IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2018

CARLOS GUTIERREZ-TORRES,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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Question Presented

The Circuits are split on whether a defendant has to re-object to the district court's explanation of its sentencing rationale in order to preserve the arguments for appeal. Petitioner's case is from the Ninth Circuit and that court imposed plain error review on petitioner for not re-objecting to the district court's sentencing explanation. *United States v. Gutierrez-Torres*, No. 17-50101, 2018 U.S. App. LEXIS 1357 (9th Cir. Jan. 19, 2018). This re-objection requirement elevates form over substance and ignores that this same district court is minutes away from sentencing the defendant. Other circuits recognize that little is gained and much is lost by requiring a tail-end objection on an argument clearly raised and rejected. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010); *United States v. Thomas*, 498 F.3d 336, 341 (6th Cir. 2007); *United States v. Bartlett*, 567 F.3d 901 (7th Cir. 2009); *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008).

List of Parties

[X] All parties appear in the caption of the case on the cover page.

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Petitioner, Carlos Gutierrez-Torres, asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered May 31, 2017.

Opinion Below

The decision of the court of appeals, *United States v. Gutierrez-Torres*, No. 17-50101, 2018 U.S. App. LEXIS 1357 (9th Cir. Jan. 19, 2018), is attached as Appendix A.

Jurisdiction

Gutierrez-Torres timely asked for rehearing and rehearing en banc; the Ninth Circuit denied rehearing on May 23, 2018. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Involved Federal Law

Rule 52. Harmless and Plain Error.

> (a) Harmless error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Statement of the Case

Carlos Gutierrez-Torres is a Mexican national that was deported from the United States after serving a thirty-month sentence for marijuana smuggling. He was physically removed in 2008. In late 2011, Gutierrez-Torres was caught re-entering the United States and was sentenced to twenty-seven months. In 2017, Gutierrez-Torres again reentered the United States. He was caught and prosecuted.

Gutierrez-Torres pled guilty with a fast track plea agreement that included a two-level downward departure under the expedited disposition program departure.[1] Gutierrez-Torres's case was assigned District Judge Larry A. Burns. This was

[1] U.S.S.G. § 5K3.1.

important because Judge Burns has several sentencing rules that he generally applies to cases such as that sentences should increase incrementally for subsequent violations and that defendants that have received fast track in a previous case should not receive it again. *See, e.g., United States v. Rosales-Gonzales*, 801 F.3d 1177, 1184 (9th Cir. 2015) (approving Judge Burns's 'individualized' denial of an expedited disposition reduction while cautioning that categorical practices were prohibited).

The sentencing of Gutierrez-Torres involved a single disputed issue. Gutierrez-Torres asked Judge Burns to consider the November 2016 change to the illegal entry guideline. Before 2016, and while this district court was formulating its sentencing policies, the illegal entry guidelines did not have any specific penalty for having prior illegal entries.[2] In November of 2016, the Sentencing Commission amended the illegal entry guidelines to add a specific increase for having a prior illegal entry conviction.[3] Petitioner argued to Judge Burns the double counting implication for the guideline amendment as it now penalizes for prior illegal entries:

> [As] I have understood Your Honor explaining the sentencing rationale, it's that people who violate the law, you know, have a second 1326, should be considered punished more harshly. So here's what I got, there's now an adjustment in the guideline for that specific purpose and because there's an adjustment for that specific purpose and there's no application note that says don't give him fast track or

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[2] U.S.S.G. § 2L1.2 (effective Nov. 1, 2015).

[3] U.S.S.G. § 2L1.2 (effective Nov. 1, 2016).

> don't give him anything else, it seems to me that it is now accounted for and that hitting him twice for that, I think that might be a little bit much.

The argument focused on the judge's longstanding practice of using prior illegal entries as a basis to deny fast track and asks it to be re-examined in light of the new four-level upward adjustment for having a prior illegal entry.[4] The district court responded:

> THE COURT: What happens though, Mr. Zugman, what happens, because, you know, you've correctly identified what is generally my view, which is if a person --, forget about immigration felonies, any felony, if a person commits the same offense, felony offense a second time, the expectation is absent some special circumstance that the Court can point to that the sentence, the consequence is going to be greater. If I follow your view here, the guidelines would indicate that it's not going to be greater, that it's going to be lesser. The guideline term, I think if I follow your view, let's see, eight and eight is 16, plus four, makes this a 20, minus three, minus two, drops it to a 15. And he's in category III, which is 24 to 30 months. He got 27 months last time?

After a back-and-forth about Gutierrez-Torres's prior and what "the man on the street" would think about Gutierrez-Torres getting a lesser sentence for an illegal entry than was imposed the first time, the discussion again came down to double counting:

> MR. ZUGMAN: Well, the best I have on fast track is I think that the plus four for the prior immigration felony accounts for it. I think it would be double counting to a degree to penalize him again for it.
>
> THE COURT: Well, okay. I don't necessarily agree with that because all of these cases where a person has a prior are going to result in the plus four and that would mean that, you know, a guy six or seven

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[4] U.S.S.G. § 2L1.2(b)(1)(A).

> times in gets fast track again, which believe it or not I've seen. I've seen that. It seems crazy to me. It seems to violate the internal policies that the U.S. Attorney is supposed to be guided by. That's not my business, but it does seem that way.

The district court then gave Gutierrez-Torres a one-level fast-track reduction and the high-end of 33 months.

