No. 18-7739

IN THE SUPREME COURT OF THE UNITED STATES

GONZALO HOLGUIN-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reviewed for plain error petitioner's claim that the district court imposed a substantively unreasonable term of imprisonment for petitioner's violation of the terms of his supervised release, when petitioner failed to object in the district court to that term of imprisonment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 746 Fed. Appx. 403.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2018. The petition for a writ of certiorari was filed on January 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. 841 and 18 U.S.C. 2. Gov't C.A. Br. 1. He was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. Ibid. After petitioner was released from that term of imprisonment, the district court found that petitioner had violated the terms of his supervised release by committing a new offense, revoked his supervised release, and ordered a 12-month term of imprisonment, with no supervised release to follow. Pet. App. 1; see Order Revoking Supervised Release 1. The court of appeals affirmed. Pet. App. 1-2.

1. In 2016, United States Border Patrol agents arrested petitioner, along with other suspects, for possessing approximately 272 pounds of marijuana. Compl. 1. Petitioner admitted to the agents that he had illegally entered the United States in order to smuggle marijuana. Id. at 2.

A federal grand jury charged petitioner with possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Indictment 1-2. Petitioner pleaded guilty, and the district court sentenced him to 24 months of imprisonment, to be followed by two years of supervised release. Am. Judgment 1-3.

Petitioner completed that term of supervision, and began his term of supervised release, in October 2017. Gov't C.A. Br. 1. In November 2017, Border Patrol agents again arrested petitioner, along with other suspects, for possessing approximately 272 pounds of marijuana. 17-cr-354 Docket entry No. 1, at 2 (W.D. Tex. Nov. 17, 2017). Petitioner again admitted that he had carried the marijuana into the United States from Mexico. Ibid. A federal grand jury charged petitioner with possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. 17-cr-354 Docket entry No. 22, at 1-2 (W.D. Tex. Dec. 12, 2017). Petitioner pleaded guilty to the new drug-trafficking offense, and the district court sentenced him to 60 months of imprisonment for that offense, to be followed by five years of supervised release. 17-cr-354 Docket entry No. 110, at 1-3 (W.D. Tex. Apr. 30, 2018).

2. Meanwhile, the Probation Office filed a petition to revoke petitioner's original term of supervised release, on the ground that he had violated the conditions of that release. Pet. for Warrant 1; see Mot. to Revoke Supervised Release 1-2. The district court held a hearing, at which petitioner admitted that he had violated the conditions of his supervised release by failing to report to the Probation Office after reentering the United States from Mexico, and by committing the second drug-trafficking offense. Revocation Hr'g 2-3. The court explained that the statutory maximum term of imprisonment for petitioner's violation

of the conditions of his supervision was three years; that the applicable policy statement of the Sentencing Guidelines recommended a revocation term of 12 to 18 months of imprisonment; and that the maximum recommended further term of supervised release was life. Id. at 3; see Gov't C.A. Br. 2-3.

Counsel for petitioner noted that petitioner had already been sentenced to 60 months of imprisonment for the new drug-trafficking offense, and she argued that there "would be no reason under [Section] 3553 that an additional consecutive sentence would get his attention any better than five years does." Revocation Hr'g 4-5. Specifically, she stated that "[t]hese people routinely are very economically motivated"; that "sometimes perhaps they're not strong enough to be able to [say] no when they're tapped to do this kind of job"; and that, if petitioner "comes back, he's going to serve his life in prison." Id. at 5. Counsel therefore asked the district court to "consider no additional time or certainly less than the guidelines," particularly in the event that the court were to order that petitioner's revocation sentence run consecutively to the sentence for his second drug-trafficking offense. Ibid.

The district court stated that it had "reviewed the policy statements contained in Chapter 7 of the guidelines in determining the appropriate disposition of this matter in relation to the defendant's violations of his conditions of release." Revocation Hr'g 6. After doing so, the court imposed a 12-month term of

imprisonment, to run consecutively to the 60-month sentence imposed for petitioner's second drug-trafficking offense. Ibid. The court explained that it did not disagree with the argument made by petitioner's counsel, but that it "believe[d] the underlying case, the original case means something and so thus the sentence" imposed was appropriate. Ibid. The court also observed that it "hope[d]" that petitioner would be "able to withstand the pressure next time and not to do what you've done a few times now already." Ibid. The court asked whether petitioner's counsel had "[a]nything further," and she responded that she did not. Ibid. Petitioner did not object to the revocation term imposed by the court. Ibid.

