No. 19-_____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ZACHARIAH GOMEZ

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER A. CURTIS
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET ROOM 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753

QUESTIONS PRESENTED

I. Whether the standard of review in appeals of federal revocation sentences is limited to review for "plain unreasonableness"?

PARTIES

Michele Zachariah Gomez is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

FEDERAL STATUTES

RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Zacharia Gomez respectfully petitions for 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Michael Zachariah Gomez*, 762 Fed. Appx. 181 (5th Cir. March 25, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on May 29, 2018, 2012, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was issued on March 25, 2019. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant certiorari is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

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.

Section 3583 of Title 18 provides:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.--The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on

a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

* * *

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

> **(1)** terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;
>
> **(2)** extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;
>
> **(3)** revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or
>
> **(4)** order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

Section 3742 of Title 18 provides:

§ 3742. Review of a sentence

(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.

(b) Appeal by the Government.--The Government 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;

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

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

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

* * *

(e) Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

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

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

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

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.--If the court of appeals determines that--

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no

applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and--

> **(A)** if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);
>
> **(B)** if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

STATEMENT OF THE CASE

A. Facts and Trial Court Proceedings

This is a criminal case on direct appeal. On April 25, 2016, Mr. Gomez began his term of supervised release. (ROA.92).[1] On May 16, 2018, the Probation Office filed a Supplemental Petition for Offender Under Supervision. *Id.* The Supplemental Petition alleged that Mr. Gomez, violated the terms of his release by burglarizing a building, and by twice using a debit card that did not belong to him, for which he had been sentenced in state court to 8 months in custody on each offense, with all sentences run concurrently. (ROA.92-93). On May 8, 2018, the Probation Office filed a Protect Act Supervised Release Violation Report. (ROA.142-46). The Report that the offenses constituted a Grade B violation, and the imprisonment range was from 4 to 10 months. (ROA.145). On May 21, 2018, the district court held a hearing on the violations. (ROA.133-40). At the hearing, Mr. Gomez pleaded true to the three violations described above. (ROA.135). The district court sentenced him to 36 months imprisonment, three and one-half times the guideline range, and four times the amount of imprisonment he received in state court for the actual offenses. (ROA.138).

B. Appellate Proceedings

On appeal, Petitioner argued that the district court's sentence of 36 months, an upward variance from the advisory range of 4-10 months, was substantively unreasonable. In connection with this argument, Petitioner argued to preserve for further review that revocation sentences should be reviewed to determine whether they are "unreasonable" rather than whether they are "plainly unreasonable." Petitioner conceded that these contentions regarding the standard of review were foreclosed by circuit precedent. *See United States v. Miller*, 634 F.3d 841, 843 (5th Cir.

[1] For the convenience of the Court and the parties, Petitioner has included citations to the record on appeal in the court below.

2011)(preserved claims of sentencing error in revocation cases may be reviewed only for "plain unreasonableness").

The court of appeals rejected Petitioner's argument, relying on the "plainly unreasonable" standard of review.. *See United States v. Gomez*, 762 Fed. Appx. 181 (5th Cir. March 25, 2019)(unpublished).

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether the standard of review in appeals of federal revocation sentences is limited to review for "plain unreasonableness." This question is the subject of long-standing divisions between the circuits. The Fifth Circuit's position is contrary to the precedent of this Court, and to the majority of federal courts of appeals.

1. The circuits are divided.

Prior to *United States v. Booker*, 543 U.S. 220 (2005), federal courts of appeals reviewed revocation sentences using the "plainly unreasonable" standard articulated in 18 U.S.C. §3742(e)(4). This subsection provides that for offenses "for which there is no applicable sentencing guideline," the reviewing court should determine whether the sentence "is plainly unreasonable." 18 U.S.C. §3742(e)(4). In *Booker*, however, this Court excised §3742(e) because it "contain[ed] critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be severed and excised." *Booker*, 543 U.S. at 260. This Court stated that "[e]xcision of §3742(e) . . . does not pose a critical problem for the handling of appeals" because, even without an explicitly stated standard of review, the proper standard is implicit: "review for 'unreasonable[ness].'" *Id.* at 260-61 (citing 18 U.S.C. §3742(e)(3) (1994 ed.)).

Since *Booker*, the courts of appeals have divided on whether the *Booker* "reasonableness" standard controls review of revocation sentences, or whether the "plainly unreasonable" standard continues to apply. Five circuit courts have adopted the "reasonableness" standard. For example, the Second Circuit has held that the Supreme Court in *Booker*

> is fairly understood as requiring that its announced standard of reasonableness now be applied not only to review of sentences for which there are guidelines but also to review of sentences for which there are no applicable guidelines. Thus, we will review the [revocation] sentence for reasonableness.

