

No. _____

In the Supreme Court of the United States

DORIAN GIVENS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition concerns the proper standard of appellate review for sentences imposed following the revocation of a defendant’s term of supervised release. For more than a decade, there has been a circuit split regarding whether post-revocation sentences are reviewed for abuse of discretion or under the heightened “plainly unreasonable” standard. The majority of circuit courts review preserved challenges to post-revocation sentences in the same manner that they review any federal sentence—for abuse of discretion. But the Fifth Circuit, along with the Fourth and Seventh Circuits, currently applies a “plainly unreasonable” standard to post-revocation sentences, even when the defendant objected to the reasonableness of the sentence during the district court proceeding. The plainly unreasonable standard requires a defendant to convince the appellate court not only that his or her sentence is unreasonable, but that the sentencing error was clear or obvious under existing law.

The question presented is:

What is the proper standard of appellate review for sentences imposed on defendants following revocation of supervised release?

TABLE OF CONTENTS

Questions Presented	ii
Table of Authorities	iv
Judgment at Issue	1
Jurisdiction	1
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Petition	7
I. For more than a decade, there has been a circuit split regarding the proper standard of review for post-revocation sentences, and this Court's guidance is necessary to resolve the issue	8
II. Application of the "plainly unreasonable" standard of review to all post-revocation sentences is inappropriate and runs afoul of this Court's precedent	9
Conclusion	12

TABLE OF AUTHORITIES

Cases

<i>Gall v. United States</i> , 552 U.S. 38 (2007)	10
<i>Setser v. United States</i> , 566 U.S. 231 (2012).....	11
<i>United States v. Bolds</i> , 511 F.3d 568 (6th Cir. 2007)	8, 9
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	9, 10
<i>United States v. Boultinghouse</i> , 784 F.3d 1163 (7th Cir. 2015)	8
<i>United States v. Butler-Acevedo</i> , 656 F.3d 97 (1st Cir. 2011).....	8
<i>United States v. Carter</i> , 730 F.3d 187 (3d Cir. 2013).....	8
<i>United States v. Deen</i> , 706 F.3d 760 (6th Cir. 2013).....	8
<i>United States v. Dorian Givens</i> , 746 F. App'x 421 (5th Cir. 2019).....	1, 6
<i>United States v. Growden</i> , 663 F.3d 982 (8th Cir. 2011)	8
<i>United States v. Johnson</i> , 786 F.3d 241 (2d Cir. 2015)	8
<i>United States v. Miller</i> , 634 F.3d 841 (5th Cir. 2011)	9
<i>United States v. Padgett</i> , 788 F.3d 370 (4th Cir. 2015).....	8
<i>United States v. Sanchez</i> , 900 F.3d 678 (5th Cir. 2018)	8
<i>United States v. Spangle</i> , 626 F.3d 488 (9th Cir. 2010)	8
<i>United States v. Sweeting</i> , 437 F.3d 1105 (11th Cir. 2006).....	8
<i>United States v. Tedford</i> , 405 F.3d 1159 (10th Cir. 2005).....	8

Statutes

18 U.S.C. § 3553(a)	5, 10
18 U.S.C. § 3553(b)(1) (2000).....	10
18 U.S.C. § 3742(a)	2
18 U.S.C. § 3742(e) (2000).....	10
28 U.S.C. § 1254.....	1

IN THE
SUPREME COURT OF THE UNITED STATES

DORIAN GIVENS, *Petitioner*,

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On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Dorian Givens respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit was reported at *United States v. Dorian Givens*, 746 F. App'x 421 (5th Cir. 2019), and is reprinted at Appendix 1A.

JURISDICTION

The Fifth Circuit entered its judgment on January 2, 2019. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 3742(a) provides:

(a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

STATEMENT OF THE CASE

Petitioner Dorian Givens pled guilty to three related drug offenses in 2013: one conviction for conspiracy to distribute 28 grams or more of crack cocaine, and two convictions for specific instances of distribution. According to the factual basis, Mr. Givens admitted to selling approximately one ounce of crack cocaine to a confidential source on two separate occasions in May of 2012. Mr. Givens had no prior criminal convictions, and thus, at the time of his original sentence, his criminal history category was I. He was sentenced to 57 months imprisonment for the drug offenses, which was subsequently reduced to 46 months, and his supervised release began on February 16, 2016.

