendants. (See *United States v. Tinsley*, 545 F. App'x 190, 191-92 (4th Cir. 2013); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *Crisp*, 454 F.3d at 1292 (11th Cir. 2006)(holding that "unjustified reliance upon any one . . . factor is a symptom of an unreasonable sentence" warranting reversal if the court "focused single-mindedly on [that factor] to the detriment of all of the other sentencing factors.")); (see also *United States v. King*, 741 F.3d 305, 308-09 (1st Cir. 2014)(holding that a single-minded focus on a particular factor "would undermine our consistent directive that sentencing courts must refrain from adopting 'a narrow focus on a particular [sentencing] factor in isolation,'" and that sentencing requires a broader focus because "section 3553(a) is more than a laundry list of discrete sentencing factors; it is, rather, a tapestry of

factors, through which runs the thread of an overarching principle": that a sentencing court ought "to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing."))

The Court's overemphasis on Petitioner's flight undermines the requirement that sentencing courts must refrain from implementing "a narrow focus on a particular factor in isolation." *King*, 741 F.3d at 308-09. As mentioned, 18 U.S.C. § 3553(a)(2)(A) requires the district court to consider multiple factors, including "the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." A single-minded focus on Petitioner's flight swayed the Court away from also taking into consideration that Petitioner's violations were not violent, that Petitioner did not have a criminal history, and that a sentence between 121 and 151 months would have been sufficient to promote respect for the law and allow Petitioner to acknowledge that he committed serious offenses and face serious punishment for doing so. While a sentencing court does have great discretion when considering sentencing factors, "unjustified reliance upon any one . . . factor is a symptom of an unreasonable sentence" *Tinsley*, 545 F. App'x at 191-192 (citing *Crisp*, 454 F.3d at 1292), and in the instant case, the sentencing Court significantly focused on Petitioner's flight while failing to take into account other sentencing factors, conflicting with the decisions of other circuits as to call for an exercise of this Court's supervisory power.

The petition should be granted because the District Court zeroed in on Petitioner's flight, giving him an additional ten years' imprisonment for it, while abandoning the Court's obligation to consider other crucial sentencing factors, violating Petitioner's right to due process of law. U.S. Const. Amend. V. The District Court sentenced Petitioner significantly above the stipulated guidelines range, which the Government recommended. This Court should exercise its supervisory power to resolve the conflict among the circuits and grant the petition. 18 U.S.C. § 3553(a)(2)(A). *See Lecroy*, 822 F. App'x at 975 (citing *Irey*, 612 F.3d at 1189 (en banc); *Crisp*, 454 F.3d at 1292; *Tinsley*, 545 F. App'x at 191-192; *King*, 741 F.3d at 308-09).

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: March 7, 2022
San Rafael, California



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APPENDIX

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| Summary Order of the United States Court of Appeals for the Second Circuit, filed 2/1/22 | A1 |
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20-4102-cr

United States v. Sisnero-Gil

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit,
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the
3 City of New York, on the 1st day of February, two thousand twenty-two.
4

5 PRESENT: PIERRE N. LEVAL,
6 RAYMOND J. LOHIER, JR.,
7 BETH ROBINSON,
8 *Circuit Judges.*
9

10 -----
11 UNITED STATES OF AMERICA,
12

13 *Appellee,*

14 v.

No. 20-4102-cr

15
16 MARLON SISNERO-GIL,
17

18 *Defendant-Appellant.**
19 -----

* The Clerk of Court is directed to amend the caption as set forth above.

1 FOR DEFENDANT-APPELLANT:

Robin Christine Smith, Law
Office of Robin C. Smith, Esq.,
P.C., San Rafael, CA

5 FOR APPELLEE:

Stephanie L. Lake, Danielle R.
Sassoon, Assistant United
States Attorneys, *for* Damian
Williams, United States
Attorney for the Southern
District of New York, New
York, NY

12 Appeal from a judgment of the United States District Court for the
13 Southern District of New York (Richard J. Sullivan, *Judge*).

14 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
15 AND DECREED that the judgment of the District Court is AFFIRMED.

16 Marlon Sisnero-Gil appeals from a November 18, 2020 judgment of
17 conviction by the United States District Court for the Southern District of New
18 York (Sullivan, L) sentencing him principally to a term of 180 months'
19 imprisonment. On appeal, Sisnero-Gil challenges the substantive reasonableness
20 of his sentence. We assume the parties' familiarity with the underlying facts and
21 record of prior proceedings, to which we refer only as necessary to explain our
22 decision to affirm.

