

No. _____

In the
Supreme Court of the United States

German Martinez,

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 German Martinez, 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 German Martinez 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The unpublished opinion of the Court of Appeals is available at *United States v. Martinez*, 2023 WL 3267841 (5th Cir. May 5, 2023)(unpublished).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 May 5, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE

Section 3553(a) of Title 18 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. Facts

In 1991, while his country underwent a devastating civil war, *see* Encyclopedia Britannica Online, *El Salvador, Civil War*, available at <https://www.britannica.com/place/El-Salvador/Civil-war>, last visited September 27, 2022, Petitioner Captain German Martinez joined the Salvadoran army. He continued to serve in that organization until 1999, achieving the rank of Captain. Sometime later, he entered the United States and suffered convictions for DUI and conspiracy to traffic drugs, the latter of which ultimately produced a 63-month sentence. The United States removed him to El Salvador, and he returned to his home village, where he performed agricultural labor.

In 2017, however, gang members interrupted his return in terrifying fashion. As two eye-witnesses swore under oath, two young men approached Captain Martinez in the field and told him the “Maras” – surely Mara Salvatrucha, MS-13 – had become aware of his prior military service. These men called him a “frog,” or soldier, and told him that MS-13 leadership had authorized his disappearance if he did not leave.

Captain Martinez fled the country and returned to the United States, in spite of his prior removal. He lived here without incident, formed a close relationship with a woman here, and had a child. He helped raise her son, and even had a new child. Sadly, his new infant son suffers from microcephaly, confining his partner to the

home to care for him at all times. For this reason, any support Captain Martinez can provide becomes very important to the family.

On February 17, 2021, Garland Police received a call falsely accusing Captain Martinez of possessing a gun. They searched him and his apartment, but did not find any evidence of a weapon. Because he had consumed too much alcohol that night, they nonetheless took him into custody for public intoxication. ICE discovered him, and the federal government brought a charge for illegally re-entering the country after a prior removal.

B. Proceedings in District Court

Captain Martinez pleaded guilty to a violation of 8 U.S.C. §1326. A Presentence Report found a Guideline range of 24-30 months imprisonment. The defense filed a motion for downward departure or variance, noting his imperfect defense of duress, and the urgent need of his family for any income he could remit upon his return. Counsel attached two affidavits from people in El Salvador, recounting the threat he received from MS-13 on account of his prior military service. She had previously provided medical records to Probation substantiating the medical condition of Captain Martinez's son. And she and Captain Martinez argued the same points at sentencing.

The government resisted the departure on grounds of duress using the following argument:

While he does claim duress, you know, Mr. Martinez can go to any other country in the world, but he chose to come back to the United States when he was allegedly threatened. You know, I don't think that that's

the duress that the guidelines consider or that this Court should consider.

The court formally denied the motion for variance or departure. As regards the claim of duress, it said:

I agree with the Government that even if he had to leave El Salvador he didn't have to come back here particularly given the prior criminal conviction and the prior removal or deportation.

It said that it was "sympathetic to the defendant's family situation," presumably the fact that his son suffers from microcephaly, which incapacitates the little boy's mother, financially. But the court said that it was "not inclined to vary on those grounds" because the defendant would be deported to El Salvador, rather than released back into the United States.

C. Proceedings in the Court of Appeals

Petitioner appealed. He contended that the sentence imposed was substantively unreasonable because it failed to give significant weight to objectively compelling mitigating evidence. Specifically, he argued that the district court erred in assuming that he could have lawfully entered a country other than the United States, and in assuming that he could not assist his family financially upon his return.

The court of appeals affirmed with the following commentary:

Martinez's general disagreement with the propriety of his sentence and the district court's weighing of the 18 U.S.C. § 3553(a) factors is insufficient to establish that the district court erred in balancing them.. He has not shown that the district court abused its discretion by

sentencing him within the applicable guidelines range to 24 months in prison.. Consequently, the judgment of the district court is AFFIRMED.

[Appx. A]; *United States v. Martinez*, No. 22-10649, 2023 WL 3267841, at *1 (5th Cir. May 5, 2023)(citing *Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010); *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009)).

REASONS FOR GRANTING THE PETITION

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

A. The courts are divided.

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. Ofrey-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. Echoing its precedent that refuses to “re-weigh” the sentencing factors, it said:

Martinez’s general **disagreement with** the propriety of his sentence and the **district court’s weighing of the 18 U.S.C. § 3553(a) factors is insufficient** to establish that the district court erred in balancing them.