On March 30, 2018, the Government filed a Rule to Revoke Supervised Release, alleging that Mr. Givens committed certain supervised release violations. The most serious violations were two convictions for being a felon in possession of a firearm, related to events that occurred in July of 2016 and January of 2017.¹ The first felon in possession charge stemmed from an incident in which Mr. Givens was shot while driving his car, and police officers found a loaded firearm in his vehicle during their investigation of the incident. It was undisputed that Mr. Givens was the target and victim of that shooting. The second felon in possession charge involved a firearm that was retrieved from a hotel room where Mr. Givens was staying prior to his arrest. Mr. Givens pled guilty to both felon in possession charges on November 29, 2017. On March 19, 2018, he was sentenced to 30 months' imprisonment for each of the two counts, with the sentences to be served concurrently.

¹ The other violations included: (1) two failed drug tests; (2) failure to maintain full-time employment; and (3) absconding from supervision.

Mr. Givens's revocation hearing was held on May 2, 2018. Based on the nature of the alleged violations and Mr. Givens's criminal history category, the Sentencing Guidelines called for an imprisonment range of four to ten months. At the hearing, Mr. Givens admitted to the violations, accepted responsibility for his actions, attempted to explain some of his conduct, and expressed a desire to change. He also mentioned that he lives "in a violent city." The court responded that the violent nature of the city in which Mr. Givens lives is "no excuse for your life-style" and "no excuse for ignoring the opportunities that have been offered to you until this very moment." The court further stated that "[i]t's no excuse for your refusing to live the kind of life that you now claim, and I have no reason to believe you, that you want to live." Then, citing Mr. Givens's "dangerous life-style and conduct," the court imposed the maximum possible sentence for each count and ran all of the sentences consecutively, which resulted in a total sentence of seven years. The court also ran the sentences consecutively to the 30-month sentence that was imposed for the substantive firearm convictions, resulting in a total term of imprisonment of nearly ten years.

Immediately following the court's imposition of the sentence, Mr. Givens's counsel objected to the "significant departure" from the Guideline range. The district court indicated that the sentence "was meant to be" significantly greater than the Guideline range, referring again to Mr. Givens's "significant [and dangerous] criminal record." The court noted counsel's objection for the record and adjourned the proceeding. Mr. Givens then filed a timely notice of appeal on May 7, 2018.

On appeal, Mr. Givens challenged the district court's revocation sentence on several grounds. First, he asserted that the district court committed procedural error in failing to adequately explain its extreme deviation from the Guideline range and failing to consider all of the relevant

sentencing factors under 18 U.S.C. § 3553(a). Mr. Givens also argued that the court committed procedural error by selecting a sentence based on clearly erroneous facts. Specifically, the sentence was based on Mr. Givens’s “dangerous life-style and conduct,” even though Mr. Givens was not charged with committing any violent acts, and the most dangerous conduct in which he was involved was a shooting where he was the target and victim. Similarly, in response to defense counsel’s objections, the court relied on a characterization of Mr. Givens’s criminal history as “significant” and “dangerous,” but Mr. Givens had no criminal history prior to the offenses that resulted in his supervised release, and his only other arrests involved minor violations, with the most severe being “simple criminal damage to property.”

In addition to challenging the district court’s procedural errors, Mr. Givens also challenges the substantive reasonableness of the court’s sentence. Mr. Givens argued that the court gave significant weight to improper factors relating to the seriousness of the supervised release violations and failed to account for factors that should have received significant weight, including the Sentencing Guidelines and policy statements and the need to avoid unwarranted sentence disparities among similarly situated defendants. *See* § 3553(a)(4) and (6). In particular, Mr. Givens referred to his co-defendant, who received only a 13-month sentence for his own supervised release violations. Mr. Givens explained that he and his co-defendant had been on supervised release for convictions stemming from nearly identical drug-related activities—two sales of crack cocaine to a confidential source. His co-defendant’s supervised release violations were extensive, involving nine new arrests since he was released from prison and several charges for batteries, assaults, and drug possessions. Nevertheless, the court inexplicably imposed a sentence on Mr. Givens that was nearly six times higher than that which it imposed on his co-defendant five months earlier. Finally, Mr. Givens argued that the district court’s decision to impose the maximum possible sentence

reflected a failure to make an individualized assessment of his case and a clear error of judgment in balancing the relevant sentencing factors.

