No. _____

In the Supreme Court of the United States

_____

Candido Gomez-Santacruz,
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

I. 18 U.S.C. § 3553(a)(1) requires district courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in" § 3553(a)(2). Those purposes include retribution, general deterrence, incapacitation, and rehabilitation, but Congress treated all four goals equally and requires consideration of each one. 18 U.S.C. § 3553(a)(2)(A)-(D). "[I]n determining the particular sentence to be imposed," § 3553(a) likewise requires district courts to "consider" a series of additional factors, which include "the nature and circumstances of the offense," "the history and characteristics of the defendant," and "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission." 18 U.S.C. § 3553(a)(1), (4).

The question presented is:

In light of its nuanced, holistic approach to federal sentencing, whether a district court may, consistent with § 3553(a)'s plain text, treat the duration of a prior term of imprisonment as a floor or baseline on its sentencing authority.

LIST OF PARTIES

Candido Gomez-Santacruz, petitioner on review, was the Defendant-Appellant below. The United States of America, respondent on review, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Gomez-Santacruz*, No. 3:20-CR-522-E, U.S. District Court for the Northern District of Texas. Judgment entered on November 12, 2021.

- *United States v. Gomez-Santacruz*, No. 21-11143, U.S. Court of Appeals for the Fifth Circuit. Opinion issued on September 15, 2022. Timely petition for panel rehearing denied on October 14, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Candido Gomez-Santacruz respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unreported opinion is available on Westlaw's electronic database at 2022 WL 4244892 and reprinted at Pet.App.a2-a15.

JURISDICTION

The Court of Appeals issued its panel opinion on September 15, 2022. It then denied a timely petition for panel rehearing on October 14, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This petition involves of 18 U.S.C. § 3553(a)(1)-(4). § 3553(a) requires district courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in" § 3553(a)(2). 18 U.S.C. § 3553(a)(1). Those purposes include "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;"
- "to afford adequate deterrence to criminal conduct;"
- "to protect the public from further crimes of the defendant;" and
- "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

18 U.S.C. § 3553(a)(2)(A)-(D).

§ 3553(a) also requires district courts to "consider"

- "the nature and circumstances of the offense and the history and characteristics of the defendant;"
- "the kinds of sentences available;" and
- "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission."

18 U.S.C. § 3553(a)(1), (3)-(4).

STATEMENT OF THE CASE

A. Introduction

18 U.S.C. § 3553 requires district courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in" § 3553(a)(2). 18 U.S.C. § 3553(a)(1). Those purposes include retribution, general deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a)(2)(A)-(D). An offender's criminal record is a relevant consideration to all four. U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (Nov. 1, 2021). The Second and Eleventh Circuits nevertheless recognize that a district court may not, consistent with § 3553(a)'s plain text, treat the duration of a prior term of imprisonment as a hard limit on its own sentencing authority. *United States v. Guzman*, 2022 WL 1409583, at *3 (2d Cir. May 4, 2022); *United States v. Ochoa-Molina*, 664 F. App'x 898, 900-01 (11th Cir. 2016). The district court did just that below. Given the failure of a prior four-year sentence to deter the instant illegal-reentry offense, it treated a four-year term of imprisonment as a baseline or floor on its own

sentencing discretion. Pet.App.a60. This despite the absence of a statutory minimum, *see* 8 U.S.C. § 1326(b)(2), and a much lower advisory range, Pet.App.a30. The Fifth Circuit affirmed the sentence as reasonable, but that decision can be squared with neither § 3553(a)'s plain text nor the abuse-of-discretion standard announced by this Court in *Gall*.

B. Legal Framework

1. *Gall v. United States*, 552 U.S. 38 (2007).

This Court announced an abuse-of-discretion standard of review for federal sentencing appeals in *Gall v. United States*. There, the Guidelines Manual suggested a term of imprisonment somewhere between 30 and 37 months. 552 U.S. 38, 43 (2007). The government requested a sentence within that range at Mr. Gall's sentencing hearing, but the district court imposed a 36-month term of probation instead. *Id*. To support the decision, the district court noted Mr. Gall's withdrawal from the charged conspiracy, post-offense rehabilitation, young age, and lack of criminal history, all of which it interpreted through the lens of the sentencing factors set out in 18 U.S.C. § 3553(a). *Id*. at 43-44. The Eighth Circuit Court of Appeals reversed Mr. Gall's sentence after finding that the district court's explanation failed to provide the "extraordinary circumstances" necessary to support the extent of the variance imposed. *Id*. at 45. This Court granted certiorari to clarify "the standard that courts of appeals should apply when reviewing the reasonableness of sentences imposed by district judges." *Id*. at 40. It then reversed

after finding that the Eighth Circuit had misapplied the abuse-of-discretion standard. *Id.* at 56.