3. On appeal, petitioner for the first time challenged his revocation term as substantively unreasonable. Pet. App. 2. The court of appeals affirmed in an unpublished per curiam decision. Id. at 1-2.

The court of appeals observed that, because petitioner "failed to raise his challenges in the district court, [its] review is for plain error only." Pet. App. 2 (citing United States v. Whitelaw, 580 F.3d 256, 259-260 (5th Cir. 2009)). The court then stated that petitioner had "failed to show that the imposition of the 12-month total sentence constituted a clear or obvious error." Ibid. The court noted that the 12-month sentence "is within the applicable advisory Guidelines policy statement ranges." Ibid. (citing Sentencing Guidelines § 7B1.4(a)). The court further

observed (ibid.) that the district court's order that petitioner's revocation term run consecutively to his drug-trafficking sentence was consistent with Sentencing Guidelines § 7B1.3(f), which provides that "[a]ny term of imprisonment imposed upon the revocation of * * * supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving."

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erred in applying plain-error review to his claim that the district court's 12-month revocation term of imprisonment was substantively unreasonable. Although the court of appeals incorrectly applied plain-error review to that claim, application of that standard did not affect the outcome of petitioner's case. Further review is therefore not warranted.

1. In order to preserve a claim for appellate review, a defendant must object to an allegedly erroneous district court ruling at the time the ruling "is made or sought," and must inform the district court "of the action the [defendant] wishes the court to take, or the [defendant's] objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). A claim that is not preserved in that manner is subject to review only for plain error. Fed. R. Crim. P. 52(b).

Petitioner correctly notes (Pet. 5-6) that the Fifth Circuit, unlike some other courts of appeals, has held that a defendant

must object to a sentence's substantive reasonableness in the district court to properly preserve that claim for appeal. See United States v. Peltier, 505 F.3d 389, 391-392 (5th Cir. 2007), cert. denied, 554 U.S. 921 (2008); see also, e.g., United States v. Autery, 555 F.3d 864, 870-871 (9th Cir. 2009) (citing cases examining this issue). That practice of applying plain-error review to substantive-reasonableness claims incorrectly extends Federal Rule of Criminal Procedure 51's contemporaneous-objection requirement. When a defendant argues for a given sentence and the district court imposes a different sentence, the defendant has already put the court on notice of his objection to the length of the sentence and so -- in accord with Rule 51(a), which provides that "[e]xceptions to rulings" are unnecessary -- need not repeat that objection after the court announces the sentence. Fed. R. Crim. P. 51(a).

Nevertheless, the Fifth Circuit has required a contemporaneous reasonableness objection for more than 11 years. See Peltier, 505 F.3d at 391-392. Such objections are now routine practice in the district courts in that circuit. See, e.g., United States v. Key, 599 F.3d 469, 473 (5th Cir. 2010), cert. denied, 562 U.S. 1182 (2011); United States v. Ocampo-Mejia, 321 Fed. Appx. 380, 381 (5th Cir. 2009) (per curiam). And during that 11-year period, this Court has denied a number of petitions raising that question in cases from the Fifth Circuit. See, e.g., Hull v. United States, No. 18-7140

(Mar. 25, 2019); Rodriguez-Flores v. United States, 136 S. Ct. 101 (2015) (No. 14-10126); Garcia-Gonzalez v. United States, 135 S. Ct. 120 (2014) (No. 13-10465); Correa-Huerta v. United States, 573 U.S. 912 (2014) (No. 13-10114); Medearis v. United States, 572 U.S. 1072 (2014) (No. 13-9149); Martinez-Canada v. United States, 572 U.S. 1063 (2014) (No. 13-8318); Zubia-Martinez v. United States, 572 U.S. 1004 (2014) (No. 13-7236); Berrios-Ramirez v. United States, 572 U.S. 1063 (2014) (No. 13-8203); Lester-Ochoa v. United States, 571 U.S. 862 (2013) (No. 12-10676); Moreno-Hernandez v. United States, 568 U.S. 1204 (2013) (No. 12-8409); Garcia-Ramirez v. United States, 568 U.S. 1092 (2013) (No. 12-5842); Hernandez-Ochoa v. United States, 568 U.S. 1093 (2013) (No. 12-6223); Minora-Escarcega v. United States, 568 U.S. 1031 (2012) (No. 12-5978); Castillo-Quintanar v. United States, 568 U.S. 1026 (2012) (No. 11-10499); Perez v. United States, 568 U.S. 1025 (2012) (No. 11-9353).

