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No. _____

In the

Supreme Court of the United States

Alexander Yoichi Duberek,

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?

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PARTIES TO THE PROCEEDING

Petitioner is Alexander Yoichi Duberek, 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 Alexander Yoichi Duberek 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The unpublished opinion of the Court of Appeals is available at *United States v. Duberek*, 2023 WL 7490050 (5th Cir. Nov. 10, 2023) (unpublished). It is attached as Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on November 10, 2023. See Sup. Ct. R. 13.1. This Court's jurisdiction to grant certiorari is invoked under 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

Twenty-three year old Alexander Duberek was threatened and blackmailed [redacted]. After months of living in abject terror and desperate to escape the situation, [redacted]. He pled guilty to his crime. At sentencing, the district court disregarded evidence that Mr. Duberek was subject to serious coercion and blackmail as recognized by USSG § 5K2.12, and imposed a life sentence—a significant upward variance from his guidelines range of 292 months to 365 months.

The facts and record evidence surrounding [redacted] are extremely detailed and lengthy. They are recounted here in the most concise manner possible.

[redacted]

[redacted]

[redacted]

For the next 4 months, Mr. Duberek went missing. He surrendered to law enforcement in San Diego on March 18, 2021, and confessed to the crime almost immediately.

B. Proceedings in District Court

Mr. Duberek pled guilty to one count of Interstate Domestic Violence, in violation of 18 U.S.C. § 2261(a)(1). At offense level 40, Criminal History Category I, the PSR calculated Mr. Duberek's guidelines range as 292 months to 365 months.

The PSR identified several grounds for upward departures. The PSR also noted that policy statement USSG § 5K2.12 Coercion and Duress provided grounds for a downward departure. Neither side objected to the PSR.

Mr. Duberek submitted a sentencing memorandum asking the court to sentence him to the lower end of the guidelines range. He argued that such a sentence would comport with 18 U.S.C. § 3553(a), and would give appropriate weight to the serious coercion and blackmail noted in the PSR and recognized by USSG § 5K2.12. [redacted]. He also submitted nine exhibits, including a Psychosocial Evaluation by Dr. Marti Loring, [redacted]

The government also submitted a sentencing memorandum, asking for a life sentence. It described the logistics of the offense, attached photographs showing the body of the deceased and provided letters and other anecdotes from [redacted]'s loved ones.

But despite asking for the statutory maximum sentence, the government could not point to a motive for the offense. *See* Gov't Mem., ECF No. 43 (filed under seal) at 2 ("It is not entirely clear what motivated Duberek to murder [redacted]...") It acknowledged that "Duberek's account of his motivation for murdering [redacted] is not supported or disproven by the physical evidence in this case . . ." *Id.*

At sentencing, the court heard expert testimony from Dr. Loring. [redacted]

After hearing argument, the court imposed a life sentence. The court explained that it "considered here the nature and circumstances of the offense." It explained that "[i]n addition to the premeditation and the cunning and manipulation of your victim, there's the extreme conduct and the extreme violence that was present. This was not just one blow, this was not 10 blows, this was not 20 blows, this was 93, again, not in dispute."

As to Mr. Duberek's argument that he was threatened and coerced, the court found "that evidence and the allegations are insufficient to materially mitigate the evidence that's before me of this premeditated murder." The court didn't dispute Dr. Loring's qualifications, but found that some of her opinions "lack credibility." It did

not find credible her opinion that "this was a panicked act and that's why you stabbed this person and stabbed him as many times as you did."

The court concluded, "[a]dding all that up, again, the evidence is insufficient to materially counterbalance the aggravating factors here." It added, "even assuming that everything that's been told to me, which is largely speculation, were true, that you felt absolutely controlled and [redacted] controlled you in some way, despite everything else I hear about this person to the contrary – even if it were true, of course, it cannot and does not change the fact that this was a cold, premeditated, cunning murder."

C. Proceedings in the Court of Appeals

Mr. Duberek raised two principal claims on appeal. First, he raised a procedural reasonableness claim.