That standard, this Court explained, turned on a deferential review of the district court's reasoning. Although no statute "explicitly set forth [the] standard of review" for federal sentencing appeals, this Court had previously inferred a reasonableness standard based on "related statutory language, the structure of the statute, and the 'sound administration of justice.'" *United States v. Booker*, 543 U.S. 220, 260-61 (2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)). That analysis led this Court to the standard of reasonableness, which meant a sentence could withstand a challenge on appeal so long as the district court's application of the factors set out in § 3553(a) made sense given the facts before it. *See id.* at 261 (citing 18 U.S.C. § 3742(e) (1994)). That standard, which the Court equated in *Gall* to abuse-of-discretion review, required appellate courts to assess a sentence for both procedural and substantive reasonableness. 552 U.S. at 51. As to procedure, a district court would abuse its discretion if it "fail[ed] to calculate (or improperly calculat[ed]) the Guidelines range, treat[ed] the Guidelines as mandatory, fail[ed] to consider the § 3553(a) factors, select[ed] a sentence based on clearly erroneous facts, or fail[ed] to adequately explain the chosen sentence." *Id.* "Assuming that the district court's sentencing decision is procedurally sound, the appellate court [would] then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* "When conducting this review," the

appellate court must consider "the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.*

This Court then applied the abuse-of-discretion standard to Mr. Gall's sentence. The Eighth Circuit reversed his 36-month term of probation after finding that the district court " fail[ed] to give proper weight to the seriousness of the offense, as required by § 3553(a)(2)(A), and fail[ed] to consider whether a sentence of probation would create unwarranted disparities, as required by § 3553(a)(6)." *Id.* at 53. This Court rejected the Eighth Circuit's analysis after finding that the district court's § 3553(a) conclusions made sense. As to seriousness, the district court explicitly addressed this factor and determined that a lengthy term of probation would be sufficient, but not greater than necessary, to achieve its retributive goals. *Id.* Moreover, "seven of the eight defendants" involved in Mr. Gall's broader "case ha[d] been sentenced to significant prison terms," and "the unique facts of Gall's situation provide[d] support for the District Judge's conclusion that, in Gall's case, 'a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.'" *Id.* at 54. This Court then turned to the question of disparity. At the outset, the Sentencing Commission had considered this factor when setting the advisory range, and "[s]ince the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." *Id.* The sentencing record also established

the district court's explicit consideration of both "the need to avoid unwarranted disparities" and "the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated." *Id.* at 55. All of this led to reversal. In short, the Eighth Circuit had misapplied the abuse-of-discretion standard by substituting its own judgment for that of the district court. *Id.* at 59-60. "On abuse-of-discretion review," it "should have [instead] given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.*

2. Substantive-reasonableness review of federal sentences after *Gall*.

Although the Circuit Courts of Appeals use different language, all have interpreted *Gall* to require the same basic analysis: a sentence withstands appellate challenge so long as the result makes sense in light of the district court's application of § 3553(a) to the facts before it. The First Circuit, for example, asks whether the district court's "plausible sentencing rationale" led to a "defensible result." *United States v. Fletcher*, ___ F.4th ___, 2022 WL 17974680, at *9 (1st Cir. Dec. 28, 2022) (quoting *United States v. Reyes-Rivera*, 812 F.3d 79, 89 (1st Cir. 2016)). The Seventh Circuit applies the same analysis but uses slightly different language. There, reasonableness review turns on "whether the district judge imposed a sentence for logical reasons that are consistent with the 18 U.S.C. § 3553(a) factors." *United States v. Campbell*, 37 F.4th 1345, 1352 (7th Cir. 2022) (citing *United States v. Bonk*, 967 F.3d 643, 650 (7th Cir. 2020)). The Second, Third, Ninth, and D.C. Circuits come at the question from the opposite direction and ask

whether the sentence and supporting analysis fall outside the range of reasonable choices given the available facts.[1] The Fourth and Tenth Circuits have announced broad tests based on a deferential review of the totality of facts before the sentencing court.[2] The Fifth Circuit has taken another approach and adopted a three-part analysis. A sentence will survive abuse-of-discretion review unless "it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *See, e.g.*, *United States v. Hudgens*, 4 F.4th 352, 358 (5th Cir. 2021) (citing *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006)). The Sixth, Eighth, and Eleventh Circuits all use the same three-part test applied in the Fifth Circuit.[3]