2. The same result is appropriate in this case. Even without application of the plain-error standard, petitioner's 12-month revocation term was substantively reasonable. Even "[w]hen the defendant properly preserves his objection for appeal," the Fifth Circuit reviews "a sentence imposed on revocation of supervised release under a 'plainly unreasonable' standard." United States v. Warren, 720 F.3d 321, 326 (2013) (citation omitted). The court has described that "plainly unreasonable" standard of review as a "more deferential standard" than the

standard that applies to appellate review of original sentences following conviction for a substantive offense. United States v. Miller, 634 F.3d 841, 843 (5th Cir.), cert. denied, 565 U.S. 976 (2011). And even as to an original sentence, the court reviews "a preserved objection to a sentence's substantive reasonableness for an abuse of discretion, examining the totality of the circumstances." Warren, 720 F.3d at 332. That "deferential review is informed by the knowledge that '[t]he sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him.'" Ibid. (quoting Gall v. United States, 552 U.S. 38, 51-52 (2007)) (brackets in original).

The 12-month term of imprisonment that the district court imposed in this case was not unreasonable under either standard. That term is at the bottom of the 12-to-18-month range that the Sentencing Commission's policy statement recommends. See Revocation Hr'g 4. Even "[r]evocation sentences exceeding the guidelines range * * * have been upheld as a matter of routine against challenges that the sentences were substantively unreasonable." United States v. Mulcahy, 403 Fed. Appx. 894, 895 (5th Cir. 2010) (per curiam). And revocation terms that are within the sentencing range recommended by the policy statement are "presumptively reasonable." United States v. Lopez-Velasquez, 526 F.3d 804, 809 (5th Cir.) (per curiam), cert. denied, 555 U.S. 1050 (2008).

Petitioner cannot rebut that presumption here. The district court explained that the term of imprisonment it imposed was necessary in light of "the original case" -- that is, petitioner's original drug-trafficking offense. Revocation Hr'g 6. The court further observed that petitioner had committed this sort of offense "a few times now already" and that it "hope[d]" petitioner would be "able to withstand the pressure next time." Ibid. It was not an abuse of discretion for the court to sentence petitioner to the bottom of the range that the Sentencing Commission's policy statement recommends, particularly in light of the court's stated concern about petitioner's recidivism.

Nor did the district court abuse its discretion in ordering that petitioner's 12-month revocation term of imprisonment run consecutively to his 60-month drug-trafficking sentence. A district court has the discretion to impose a revocation term for violating the conditions of supervised release by committing a new crime that is consecutive to the term of imprisonment for the crime itself, thereby accounting for the separate breach of trust that the commission of the crime while on supervised release entails. See United States v. Gonzalez, 250 F.3d 923, 929-931 (5th Cir. 2001). And as the court of appeals explained (Pet. App. 2), the Sentencing Commission's policy statement recommends that "[a]ny term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether

or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release." Sentencing Guidelines § 7B1.3(f); see id. at comment (n.4). Consistent with that recommendation, the court of appeals has repeatedly upheld revocation terms that run consecutively to sentences for the underlying offense leading to the revocation. See United States v. Hernandez-Archila, 700 Fed. Appx. 370, 371 (5th Cir. 2017) (per curiam); United States v. Cantu-Sandoval, 668 Fed. Appx. 638, 639-640 (5th Cir. 2016); United States v. Watson, 463 Fed. Appx. 366, 368 (5th Cir. 2012) (per curiam).

Petitioner does not offer (Pet. 13) any reason to believe that the court of appeals would have arrived at a different conclusion in the absence of plain-error review, either with respect to the term of imprisonment that the district court imposed or the decision to impose that term consecutively. And because the court of appeals would have upheld petitioner's 12-month term of imprisonment even under the "plainly unreasonable" standard that it applies to preserved claims of substantive unreasonableness in the revocation context, the application of plain-error review had no effect on the disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2019