United States v. Fleming, 397 F.3d 95, 99 (2d Cir. 2005). Similarly, the Third Circuit has held:

> The dust has settled, post-*Booker*, and it is now well understood that an appellate court reviews a sentence for reasonableness with regard to the factors set forth in 18 U.S.C. § 3553(a). We see no reason why that standard should not also apply to a sentence imposed upon a revocation of supervised release, and we so hold.

United States v. Bungar, 478 F.3d 540, 542 & 542 n.1 (3d Cir. 2007) (citations omitted). The Eighth, Ninth, and Tenth Circuits followed suit. *See United States v. Miqbel*, 444 F.3d 1173, 1176 n.5 (9th Cir. 2006) ("We join the Second and Eighth Circuits in concluding that *Booker*'s 'reasonableness' standard has displaced the former 'plainly unreasonable' standard in the context of revocation sentencing."); *United States v. Tyson*, 413 F.3d 824, 825 (8th Cir. 2005) ("we think it is more consistent with *Booker* to review revocation sentences after *Booker* under the 'unreasonableness' standard announced in that opinion."); *United States v. Tedford*, 405 F.3d 1159, 1161 (10th Cir. 2005) (revocation sentence is reviewed to determine whether it is "reasoned and reasonable").

Conversely, three circuit courts have held that the "plainly unreasonable" standard persists. In *United States v. Miller*, 634 F.3d 841 (5th Cir. 2010), the court below held that 18 U.S.C. §3742(a)(4) – the plain unreasonableness standard – remains applicable to appeals from revocation sentences, notwithstanding *Booker*. *See Miller*, 634 F.3d at 843. The Second and Seventh Circuits have likewise held that the "plainly unreasonable" standard applies. *See United States v. Kizeart*, 505 F.3d 672, 674 (7th Cir. 2007) (finding "nothing in the logic or language of the *Booker* majority opinions to suggest that the Court was altering the statutory standard of appellate review of sentences for violating conditions of supervised release" and therefore adhering to the rule "that a defendant who challenges his sentence for violating supervised release

show that the sentence is plainly unreasonable")[2]; *United States v. Crudup*, 461 F.3d 433, 437 (4th Cir. 2006) ("[W]e hold that revocation sentences should be reviewed to determine whether they are 'plainly unreasonable' with regard to those § 3553(a) factors applicable to supervised release revocation sentences.").

2. The division of authority merits review.

This circuit split regarding the standard of review in supervised release cases is longstanding, and has been expressly acknowledged by the judiciary. *See Miller*, 634 F.3d at 842-843 ("Because *Booker* considered a Guidelines sentence imposed pursuant to a conviction, it was unclear whether Booker's reasonableness standard applied to the appellate review of supervised release terms. ***This question has resulted in a split among circuits***.")(emphasis added). Further, it has real consequences for the way that appeals of revocation sentences are decided. In *Miller*, for example, the court below held that the "plain unreasonableness" standard foreclosed relief for preserved procedural error unless the law was clearly established. *See id.* at 844.

The decision in the Petitioner's case, likewise, reflects that the court below held that the "plainly unreasonably" standard foreclosed relief while at the same time acknowledging the 36-month sentence in this case was "well above" the advisory range of 4-10 months. *See United States v. Gomez*, 762 Fed. Appx. 181. Moreover, the court below specifically stated, "Given the deference owed to the district court's sentencing decision, Gomez has not established that his 36-month sentence was substantively unreasonable." *Id.* Accordingly, the decision below specifically turns on the court's reliance on the "plainly unreasonable" standard of review.

---

[2] In *Kizeart*, the Seventh Circuit observed that "the practical difference between 'unreasonable' and 'plainly unreasonable' is slight, perhaps even nil," but cautioned that appellate courts "must respect Congress's wish to curtail appellate review of nonguidelines sentences particularly sharply, and so must seek to give meaning to the difference between 'unreasonable' and 'plainly unreasonable.'" *Kizeart*, 505 F.3d at 674.