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[1] *United States v. Cesar*, 10 F.4th 66, 79 (2d Cir. 2021) (quoting *United States v. Park*, 758 F.3d 193, 200 (2d Cir. 2014)) ("A sentence is substantively unreasonable if 'affirming it would damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.'"); *United States v. Williamson*, 903 F.3d 124, 136 (D.C. Cir. 2018) (quoting *United States v. Gardellini*, 545 F.3d 1089, 1093 (D.C. Cir. 2008)) ("In considering a defendant's challenge to the substantive reasonableness of a sentence, we ask the following question: 'In light of the facts and circumstances of the offense and offender, is the sentence so unreasonably high or unreasonably low as to constitute an abuse of discretion by the district court?'"); *United States v. Jackson*, 862 F.3d 365, 394 (3d Cir. 2017) (quoting *United States v. Tomko*, 562 F.3d 558, 560-61 (3d Cir. 2014) (*en banc*)) ("A sentence must still be reversed if 'no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.'"); *United States v. Doe*, 842 F.3d 1117, 1122 (9th Cir. 2016) (quoting *United States v. Ressam*, 679 F.3d 1069, 1087-88 (9th Cir. 2012) (*en banc*)) ("Our review is deferential, and relief is appropriate only in rare cases when the appellate court possesses 'a definite and firm conviction that the district court committed a clear error of judgment.'").

[2] *United States v. Williams*, 10 F.4th 965, 977 (10th Cir. 2021) (quoting *United States v. Carter*, 941 F.3d 954, 960-61 (10th Cir. 2019)) ("In [reviewing substantive reasonableness,] we ask 'whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in § 3553(a).'"); *United States v. Rose*, 3 F.4th 722, 731 (4th Cir. 2021) (quoting *United States v. Gomez-Jimenez*, 750 F.3d 370, 383 (4th Cir. 2014)) ("In considering whether a sentence is substantively reasonable, we review 'the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a).'").

[3] *United States v. Doak*, 47 F.4th 1340, 1360 (11th Cir. 2022) (quoting *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (*en banc*)) ("A district court strays beyond the range of reasonable sentences when, based on the 18 U.S.C. § 3553(a) sentencing factors, it "(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an

3. Applying *Gall*, the Second and Eleventh Circuits have found that a district court errs if it uses a prior term of imprisonment as a floor or baseline on its own sentencing discretion.

A defendant's criminal record is a fact relevant to multiple § 3553(a) factors. A history of recidivism sheds light on the defendant's "history and characteristics," 18 U.S.C. § 3553(a)(1), but § 3553(a) also requires district courts 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," 18 U.S.C. § 3553(a)(2)(A). "A defendant with a record of prior criminal behavior," the Sentencing Commission notes in an introductory comment to the Guidelines Manual's criminal-history chapter, "is more culpable than a first offender and thus deserving of greater punishment." U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (Nov. 1, 2021). The existence of prior convictions also affects "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). "General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence." USSG ch. 4, pt. A, introductory cmt. A defendant's record is similarly relevant to

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improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.'"); *United States v. Gates*, 48 F.4th 463, 477 (6th Cir. 2022) (quoting *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008)) ("On the other hand, sentences are substantively unreasonable when 'the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.'"); *United States v. King*, 898 F.3d 797, 810 (8th Cir. 2018) (quoting *United States v. Watson*, 480 F.3d 1175, 1177 (8th Cir. 2007)) ("A sentencing court 'abuses its discretion if it fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors.'").

incapacitation. § 3553(a) requires district courts to consider "the need for the sentence imposed . . . to protect the public from further crimes of the defendant, 18 U.S.C. § 3553(a)(2)(C), and to achieve this goal, "the likelihood of recidivism and future criminal behavior must be considered," USSG ch. 4, pt. A, introductory cmt. Last, § 3553(a) requires district courts to consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). "Repeated criminal behavior," in turn, "is an indicator of a limited likelihood of successful rehabilitation." USSG ch. 4, pt. A, introductory cmt.

