

No. _____

In the
Supreme Court of the United States

Matthew Michael Cimino,

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 requires the court of appeals to reweigh the sentencing factors?

PARTIES TO THE PROCEEDING

Petitioner is Matthew Michael Cimino, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew Michael Cimino seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is available at *United States v. Cimino*, 2022 WL 899465 (5th Cir. March 28, 2022)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 28, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE

Section 18 U.S.C. 3553(a) 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.

STATEMENT OF THE CASE

A. Proceedings in District Court

Matthew Michael Cimino (Cimino) was charged in a one-count indictment in the Northern District of Texas, Fort Worth division with the offense of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (Record in the Court of Appeals, at 10). He entered a guilty plea without a plea agreement. (Record in the Court of Appeals, at 34-39).

After the guilty plea, the probation officer prepared a pre-sentence investigation report (PSR). In the PSR, applying the provisions of U.S.S.G. § 2K2.1, the probation officer found that Cimino's total offense level, after a two-level reduction for acceptance of responsibility, was a level 12. (Record in the Court of Appeals, at 125). The probation officer determined that Cimino had a criminal history score of 13, resulting in a criminal history category VI. (Record in the Court of Appeals, at 126-131). With a total offense level 12 and a criminal history category VI, Cimino had an advisory Guideline imprisonment range of 30-37 months. (Record in the Court of Appeals, at 131-138). In paragraphs 97 through 99, the PSR identified grounds that warranted an upward departure or upward variance, primarily based on the criminal history score substantially underrepresenting the seriousness of Cimino's prior history, and also because of the nature of the offense. (Record in the Court of Appeals, at 140).

Cimino objected to the criminal history score, arguing that he had only 10 criminal history points and was a category V. (Record in the Court of Appeals, at

142-144). This objection was accepted in the PSR Addendum. (Record in the Court of Appeals, at 158). Cimino also objected to the PSR's factual assertion to the number of rounds that were fired. (ROA144-145). The PSR Addendum essentially accepted Cimino's objection, noting that four rounds could have been fired, but no casings were recovered from the scene. (Record in the Court of Appeals, at 159). The PSR Addendum corrected Cimino's criminal history category to a category V and lowered his imprisonment range to 27-33 months. (Record in the Court of Appeals, at 160).

The court adopted the facts and conclusions in the PSR (Record in the Court of Appeals, at 105-106) and sentenced Mr. Cimino to 42 months imprisonment. (Record in the Court of Appeals, at 110-111, 61-63). The court identified the sentence as an upward departure pursuant to U.S.S.G. §4A1.3(a)(1), finding, "reliable information indicates that Mr. Cimino's criminal history category substantially underrepresents the seriousness of his criminal history and the likelihood he will commit other crimes." (Record in the Court of Appeals, at 112).

B. Proceedings in the Court of Appeals

Petitioner appealed, contending, *inter alia*, that his sentence was simply too long. See Initial Brief in *United States v. Cimino*, No. 21-10550, at 17-21 (5th Cir. Filed October 27, 2021) ("Initial Brief"). In that vein, he stressed that the sentence exceeded the Guidelines, and that it was not among the kinds of cases for which the Guidelines recommend departure. See Initial Brief, at 19-20. He also noted the government's own conclusion that a sentence within the Guidelines sufficed to

satisfy the statutory goals of sentencing, and its observation that Petitioner had no convictions for violent prior offenses for more than twenty years. *See id.*

The court of appeals affirmed. It held:

Cimino's challenge to the imposed sentence is merely a disagreement with how the district court weighed the relevant factors and thus “is not a sufficient ground for reversal.” *United States v. Malone*, 828 F.3d 331, 342 (5th Cir. 2016). We have upheld proportionately greater upward departures than the nine month departure at issue here.

[Appx. A]; *United States v. Cimino*, No. 21-10550, 2022 WL 899465, at *1 (5th Cir. Mar. 28, 2022).

REASONS FOR GRANTING THE PETITION

The courts of appeals are in conflict as to the nature of substantive reasonableness review.

The length of a federal sentence is determined by the district court's application of 18 U.S.C. §3553(a). *See 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 dictate 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 51. This review "take(s) into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* And "a major departure should be supported by a more significant justification than a minor one." *Id.* at 50.

Fifth Circuit precedent imposes several important barriers to relief from substantively unreasonable sentences. By forbidding the "substantive second guessing" of the district court, it very nearly forecloses substantive reasonableness review entirely. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008). To similar effect is its oft-repeated unwillingness to "reweigh the sentencing factors." *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. Vasquez-Tovar, 2012 U.S. App. LEXIS 21249, at *4 (5th Cir. 2012)(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). Although *Gall* plainly affords the district court extensive latitude, it is difficult to understand what substantive reasonableness review is supposed to be, if not an effort to reweigh the sentencing factors, vacating those sentences that fall outside a zone of reasonable disagreement.

Notably, other circuits have declined to abdicate their roles in conducting substantive reasonableness review. 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).

The Fifth Circuit’s restrictive approach to substantive reasonableness review is evident in its opinion. In affirming the sentence, the court essentially undertook only review for procedural error. It noted that the court cited valid reasons for the variance. [Appx. A]; *United States v. Cimino*, No. 21-10550, 2022 WL 899465, at *1 (5th Cir. Mar. 28, 2022). But it declined to consider whether those factors could *reasonably* support the particular sentence impose. *See Cimino*, 2022 WL 899465, at *1. To the contrary, it appeared to categorically foreclose relief for claims involving “mere[] ... disagreement with how the district court weighed the relevant factors...” *Id.* The case accordingly squarely presents the issue that has divided the courts of appeals. That issue is recurring and important. It is potentially implicated in nearly every federal criminal case that proceeds to sentencing, and it serves as an important check on the substantive injustice of sentences that are simply too long or too short. This Court should grant certiorari.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 27th day of June, 2022.

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