Also, the decision below continues a lengthy tradition of Fifth Circuit cases holding or suggesting that no sentence within the statutory limits can be plainly unreasonable. *See United States v. Gomez*, 762 Fed. Appx. 181 ("[w]e have routinely affirmed revocation sentences exceeding the advisory range, even where the sentences exceed the statutory maximum.")(citing *United States v. Warren*, 720 F.3d 321, 326 (5th Cir. 2013); *United States v. Neal*, 212 F. App'x 328, 330-31 (5th Cir. 2008) (unpublished); *United States v. Weese*, 199 F. App'x 394, 395-96 (5th Cir. 2006) (unpublished)); *see also United States v. Wheat*, 2006 U.S. App. LEXIS 26346, at *3 (5th Cir. 2006)(unpublished); *United States v. Norman*, 2006 U.S. App. LEXIS 26345, at *2 (5th Cir. 2006)(unpublished); *United States v. Jones*, No. 05-30665, 182 Fed. Appx. 343, 344 (5th Cir. 2006)(unpublished); *United States v. Nickerson*, No. 05-10954, 2006 U.S. App. LEXIS 22396, at *3 (5th Cir. 2006)(unpublished); *United States v. Savala*, 05-20480, 2006 U.S. App. LEXIS 22010, at *2 (5th Cir. 2006)(unpublished); *United States v. Nobles*, No 05-50518, 2006 U.S. App. LEXIS 22017, at *2-3 (5th Cir. 2006)(unpublished); *United States v. Smith*, No. 05-11233, 2006 U.S. App. LEXIS 20449, at *2 (5th Cir. 2006)(unpublished).

The position taken by the Fourth, Fifth, and Seventh Circuits conflicts with this Court's precedent. Although *Booker* involved review of an original sentence imposed under the mandatory Guidelines, and not a revocation sentence, this Court spoke without qualification when it stated that appellate courts should "review sentencing decisions for unreasonableness." *Booker*, 543 U.S. at 260-61, 264. And this Court excised the very statutory provision that dictated the "plainly unreasonable" standard for non-Guidelines cases (such as revocation sentences), even though *Booker* itself was a Guidelines-governed case.

Booker did not excise § 3742(a)(4), which permits a defendant to file a notice of appeal if the sentence "was imposed for an offense for which there is no sentencing

guideline and is plainly unreasonable." Yet the Court's *dicta* make clear that it did not intend for appellate courts to look to § 3742(a) for a standard of review. Indeed, in its pronouncement of the reasonableness standard of review, the Court cited six exemplary "reasonableness" cases – all of which were appeals from revocation decisions. *Booker*, 543 U.S. at 262. If this Court had intended that appellate courts review revocation sentences using a "plainly unreasonable" standard of review, it would not have cited these revocation decisions as evidence that appellate judges were well-equipped to engage in reasonableness review.[3] The position of the court below is wrong on the merits, and should be overturned.

Finally, this Court recently granted certiorari in *United States v. Holguin-Hernandez*, No 18-7739, 2019 WL 429919, __ S. Ct. __ (June 3, 2019) (granting certiorari). This Court has granted certiorari in *Holguin-Hernandez* to determine whether a defendant must specifically object to a sentence as "unreasonable" in order to preserve reasonableness review, or whether the presentation of mitigating factors and argument for a lesser sentence is sufficient tp preserve reasonableness review. A decision in *Holguin-Hernandez* could directly affect Petitioner's case in that a finding by this Court that "reasonableness" review was properly preserved in *Holguin-Hernandez* would necessarily mean that the proper standard of review is not "plainly unreasonable.". Therefore, this Court should hold a decision on this case pending a decision in *Holguin-Hernandez.*

[3] Moreover, review of revocation sentences using the "plainly unreasonable" standard necessarily relies on the same language that was excised in § 3742(e)(4). It is implausible that this Court intended courts of appeals to review revocation sentences using a "plainly unreasonable" standard when it specifically excised the portion of the statute that provided for such review. Just as the Court did not excise § 3742(a)(3) – which authorizes a notice of appeal from a sentence imposed under correctly applied Guidelines only if the court departs or varies upward – but clearly contemplates "reasonableness" review of within-Guidelines sentences, the fact that the Court did not excise § 3742(a)(4) does not mean that review of revocation sentences is limited to a "plainly unreasonable" standard.

CONCLUSION

For these reasons, Petitioner asks that this Honorable Court grant a writ of *certiorari*, or in the alternative, hold this case pending a decision in *Holguin-Hernandez* .

Respectfully submitted this 24th day of June, 2019

/s/ *Christopher A. Curtis*
Christopher A. Curtis
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET, ROOM 9A10
FORT WORTH, TEXAS 76102
(817)-978-2753
TEXAS STATE BAR. NO. 05270900