Despite its general relevance, the Eleventh Circuit Court of Appeals has recognized a substantive limit on the use of a defendant's prior record at a federal sentencing hearing. In *United States v. Ochoa-Molina*, the district court treated a prior term of imprisonment as a hard limit on its sentencing discretion, and the Eleventh Circuit reversed. 664 F. App'x 898, 900-01 (11th Cir. 2016). There, the Guidelines called for a sentence somewhere between 70 and 87 months for a defendant convicted of illegal reentry. *Id*. at 899. He had previously received a 70-month sentence for the same offense, but by the time of his sentencing hearing, that conviction was about a decade old. *See id*. The district court nevertheless treated the prior term of imprisonment as a baseline on its own discretion and worked its way up from there. *Id*. at 900. It eventually imposed a 73-month sentence and repeatedly indicated that a sentence below 70 months would improperly "disregard"

the earlier term of imprisonment. *Id.* Applying the abuse-of-discretion standard, the Eleventh Circuit reversed the sentence as unreasonable. For one, it "gave significant weight to an irrelevant factor." *Id.* That was so because the district court had unreasonably elevated an otherwise relevant data point—the term of imprisonment imposed after a prior conviction—to a hard limit on its own authority. *Id.* That emphasis was unreasonable because the earlier sentence had been imposed "under substantially different circumstances." *Id.* By ignoring that fact, the district court "essentially substituted the judgment" of another court "for its own consideration of the circumstances of the instant case under the appropriate § 3553(a) factors." *Id.*

The district court's misuse of the prior term of imprisonment also resulted in a clear error of judgment in balancing the § 3553(a) factors. The district court "reasoned that imposing a sentence below" 70 months "would create an unwarranted sentencing disparity between the two sentences." *Id.* That analysis, however, overlooked "the circumstances of each offense." *Id.* The earlier illegal-reentry crime, the Eleventh Circuit explained, was committed in "much closer temporal proximity to two trafficking-in-methamphetamine convictions," but "[a]side from the instant illegal reentry," Mr. Ochoa had no other convictions in the interim period. *Id.* The earlier illegal-reentry offense also took place a mere four months after Mr. Ochoa's prior deportation. *Id.* at 900-01. "This time," the Eleventh Circuit noted, Mr. Ochoa "was arrested two and a half years after his deportation," and "uncontroverted testimony demonstrated that he had only been in

the United States for a few months prior to his arrest." *Id.* at 901. The "previous illegal re-entry," the Eleventh Circuit summarized, "occurred at a different time, in a different jurisdiction, and under a different set of facts from the instant one." *Id.* By elevating the prior term of imprisonment to a hard limit on its sentencing authority, the district court "unreasonably balanced an otherwise properly considered factor" and imposed an unlawful sentence. *Id.*

The Second Circuit recently recognized the same problem. In *United States v. Guzman*, the defendant argued that the district court had improperly treated a prior term of imprisonment as a hard limit on its authority. 2022 WL 1409583, at *1 (2d Cir. May 4, 2022). This, the Second Circuit noted, would result in error. *Id.* at *3. "Such an approach," it explained, "would improperly create a sentencing floor that would not allow the district court to appropriately consider, as mandated by Section 3553(a), all of the relevant factors in imposing an individualized sentence that is 'sufficient, but not greater than necessary' to achieve the purposes of sentencing." *Id.* (quoting 18 U.S.C. § 3553(a)).

The Second Circuit affirmed after finding that the district court had not improperly used the prior term of imprisonment. It instead considered the defendant's record and his prior terms of imprisonment as relevant factors among several others. *Id.* at *3-4. Those included Mr. Guzman's mitigating "background and characteristics," his failure to comply with parole conditions in the past, and the "nature and circumstances of the crime," which included crack-cocaine and fentanyl. *Id.* at *4 & n.4. "Therefore," the Second Circuit concluded, "the record

reflects the requisite consideration of the Section 3553(a) factors, including an explanation as to why the factors of deterrence and protection of the public (which included consideration of the need for incremental punishment) ultimately outweighed the other statutory factors that may have supported a lower sentence." *Id*. at *4.

C. Factual and Procedural History

1. Based on the failure of a prior four-year sentence to deter the instant offense, the district court imposed a 120-momth term of imprisonment despite a much lower advisory range.

The parties and probation agreed that a term of imprisonment somewhere between 15 and 21 months would be sufficient, but not greater than necessary, to carry out the statutory purposes of sentencing. Mr. Gomez pleaded guilty to a one-count indictment alleging illegal reentry. Pet.App.a16. The Guidelines Manual recommended a term of imprisonment somewhere between 15 and 21 months. Pet.App.a30. Mr. Gomez, through counsel, requested a sentence within the suggested range. Pet.App.a44. The government did the same but asked specifically for a sentence at the high end. Pet.App.a44.

The district court instead imposed a 120-month term of imprisonment. Pet.App.a55. To provide support for the 99-month variance, the district court repeatedly lamented the failure of a prior four-year term of imprisonment to deter the instant offense. Pet.App.a55, a58-a-59, a63. In 2012, Mr. Gomez received an aggregate four-year term of imprisonment following convictions in DeKalb County, Georgia, for burglary, false imprisonment, and sexual battery. Pet.App.a55-a56.