Consistent with circuit precedent, the Fifth Circuit reviewed Mr. Givens's sentence under the heightened "plainly unreasonable" standard. *United States v. Givens*, 746 F. App'x 421, 421 (5th Cir. 2019). Under that standard, the court first considers whether there was any procedural error, and then, if the court finds no procedural error, it reviews the substantive reasonableness of the sentence. However, even if the court finds the sentence to be unreasonable, it will only reverse the district court if it determines that "the error was obvious under existing law." *Id.* The court ultimately determined that Mr. Givens's arguments regarding the reasonableness of his sentence were "insufficient to show that the court made a *clear error* of judgment." *Id.* At 422 (emphasis added). Noting that the Fifth Circuit has "routinely affirmed revocation sentences exceeding the advisory range, even where the sentence equals the statutory maximum," the court found that Mr. Givens did not show that his revocation sentence was "plainly unreasonable" and affirmed the sentence. *Id.*

REASONS FOR GRANTING THE PETITION

For more than a decade, there has been a circuit split regarding the proper standard of review for sentences imposed on defendants following the revocation of supervised release. The majority of circuits review the reasonableness of post-revocation sentences in the same manner that all other federal sentences are reviewed—for abuse of discretion by the district court. However, the Fourth, Fifth, and Seventh Circuits continue to apply a heightened “plainly unreasonable” standard of review, effectively insulating post-revocation sentences from any meaningful review.

Applying a “plainly unreasonable” standard of review to post-revocation sentences, even when a defendant voices objections to an unreasonably harsh sentence, is inappropriate and violates this Court’s precedent. Even if a defendant like Mr. Givens is sentenced to the maximum amount of time allowable under the law, his sentence can only be reversed for “clear error.” One glaring problem with that approach is that substantive reasonableness challenges often are not based on discrete, identifiable legal errors, which may or may not be obvious under existing law. Rather, they are broader reasonableness challenges to the manner in which the district court considered and balanced the relevant sentencing factors, and to the fairness and proportionality of the ultimate sentence imposed. Accordingly, it is difficult to imagine a scenario in which a substantive reasonableness challenge could be successful under the “plainly unreasonable” framework.

This Court’s guidance is necessary to resolve the circuit split, eliminate a longstanding inconsistency within the federal system, and protect the right of defendants to challenge the reasonableness of sentences imposed following the revocation of supervised release.

I. For more than a decade, there has been a circuit split regarding the proper standard of review for post-revocation sentences, and this Court’s guidance is necessary to resolve the issue.

Eight circuits currently review post-revocation sentences under the general reasonableness framework that is applied to all federal sentences, *i.e.* for “abuse of discretion.” *United States v. Butler-Acevedo*, 656 F.3d 97, 99 (1st Cir. 2011); *United States v. Johnson*, 786 F.3d 241, 243 (2d Cir. 2015); *United States v. Carter*, 730 F.3d 187, 190 (3d Cir. 2013); *United States v. Deen*, 706 F.3d 760, 762-63 (6th Cir. 2013); *United States v. Growden*, 663 F.3d 982, 984 (8th Cir. 2011); *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010); *United States v. Tedford*, 405 F.3d 1159, 1161 (10th Cir. 2005); *United States v. Sweeting*, 437 F.3d 1105, 1106-07 (11th Cir. 2006). Three circuits—the Fourth, Fifth, and Seventh Circuits—apply the heightened “plainly unreasonable” standard of review to post-revocation sentences, even when an objection was properly preserved at sentencing.² See *United States v. Padgett*, 788 F.3d 370, 373 (4th Cir. 2015); *United States v. Sanchez*, 900 F.3d 678, 682 (5th Cir. 2018); *United States v. Boultinghouse*, 784 F.3d 1163, 1177 (7th Cir. 2015).

Although some circuits believe there is no practical difference between these standards of review, *see, e.g.*, *United States v. Bolds*, 511 F.3d 568, 575 (6th Cir. 2007), the circuits that apply the plainly unreasonable standard to post-revocation sentences acknowledge that they are affording greater deference to district courts than they would for original, post-conviction sentences. *See, e.g.*, *Padgett*, 788 F.3d at 373 (“In determining whether a revocation sentence is unreasonable, we strike a more deferential appellate posture than we do when reviewing original sentences.” (internal quotation marks and citations omitted)); *Boultinghouse*, 784 F.3d 1163 at 1177 (“Our

² There also is a circuit split regarding whether defendants need to object to the reasonableness of sentences at all in order to preserve the issue for appeal. Because Mr. Givens’s counsel objected to the reasonableness of the sentence, that issue has no bearing on this case.

review of a sentence imposed in a revocation proceeding is highly deferential, and perhaps akin to the narrowest judicial review of judgments we know, namely judicial review of sanctions imposed by prison disciplinary boards.” (internal quotation marks and citations omitted)); *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011) (“It is appropriate to permit a more deferential standard of review for the imposition of a new sentence after a court revokes a supervised release term.”).

There also is disagreement among the circuits regarding whether this Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), changed the standard of review for post-revocation sentences. *See, e.g.*, *United States v. Bolds*, 511 F.3d 568, 575 (6th Cir. 2007) (summarizing the different positions among the circuits). While this disagreement is tangential to the central question—what is the proper standard of review for post-revocation sentences—it reveals that the confusion among circuit courts on this issue existed even before the mandatory Guidelines were invalidated in *Booker*. Accordingly, it is important for this Court to resolve the circuit split and impose a uniform standard that will apply to all defendants across the federal system.