Second, relevant here, he argued that the sentence was substantively unreasonable because it failed to account for the circumstances under which he committed his offense, a factor that should have received significant weight. In stating that "even if" Mr. Duberek's claim of being coerced "were true . . . it cannot and does not change the fact that this was a cold, premeditated, cunning murder[,]" the district court effectively stated that it does not matter why Mr. Duberek murdered [redacted] But why a person kills another person always matters. To say otherwise flies in the face of hundreds of years of common law, which recognizes that someone who kills out of self-defense, duress or necessity deserves a lesser punishment—or no punishment at all. This Court has expressly identified a defendant's motive as central

to forming a just punishment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993). And even assuming *arguendo* that some upward variance was warranted, the record does not support the extent of the upward variance from the guidelines range of 24.5 to 30 years to a life sentence, which for someone of Mr. Duberek's age can amount to approximately 48 years—nearly double his guidelines range.[1]

Nevertheless, the court of appeals affirmed. The court provided no analysis or reasoning with regard to the substantive reasonableness claim, stating only that:

> As to substantive reasonableness, following a detailed discussion of the § 3553(a) factors in light of the offense and Duberek's evidence regarding his motive, the district court determined that the only reasonable sentence was life imprisonment. Because we are not persuaded that the district court erred in its weighing or balancing of the § 3553(a) factors or in determining that the extent of the variance was warranted, Duberek fails to show that a life sentence is substantively unreasonable.

[Appx. A]; *United States v. Duberek*, 2023 WL 7490050 (5th Cir. Nov. 10, 2023) (unpublished) (citing *Gall v. United States*, 552 U.S. 38, 50-51 (2007); *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006)).

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[1] At the time of sentencing, Mr. Duberek was 25 years old. As a male, his life expectancy is approximately 73 years, so he had approximately 48 years left to live. Centers for Disease Control and Prevention. "Life Expectancy in the U.S. Dropped for the Second Year in a Row in 2021." https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/20220831.htm (last visited June 21, 2023).

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 41. This review "take(s) into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* at 51. 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 F. App'x 175, 178 (5th Cir. 2016) (unpublished); *United States v. Mosqueda*, 437

F. App'x 312, 312 (5th Cir. 2011) (unpublished); *United States v. Turcios-Rivera*, 583 F. App'x 375, 376-377 (5th Cir. 2014); *United States v. Douglas*, 667 F. App'x 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. Echoing its precedent that refuses to "re-weigh" the sentencing factors, it said:

> Because we are not persuaded that the district court erred in its weighing or balancing of the § 3553(a) factors or in determining that the extent of the variance was warranted, Duberek fails to show that a life sentence is substantively unreasonable.

[Appx. A]; *United States v. Duberek*, 2023 WL 7490050 (5th Cir. Nov. 10, 2023) (unpublished) (citing *Gall v. United States*, 552 U.S. 38, 50-51 (2007); *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006)).

And, indeed, it conducted no specific analysis of the arguments that Mr. Duberek raised against the district court's reasoning, including the fact that the district court effectively said that it does not matter why Mr. Duberek murdered [redacted]. 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 implied 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. Twenty-three years old at the time of his offense,

Mr. Duberek received the penultimate sentence in our justice system. Life-without-parole terms, according to this Court, "share some characteristics with death sentences that are shared by no other sentences." *Graham v. Florida*, 560 U.S. 48, 69 (2010). Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture that is irrevocable." *Id.* "It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Id.* at 69-70 (citing *Solem v. Helm*, 463 U.S. 277, 300-301 (1983)).

Further, the court completely neglected to address Mr. Duberek's claim that the sentence was unreasonable because it disregarded his motive for committing the offense. This Court has recognized that a person's motive for committing a crime bears on his culpability. *Mitchell*, 508 U.S. at 485 ("Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives[.]") (quoting 1 W. LeFave & A. Scott, Substantive Criminal Law § 3.6(b), 324 (1986)).

And, motive goes to the heart of "the nature and circumstances of the offense and the history and characteristics of the defendant," which are central to the sentencing analysis. *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007) (citing 18 U.S.C. § 3553(a)).

Finally, the PSR flagged USSG § 5K2.12, a policy statement instructing the court that a downward departure may be appropriate "[i]f the defendant committed

the offense because of serious coercion, blackmail, or duress, under circumstances not amounting to a complete defense." The fact that the Sentencing Commission ***recognized*** Mr. Duberek's motive as mitigating, and yet, with no explanation, the district court decided that his motive was ***irrelevant*** to its § 3553(a) analysis rendered the sentence substantively unreasonable. *Cf. United States v. Ramirez-Mendoza*, 683 F.3d 771, 775 (7th Cir. 2012) (district court erred in ignoring the defendant's claim that he was coerced into participating in a kidnapping.).

As such, the instant case is one in which Mr. Duberek 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 receive a fair evaluation.

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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 8th day of February, 2024.

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