The United States deported Mr. Gomez after the sentence lapsed in July 2014, but he illegally returned the following year in May. Pet.App.a55-a56. To justify its 99-month variance, the district court repeatedly referenced the prior term of imprisonment.

Some of the district court's references were general in nature. Three simply lamented the prior sentence's failure to deter Mr. Gomez's illegal reentry. The district court, for example, began by noting the sentence's failure to deter the instant offense:

> I am going to upward vary based upon everything I've heard today. The four years in prison didn't deter the defendant at all. He was back less than a year after that felony and, you know, he pled guilty to sexual battery.

Pet.App.a52. It reiterated this point two more times:

> The defendant was ordered removed and was deported after being convicted of [sexual battery], burglary and false imprisonment. And he was sentenced to four years in prison for that offense. Didn't serve all four, and was deported in July 2014. He was already back by [M]ay 2015.
>
> . . .
>
> The defendant's behavior both in his illegal reentries and in his commission of a violent felony show he clearly demonstrates a lack of respect for the American legal system and its justice, and is a threat to all American citizens, and those who are not citizens, in this country. And a prison sentence of four years obviously did not deter the defendant from committing crimes again and illegally reentering.

Pet.App.a56. On two other occasions, the district court briefly noted that Mr. Gomez had not served the full four-year term. Pet.App.a53-a54. These comments

came in response to Mr. Gomez's factual objections about the conduct underlying his earlier convictions:

> And so he was charged with burglary, sexual battery, and false imprisonment; all of which he pled guilty to. And he was sentenced to 20 years, to serve four and have 16 years probation. Well, he didn't even serve the whole four, and they didn't – he didn't do a year of probation because he got deported
>
> . . .
>
> I get that that is what the defense is – is saying is true, but I – I don't have any evidence of that other than argument. The evidence I do have is that he pled guilty and he got four years, and didn't do even that.

Pet.App.a53-a54. The district court also compared the likely deterrent effect of the prior sentence to this one: "Four years didn't stop him. Maybe ten will." Pet.App.a60.

At another point, however, the district court explicitly cited the length of a prior term of imprisonment as a hard limit on its discretion at sentencing. Pet.App.a56. Its first statement to this effect was arguably equivocal:

> And if four years did not deter him at all; and it didn't, because he came back less than a year later, then that tells the Court he needs a little more time.

Pet.App.a56. Mr. Gomez objected, Pet.App.a58, and in response, the district court laid out the unique relevance of the prior sentence:

> And I'll tell you the measure I came by, that I – that I – I think of – there is in deciding what's necessary, but not more than necessary, if four years didn't knock some sense into him, and he's back less than a year later after that, then the Court thinks in order to deter and protect the community, that more than four years is required.

Pet.App.a60. Here, the district court was admirably candid. "[M]ore than four years [was] required" because the prior term of imprisonment had not deterred the instant offense. Pet.App.a60.

Mr. Gomez contested the district court's § 3553(a) analysis. He had originally suggested an alternative means—a term of supervised release—to address the risk of recidivism and argued that supervision would provide sufficient deterrence without the need for an upward variance or departure. Pet.App.a43-a44. After the district court imposed both supervision and a 99-month variance, Mr. Gomez disputed the district court's emphasis on the prior term of imprisonment as largely unfounded. Pet.App.a61. The earlier sentence, he explained, was not related to his immigration status, and the instant conviction was his first for a federal immigration crime. Pet.App.a61. Mr. Gomez then made a final objection that tied his various claims to the reasonableness of the sentence imposed. The district court, he argued, had "improperly" given "weight" to the sentence that followed his prior convictions. Pet.App.a61. These objections, he elaborated, implicated the district court's overarching failure to "weigh" the statutory purposes of sentencing "in a balanced manner." Pet.App.a61. The district court overruled the objection and concluded by explaining that a 99-month variance was necessary "to do justice and keep people safe." Pet.App.a62.

2. Mr. Gomez raised a preserved substantive-reasonableness claim on appeal attacking the district court's misuse of the prior term of imprisonment.