II. Application of the “plainly unreasonable” standard of review to all post-revocation sentences is inappropriate and runs afoul of this Court’s precedent.

This Court’s precedent makes clear that the reasonableness of post-revocation sentences should be reviewed in the same manner as all federal sentences—for abuse of discretion. It has neither instructed nor suggested that appellate courts draw the distinction that the Fourth, Fifth, and Seventh Circuits have drawn between “original” sentences and post-revocation sentences. Moreover, blanket application of a “plainly unreasonable” standard of review to all post-revocation sentences effectively insulates those sentences from meaningful appellate review, because litigants are required to prove the existence of a clear, identifiable error even when the appellate court concludes that a sentence was substantively unreasonable.

In *Booker*, this Court invalidated two provisions of the Sentencing Reform Act of 1984: § 3553(b)(1) and § 3742(e). 543 U.S. at 258-59. Section 3553(b)(1) was the provision that made the Sentencing Guidelines mandatory, requiring courts to impose a sentence within the applicable Guidelines range. *Id.* at 259. Section 3742(e) set forth the standard of appellate review for sentences, including *de novo* review of departures from the applicable Guideline range. *Id.* The Court noted, however, that the excising of § 3742(e) “does not pose a critical problem for the handling of appeals” because the statute implies “a practical standard of review already familiar to appellate courts: review for unreasonableness.” *Id.* at 260-61 (internal quotation marks and citations omitted). The Court further explained that § 3553(a) “remains in effect, and sets forth numerous factors that guide sentencing” which “in turn will guide appellate court, as they have in the past, in determining whether a sentence is unreasonable.” *Id.* at 261. The Court summarized the impact of its decision (or lack thereof) on appellate review as follows:

The courts of appeals review sentencing decisions for unreasonableness. These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.

Id. 264-65.

Two years later, in *Gall v. United States*, the Court explained that, as a result of *Booker*, “appellate review of sentencing decisions is limited to determining whether they are ‘reasonable.’” 552 U.S. 38, 46 (2007). The Court continued:

Our explanation of “reasonableness” review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.

Id. Several years later, the Court reiterated in *Setser v. United States* that “[t]he reasonableness standard we apply in reviewing federal sentences asks whether the district court abused its discretion.” 566 U.S. 231, 244 (2012). In all of these cases, the Court refers to sentences generally—it does not specify “post-conviction sentences” or parse out the different circumstances under which a federal sentence of imprisonment may be imposed. The decision by the Fourth, Fifth, and Seventh Circuits to impose a heightened standard of review on post-revocation sentences thus imposes an unjustified and inappropriate appellate burden on defendants.

In addition to finding no support in this Court’s precedent, the “plainly unreasonable” standard is impractical and unworkable in the context of substantive reasonableness challenges. Abuse of discretion is a logical standard for reviewing the reasonableness of a sentence because sentencing requires an individualized, fact-specific assessment of each case, involving the consideration and balancing of several factors. In other words, reasonableness challenges often are directed to the proportionality and fairness of a sentence, and with a few exceptions, they are not directed to discrete, identifiable legal errors. As a result, the “plainly unreasonable” standard of review prevents meaningful appellate review of the reasonableness of sentences in most cases.

In this case, the district court sentenced Mr. Givens to the longest prison sentence possible under the law. On appeal, Mr. Givens identified several problems with the court’s sentence, including: (a) the court’s reliance on a mischaracterization of Mr. Givens’s criminal history and conduct; (b) the extreme and unjustified deviation from the recommended Guideline range; and (c) the significant and unwarranted disparity between Mr. Givens’s sentence and the sentence that the district court imposed on his similarly situated co-defendant. Applying the “plainly unreasonable” standard, the Fifth Circuit found Mr. Givens’s arguments to be insufficient to show clear error by the district court, and it characterized the arguments as “mere[] disputes” and “mere

disagreement” with the district court. The district court clearly abused its discretion in imposing such an unreasonably disproportionate sentence on Mr. Givens. But the Fifth Circuit’s heightened standard of review effectively insulated the district court’s sentence from any meaningful scrutiny. As a result, Mr. Givens will serve a seven-year sentence for violations that should generally result in no more than ten months of incarceration. Mr. Givens’s case demonstrates that the Fifth Circuit’s standard of review for post-revocation sentences has real, tangible consequences for defendants, and he respectfully requests that this Court address the issue and resolve the circuit split.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted this 2nd day of April, 2019,

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