[Appx. A]; *United States v. Martinez*, No. 22-10649, 2023 WL 3267841, at *1 (5th Cir. May 5, 2023) (emphasis added). And, indeed, it conducted no specific analysis of the arguments made by Petitioner against the reasoning of the district court. Rather, it simply refused to engage with any argument that expressed a “disagreement” with the way that the trial court weighed the sentencing considerations. The case accordingly squarely presents the issue that has divided the courts of appeals. Here, the court expressly that it simply would not reweigh the factors; in other circuits – and according to this Court’s precedent, *see Booker*, 543 U.S. at 261 – that is precisely the task of substantive reasonableness, albeit with deference.

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.

B. The present case is the right vehicle.

This case, moreover, presents a strong vehicle to address the nature of substantive reasonableness review. Petitioner will not be released from prison until December of next year, providing plenty of time to consider the issue and offer meaningful relief.

Further, the court gave no weight to the defendant’s claim of duress, although it expressed no doubt about his account of the threats. Instead, it reasoned that these threats should not affect the sentence, or not affect it much, because “even if he had to leave El Salvador he didn’t have to come back here particularly given the prior

criminal conviction and the prior removal or deportation.” Respectfully, this does not bear scrutiny.

The United States is not the only country that restricts immigration. Given Captain Martinez’s American drug conviction, for example, it is not clear that he could gain lawful access to the neighboring countries of Honduras or Guatemala. *See* Decreto No 208-2003, 3 diciembre 2003, Ley de Migración y Extranjería, Art. 81, La Gaceta, 3 marzo 2004 (Honduras)(“La Dirección General de Migración y Extranjería negará la entrada o permanencia en el país, aún cuando dispongan de la visa respectiva, a los extranjeros que se hallen en alguno de los casos siguientes: ... 5) ... los que se dedican al tráfico ilegal de drogas heroicas y estupefacientes ... 7) Quienes hayan sufrido condena por delitos comunes, excluyendo los delitos comunes conexos a los políticos”)(“The General Directorate of Immigration and Foreign Affairs will deny entry or stay in the country, even when they have the respective visa, to foreigners in any of the following cases: ... 5) ... those who are engaged in illegal drug trafficking, whether experimental or narcotic... 7) Those who have been sentenced for common crimes, excluding common political crimes”)(2003), available at <https://www.refworld.org.es/pdfid/5c0a9a464.pdf> , last visited July 26, 2023; Decreto No 44-2016, Código de Migración, Art. 66 (Guatemala) (“Impedimentos para el ingreso. Además de las disposiciones administrativas que se dispongan por el Instituto Guatemalteco de Migración, son impedimentos para ingresar al país: ... c) Ser perseguido penalmente por delitos de orden común contra la vida, la propiedad y la libertad.”)(“Bars to entry. In addition to the administrative regulations made by

the Guatemalan Institute of Migration, the bars to entering the country are ... c) Bring prosecuted criminally for common crimes against life, property or freedom"), available at <https://igm.gob.gt/wp-content/uploads/2017/09/CODIGO-MIGRACION-DTO-44-2016.pdf>, last visited July 26, 2023.

The district also made an error in discounting the significance of another critical sentencing consideration, namely the gravely disabled medical condition of Captain Martinez's son. Given the medical records, it could hardly doubt that his son suffered this condition, and expressed no doubt that the condition incapacitated the boy's mother financially. However, it discounted this consideration because Captain Martinez would not be released to the United States, by which it presumably meant that he could not offer much help upon his return to El Salvador. See (ROA.87). No doubt, Captain Martinez would enjoy greater opportunity to support his family had he been permitted to remain. But it is hardly the case that he cannot offer help to them abroad. Many returned migrants engage in all manner of productive labor in Central America, offering substantial opportunity to support the disabled boy. See Isaku Endo, et al, World Bank, World Bank Working Paper No. 177, *The U.S.-Honduras Remittance Corridor* 46 (2010) ("Returned migrants ...run hotels, restaurants, retail stores, as well as transportation and communication enterprises, and are engaged in import-export trading, courier services, real estate, construction, and tourism.") available at https://www.lai.fu-berlin.de/disziplinen/oekonomie/mitarbeiter_innen/Sarah_Hirsch/USHondurasCorridor.pdf, last visited July 26, 2023.

As such, the instant case is one in which the Petitioner could levy a persuasive critique of the sentence as based on unreasonable considerations. The restrictive approach of the Fifth Circuit foreclosed consideration of this argument. This Court should resolve the circuit split so that his contentions may have a fair evaluation.

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 1st day of August, 2023.

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