On appeal, Mr. Gomez challenged the district court's use of the prior four-year term of imprisonment as a hard limit on its sentencing discretion. He cited the district court's general statements on this point as proof of its emphasis, but the error, Mr. Gomez argued, occurred when the district court "explicitly tied this analysis to § 3553(a)" by treating the length of the prior sentence as a floor on its own discretion. *See* Appellant's Initial Brief at 25-26, *United States v. Gomez-Santacruz*, 2022 WL 4244892 (5th Cir. Sept. 15, 2022) (No. 21-11143) (quoting Pet.App.a60). This happened when the district court explained that "[m]ore than four years [was] *required*" because the prior term of imprisonment had not deterred the instant offense. Pet.App.a60. "The district court," Mr. Gomez continued, thereby "privileged the prior term of imprisonment as effectively setting a baseline . . . on its discretion despite the much lower advisory range." Appellant's Initial Brief, *supra*, at 27-28 (citing Pet.App.a60). That approach, he concluded, "shortchanged the advisory range" and "unreasonably elevated a prior term of imprisonment imposed in distinct circumstances as uniquely relevant to [the district court's] own independent duty to assess 'the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct' and 'protect the public from further crimes of the defendant.'" *Id.* at 29-30 (quoting 18 U.S.C. § 3553(a)(2)(B)-(C)).

3. The Fifth Circuit affirmed the 99-month variance as substantively reasonable.

A panel of Fifth Circuit judges affirmed after focusing on the district court's general statements, not its explicit clarification of the prior sentence's primary role at sentencing. The district court, this panel noted, "expressed concern that, because his wife and children were located in the United States, Gomez was likely to 'come right back.'" Pet.App.a5. Mr. Gomez's "illegal reentry and sexual battery offenses," the panel continued, led the district court to "determine[] that, in addition to serving as a just punishment," a ten-year "sentence would effectively deter Gomez from making future attempts to illegally reenter the United States." Pet.App.a5. This context led the panel to reject Mr. Gomez's substantive-reasonableness argument as unfounded: "In weighing the need for deterrence and incapacitation, the district court accounted for multiple facets of Gomez's criminal history and its relation to his life today." Pet.App.a13.

From there, the panel's opinion linked unrelated arguments concerning the facts underlying his prior conviction to the substantive-reasonableness claim advanced on appeal.

> At the Sentencing Hearing, Gomez asserted that he had been having a consensual affair with the victim in his 2012 Convictions and her call to the police was the product of a misunderstanding. Gomez made these arguments for the first time at the Sentencing Hearing and presented no corroborating evidence. The court, skeptical of Gomez's story, stated that his account was "hard to believe."

Pet.App.a14. Mr. Gomez, the panel noted, had not challenged these findings on appeal. Pet.App.a14. "Instead," the panel claimed, "he asserts that they somehow show that the court used his prior four-year prison term as a 'baseline' or 'floor' during sentencing." Pet.App.a14. "In further support of this argument," the panel wrote, "Gomez points to the court's statement that a ten-year sentence might serve as a more effective deterrent than his prior four-year sentence." Pet.App.a14. The panel rejected both claims:

> It was well within the court's discretion to consider whether Gomez's previous sentence had been an effective deterrent, and, having concluded that it had not, ruled accordingly.

Pet.App.a14-a15.

Mr. Gomez filed a timely petition for panel rehearing. In it, he faulted the panel opinion for "overlooking" one "point of . . . fact" and "misapprehending" another. Appellant's Petition for Panel Rehearing at 9, *United States v. Gomez-Santacruz*, 2022 WL 4244892 (5th Cir. Sept. 29, 2022) (No. 21-11143) (quoting FED. R. APP. P. 40(a)(2)). The district court had not, he pointed out, simply determined that the prior four-year sentence had failed as an "effective deterrent." *Id.* (quoting Pet.App.a15). It instead extrapolated from that fact "that more than four years [was] *required*." *Id.* (quoting Pet.App.a60). That statement, he argued, "show[ed] that the court used [the] prior four-year prison term as a 'baseline' or 'floor' during sentencing." *Id.* (quoting Pet.App.a14). The panel opinion also misapprehended the relationship between Mr. Gomez's factual objections concerning the conduct underlying his past convictions and his claims on appeal about deterrence and

incapacitation. *Id*. One had nothing to do with the other, he pointed out, but the opinion conflated the two. *Id*. In light of these errors, he asked the panel to grant the petition and reconsider its ruling on the substantive reasonableness of treating the length of a prior term of imprisonment as dispositive to § 3553(a)'s deterrence and incapacitation analyses. *Id*. at 10-13. The panel denied the petition in a one-page order issued on October 14, 2022. Pet.App.a1. The order is unsigned and engaged with none of the claims advanced by Mr. Gomez. Pet.App.a1.

REASONS FOR GRANTING THIS PETITION

I. The Fifth Circuit's opinion in this case conflicts with those issued by the Second and Eleventh Circuits.

a. The Second and Eleventh Circuits are right—a district court may not, consistent with 18 U.S.C. § 3553(a), treat the duration of a prior term of imprisonment as a limit on its own sentencing authority.