The Appeal

Gutierrez-Torres appealed to the Ninth Circuit and set out the above. The Ninth Circuit held that the district court appropriately exercised its discretion and did not double count Gutierrez-Torres's prior conviction by reducing the government sponsored fast track departure and sentencing at the high-end. The Ninth Circuit did not address Gutierrez-Torres's argument that the newly amended illegal entry guideline now fully accounted for Gutierrez-Torres's single prior illegal entry offense:

> Gutierrez-Torres also argues that the district court procedurally erred by failing to address his argument about impermissible double counting and by failing to explain the sentence adequately. The district court did not plainly err. *See United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010). The court addressed Gutierrez-Torres's arguments and adequately explained its reasons for the sentence. *See United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc).[5]

Far from helping the law evolve, the Ninth Circuit's plain error rule allows it to duck the question. Judge Burns's reasoning plainly did not apply to Gutierrez-

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[5] *United States v. Gutierrez-Torres*, No. 17-50101, 2018 U.S. App. LEXIS 1357, at *3 (9th Cir. Jan. 19, 2018).

Torres's case so either it's the case that Judge Burns's reasoning did not matter because it does not matter that the guidelines had been amended to account for the prior illegal entry or Judge Burns's reasoning did matter, but Gutierrez-Torres was not prejudiced because the decision to depart or sentence within a range is purely discretionary.

Reasons to Grant the Writ

The Southern District of California, new home to zero-tolerance immigration policy, is a very busy criminal court. District Judge Larry A. Burns has been on that Court for fourteen years and he has settled sentencing policies.[6] Judge Burns has settled policies regarding how he sentences which have been appealed but were approved in *United States v. Rosales-Gonzalez*, in which the 9th Circuit affirmed Judge Burns's denial of a fast track, government-sponsored departure for an illegal entry defendant because of the defendant's prior illegal entry conviction and *thirty-five* prior deportations.[7]

The new illegal entry guideline gives a specific four-level upward adjustment under 2L1.2(b)(1)(A). The four level increase doubled Gutierrez-Torres's guideline range. The district court's only response to Gutierrez-Torres's argument was to note that if the argument were accepted, then the guidelines would be reduced to 18 to

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[6] https://www.casd.uscourts.gov/Rules/Lists/Rules/Attachments/6/Burns%20Criminal%20Procedures%20-%20Revised.pdf

[7] *United States v. Rosales-Gonzales*, 801 F.3d at 1179.

24 months of custody which would be less than Gutierrez-Torres's last sentence. The district court also gave a reductio ad absurdum about whether Gutierrez-Torres's argument would also apply to a defendant with "six or seven" convictions.

Judge Burns's analysis plainly did not answer the argument made by Gutierrez-Torres which Judge Burns understood. But in Petitioner's case, he is saddled with plain error review because he did not object to the overruling of his objection.

The Fourth, Sixth,[8] Seventh, Eighth, and D.C. Circuits,[9] hold that procedural error is preserved by arguing for a sentence based on the § 3553(a) factors that is different from the sentence the district court imposes.[10] These Circuits do not require the formalistic objection or exception to the sentence. This approach is the more sensible one and should be adopted by this Court. As Judge Easterbrook explained in *United States v. Bartlett* Federal Rule of Criminal Procedure 51 does

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[8] The Sixth Circuit requires the sentencing judge to ask the parties for any objections about the sentence just imposed and the failure of the judge to ask will preclude plain error review to a procedural reasonableness claim. *See United States v. Vonner*, 516 F.3d 382, 385-86 (6th Cir.) (en banc).

[9] The D.C. Circuit claims that it is applying plain error but finds the failure to explain to be plain error because the absence of reasoning "precludes appellate review of the substantive reasonableness of the sentence, ... thus 'seriously affect[ing] the fairness, integrity, or public reputation of judicial proceedings.'" *In re Sealed Case*, 527 F.3d 188 at (quotations omitted).

[10] *United States v. Lynn*, 592 F.3d at 578; *United States v. Swehla*, 442 F.3d 1143, 1145 (8th Cir. 2006); *United States v. Burroughs*, 613 F.3d 233, 241 (D.C. Cir. 2010); *United States v. Dale*, 498 F.3d 604, 610 n.5 (7th Cir. 2007) ("a defendant need not object to his sentence on the grounds that it is unreasonable to preserve appellate review for reasonableness").

"not require a litigant to complain about a judicial choice after it has been made."[11]

As a practical matter, requiring a defendant to make a failure to explain objection after the district court has ruled on the matter needlessly lengthens sentencing while adding no value.

> Requiring a party to lodge an explicit objection after the district court explanation would "saddle busy district courts with the burden of sitting through an objection-probably formulaic-in every criminal case." When the sentencing court has already "heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence," we see no benefit in requiring the defendant to protest further.

Lynn, 592 F.3d at 578-79 (quoting *United States v. Castro-Juarez*, 425 F.3d 430, 433-34 (7th Cir.2005)).

Here, Counsel brought up the issue of double counting twice during the hearing and it was the only substantive issue discussed. There is no question that District Judge Burns heard and understood the argument. Moreover, it is also readily apparent that District Judge Burns is going to deny as a matter of policy fast-track reductions to recidivists because that has been and will continue to be his practice.

By imposing plain error review, the Ninth Circuit avoids answering an important question regarding how the most frequently applied guideline in the most frequent type of offense ought to be applied.

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[11] *United States v. Bartlett*, 567 F.3d at 910.

Conclusion

The Ninth Circuit's rule benefits no one. Litigants are forced to repeat objections already made, the district courts will have to rule on issues they have already decided, and, by imposing plain-error review, the Ninth Circuit avoids answering a simple question that would provide guidance for the thousands of other illegal entry defendants that find themselves in the Ninth Circuit. Certiorari is appropriate.

Dated: August 19, 2018

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