1 Sisnero-Gil was charged in a three-count superseding indictment with
2 distributing and conspiring to distribute cocaine, in violation of 21 U.S.C.
3 §§ 841(b)(1)(A), 841(b)(1)(B), and 846, and failing to appear after being released on
4 bail, in violation of 18 U.S.C. §§ 3146(a)(1) and (b)(1)(A)(i). Sisnero-Gil pleaded
5 guilty to all three counts pursuant to a plea agreement that included a provision
6 in which he waived the right to appeal any sentence within or below a stipulated
7 Guidelines range of 121 to 151 months (the “Stipulated Guidelines Range”). In
8 calculating that range, the parties agreed that Sisnero-Gil was entitled to a two-
9 level reduction in his offense level, thus reducing his offense level from 34 to 32,
10 because he appeared to meet the safety valve criteria set forth in 18 U.S.C.
11 § 3553(f) and § 5C1.2(a) of the Guidelines. The District Court later determined,
12 however, that Sisnero-Gil was not in fact entitled to safety-valve relief and that
13 the correct Guidelines range was 151 to 188 months. The District Court
14 thereafter sentenced Sisnero-Gil principally to a term of 180 months’
15 imprisonment.

16 We first note that Sisnero-Gil claims only that his sentence is substantively
17 unreasonable; he makes no argument about the procedural reasonableness of his

1 sentence. We review the substantive reasonableness of a sentence for abuse of
2 discretion, see Gall v. United States, 552 U.S. 38, 41, 51 (2007), understanding that
3 district courts enjoy “very wide latitude” in sentencing, and we will conclude
4 that a sentence is substantively unreasonable only if it “cannot be located within
5 the range of permissible decisions,” United States v. Cavera, 550 F.3d 180, 188–89
6 (2d Cir. 2008) (quotation marks omitted).

7 As an initial matter, Sisnero-Gil claims that the District Court was bound
8 to impose a sentence within the Stipulated Guidelines Range. We are not
9 persuaded. The District Court determined that the correct applicable Guidelines
10 range was 151 to 188 months because it found that Sisnero-Gil was not eligible
11 for safety-valve relief. On appeal, Sisnero-Gil does not challenge this finding or
12 claim that the District Court’s Guidelines range determination was procedurally
13 unreasonable. And both in his plea agreement and at his allocution, Sisnero-Gil
14 acknowledged that the District Court was not “bound by the . . . Guidelines
15 stipulation, either as to questions of fact or as to the determination of the proper
16 Guidelines.” Add. 4; see App’x 62–63.

17 Sisnero-Gil also contends that the District Court placed disproportionate

1 weight on his failure to appear and failed to adequately consider mitigating
2 evidence. Contrary to Sisnero-Gil's claim that the District Court "abandon[ed]
3 [this] obligation to consider . . . crucial sentencing factors," Def.'s Br. 17, the
4 District Court considered the § 3553(a) factors and various mitigating
5 circumstances, including his employment, family circumstances, the non-violent
6 nature of his offense, and the allegation that his attorney advised him to flee. It is
7 true that, in assessing the seriousness of Sisnero-Gil's offenses and the need to
8 promote respect for the law, the District Court afforded particular weight to the
9 fact that he failed to appear in court and lied to law enforcement officers. But
10 "[t]he particular weight to be afforded aggravating and mitigating factors is a
11 matter firmly committed to the discretion of the sentencing judge," United States
12 v. Broxmeyer, 699 F.3d 265, 289 (2d Cir. 2012), and this Court generally does "not
13 second guess the weight (or lack thereof) that the judge accorded to a given
14 factor," United States v. Pope, 554 F.3d 240, 247 (2d Cir. 2009). Here, the District
15 Court acted well within its discretion in affording the most sentencing weight to
16 the fact that Sisnero-Gil fled before trial and lied to federal agents.

17 Finally, Sisnero-Gil argues that his sentence created an unwarranted


1 disparity between him and one of his co-defendants. But § 3553(a)'s instruction
2 to "avoid unwarranted sentence disparities" refers to nationwide disparities;
3 sentencing judges are not required to consider sentencing disparities between co-
4 defendants. United States v. Frias, 521 F.3d 229, 236 (2d Cir. 2008) (quotation
5 marks omitted). Regardless, Sisnero-Gil's co-defendant's eligibility for safety-
6 valve relief, among other factors in the record, reasonably explains the different
7 sentences imposed. See United States v. Ebbers, 458 F.3d 110, 129 (2d Cir. 2006).

8 In sum, we conclude that the District Court's sentence fell within the range
9 of permissible decisions and reject Sisnero-Gil's claim that it was substantively
10 unreasonable.

11 We have considered Sisnero-Gil's remaining arguments and conclude that
12 they are without merit. For the foregoing reasons, the judgment of the District
13 Court is AFFIRMED.

14 FOR THE COURT:
15 Catherine O'Hagan Wolfe, Clerk of Court
16
17

Catherine O'Hagan Wolfe

The seal of the United States Second Circuit Court of Appeals is circular. It features a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside this ring is a blue circle with the words "SECOND CIRCUIT" in white. The seal is positioned over the signature of Catherine O'Hagan Wolfe.