The plain text of 18 U.S.C. § 3553(a) mandates a nuanced, holistic approach to sentencing. The district court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in" § 3553(a)(2). 18 U.S.C. § 3553(a)(1). Those purposes include retribution, general deterrence, incapacitation, and rehabilitation, but Congress treated all four goals equally and requires consideration of each one. 18 U.S.C. § 3553(a)(2)(A)-(D). "[I]n determining the particular sentence to be imposed," § 3553(a) likewise requires district courts to "consider" a series of additional factors, which include "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the kinds of sentences available," and "the kinds of sentence and the sentencing

range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission." 18 U.S.C. § 3553(a)(1), (3)-(4). Again, Congress treated these factors equally and required consideration of all. This holistic approach requires a nuanced balancing of sentencing factors that may cut in different directions, and Congress mandated a similarly broad consideration of real-world facts: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661.

In light of its plain text, a district court may not, consistent with 18 U.S.C. § 3553(a), treat the duration of a prior term of imprisonment as a limit on its own sentencing authority. A defendant's prior record is no doubt relevant to all four of the sentencing goals set by Congress in § 3553(a)(2), USSG ch. 4, pt. A, introductory cmt, but if a district court reduces its analysis on any of those factors to a specific number based on a sentence imposed in different circumstances for another crime committed at some point in the past, the nuanced, holistic balancing required by § 3553(a)(2) becomes impossible. Such analysis instead elevates the § 3553(a)(2) factor at issue to supreme importance while limiting the potential relevance of "the nature and circumstances of the offense and the history and characteristics of the defendant." *See* 18 U.S.C. § 3553(a)(1). Treating a prior term of imprisonment as a hard limit on its authority may also disrupt the larger sentencing process by

making a sentence within "the range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines" impossible. 18 U.S.C. § 3553(a)(4). If the prior sentence is more severe than the high end of the advisory range, a sentence within the range suggested by the Guidelines Manual is off the table. This, in turn, ignores the preference set by Congress in § 3553(a) for a sentence "sufficient, but not greater than necessary," to carry out the goals set in § 3553(a)(2). *See* 18 U.S.C. § 3553(a)(4).

In recognizing these problems, the Second and Eleventh Circuits faithfully applied both § 3553(a) and the abuse-of-discretion standard announced by this Court in *Gall*. In *Guzman*, the Second Circuit recognized the larger problem: setting a prior term of imprisonment as a baseline at federal sentencing "improperly create[s] a sentencing floor that would not allow the district court to appropriately consider, as mandated by Section 3553(a), all of the relevant factors in imposing an individualized sentence that is 'sufficient, but not greater than necessary' to achieve the purposes of sentencing." 2022 WL 1409583, at *1 (quoting 18 U.S.C. § 3553(a)). The Eleventh Circuit confronted and diagnosed two granular problems with that approach in *Ochoa-Molina*. First, too much emphasis on the duration of the prior term of imprisonment turns an otherwise relevant data point into an irrelevant consideration. *Ochoa-Molina*, 664 F. App'x at 900. The otherwise relevant fact—the prior term of imprisonment's failure to deter the instant offense—cannot reasonably bear the weight placed upon it when a district court identifies it as a hard limit at sentencing. Every sentence is imposed under "different

circumstances," and by ignoring that fact, the district court "essentially substitute[s] the judgment" of another court "for its own consideration of the circumstances of the instant case under the appropriate § 3553(a) factors." *Id.* The baseline approach may also lead the district court to give unreasonable weight to whatever sentencing factor it has linked to the prior sentence. In *Ochoa-Molina*, for example, the district court justified its use of the prior sentence with reference to the need to avoid unwarranted sentencing disparities, but that analysis could not be squared with a reasonable assessment of the real-world facts. *Id.* at 900-01. The "previous illegal re-entry," the Eleventh Circuit explained, "occurred at a different time, in a different jurisdiction, and under a different set of facts from the instant one." *Id.* at 901. By elevating the prior term of imprisonment to a hard limit on its sentencing authority, the district court "unreasonably balanced an otherwise properly considered factor." *Id.*

A final point—despite recognizing error, the Second and Eleventh Circuits correctly applied the deferential abuse-of-discretion standard announced in *Gall*. There, the Eighth Circuit "correctly stated that the appropriate standard of review was abuse of discretion" but "engaged in an analysis that more closely resembled *de novo* review of the facts presented." *Gall*, 552 U.S. at 56. That led the Eighth Circuit to set aside the district court's "reasoned and reasonable" § 3553(a) analysis, *id.* at 59-60, but the Eleventh Circuit avoided the same error in *Ochoa-Molina*. There, it did not substitute one reasonable judgment for another but instead declared the district court's § 3553(a) misuse of the prior sentence as irrational and

inconsistent with § 3553(a)'s plain text. *Ochoa-Molina*, 664 F. App'x at 900-01. It reversed but not with instructions to impose a higher or lower sentence. *Id.* at 901. The Eleventh Circuit instead required the district court to try again but this time with the nuanced, holistic approach to recidivism required by § 3553(a).

b. The Fifth Circuit is wrong—the district court treated Mr. Gomez's prior term of imprisonment as a hard limit on its sentencing authority in this case.

The district court treated the prior four-year term of imprisonment as a hard limit on its own authority at Mr. Gomez's sentencing hearing. Its first statement to this effect was arguably equivocal:

> And if four years did not deter him at all; and it didn't, because he came back less than a year later, then that tells the Court he needs a little more time.

Pet.App.a56. Mr. Gomez objected, Pet.App.a58, and in response, the district court laid out the unique relevance of the prior sentence:

> And I'll tell you the measure I came by, that I – that I – I think of – there is in deciding what's necessary, but not more than necessary, if four years didn't knock some sense into him, and he's back less than a year later after that, then the Court thinks in order to deter and protect the community, that more than four years is required.

Pet.App.a60. Here, the district court was admirably candid. "[M]ore than four years [was] required" because the prior term of imprisonment had not deterred the instant offense. Pet.App.a60

That approach to federal sentencing cannot be squared with § 3553(a)'s plain text. The district court effectively reduced its analysis on deterrence and incapacitation, *see* 18 U.S.C. § 3553(a)(2)(B)-(C), to a prior four-year term of

imprisonment and worked its way up from there. In doing so, the district court outsourced its sentencing authority to a state court in DeKalb County, Georgia, considering a different set of crimes and operating on markedly different facts almost a decade in the past. The district court's decision to treat the prior term of imprisonment as a floor on its own authority also made a sentence within the range suggested by the Guidelines Manual an impossibility. That too was error. Congress requires the district court to "consider . . . the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission." 18 U.S.C. § 3553(a)(4). By its own admission, the district court could not do that here. Pet.App.a60.

Nor can the Fifth Circuit's deference to the district court be squared with the abuse-of-discretion standard announced and applied by this Court in *Gall*. That standard requires appellate courts to defer to a district court's "reasoned and reasonable" § 3553(a) analysis, *see Gall*, 552 U.S. at 60-61, but if a district court unreasonably misapplies § 3553(a), no deference is in order. According to the Fifth Circuit, the district court merely commented upon the relative deterrent effect of a four-year and ten-year sentence, Pet.App.a14-a15, but the record goes much further. The district court instead used the prior four-year term of imprisonment as a baseline on its own sentencing authority. Pet.App.a60. As the Second and Eleventh Circuits already recognize, that is error, and the Fifth Circuit avoided the same issue by ignoring the preserved claim advanced on appeal. The abuse-of-

discretion standard announced and applied in *Gall*, by contrast, turns on the district court's actual analysis. 552 U.S. at 56-59.

II. The Fifth Circuit's misapplication of § 3553(a) presents an important question of federal law.

The question presented by this petition implicates every sentencing hearing in federal district court. At each of those hearings, the district court considers and applies "the need for the sentence imposed" to reflect the goals set by § 3553(a)(2), and in fiscal year 2021, federal judges applied § 3553(a) to 57,377 offenders. U.S. SENTENCING COMM'N, FISCAL YEAR 2021 – OVERVIEW OF FEDERAL CRIMINAL CASES 1 (2022). 59.4 percent of them had criminal record qualifying for placement in criminal-history category II or above. *Id*. at 7. Although those records were relevant to all four of the sentencing goals set out in § 3553(a)(2), USSG ch. 4, pt. A, introductory cmt, a district court nevertheless short-circuits the application of § 3553(a) whenever it treats a specific prior term of imprisonment as a baseline or floor on its own sentencing discretion. The Second Circuit has recognized as much, *Guzman*, 2022 WL 1409583, at *1, and the Eleventh Circuit reversed a sentence based on the same analysis as unreasonable, *Ochoa-Molina*, 664 F. App'x at 900-01. The Fifth Circuit's contrary analysis below confused the error asserted and invites additional mistakes. To ensure § 3553(a)'s uniform and reasonable application moving forward, this Court should grant certiorari to resolve a recurring an "important question" of federal law. *See* Rule 10(c), RULES OF THE SUPREME COURT OF THE UNITED STATES.

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 January 12, 2023.

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