

No. _____

In the Supreme Court of the United States

FREDERICK JOHNSON, *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 sentences 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?

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IN THE
SUPREME COURT OF THE UNITED STATES

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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 Frederick Johnson 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit was reported at *United States v. Frederick Johnson*, 764 F. App'x 440 (5th Cir. 2019), and is reprinted as the Appendix.

JURISDICTION

The Fifth Circuit entered its judgment on April 10, 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

On January 3, 2018, Petitioner Frederick Johnson pleaded guilty in Orleans Parish Criminal District Court to a charge of conspiracy to commit second degree murder. The state court sentenced Mr. Johnson to serve twenty years in the custody of the Louisiana Department of Corrections with credit for time served from the date of his arrest on June 21, 2013. The state court also instructed that Mr. Johnson's sentence should be "served concurrently with any other sentence and with any federal supervised release sentence imposed" and ordered his "immediate transfer to federal custody."¹

The federal government brought revocation proceedings against Mr. Johnson based on the state convictions because he was on supervised release at the time the offenses occurred. Prior to Mr. Johnson's revocation hearing, his counsel filed a motion requesting that the court run any term of imprisonment imposed at revocation concurrently with Mr. Johnson's state sentence. The motion explained the nature and circumstances underlying Mr. Johnson's state charges and guilty plea, and noted the fact that the state prosecutors voiced no objection to having the state and federal sentences run concurrently with one another. Mr. Johnson's counsel also explained in the motion that the state court judge "went as far as to have his opinion regarding the imposition of any sanction by [the federal district court] be incorporated into the Sentencing Minute Entry." The motion concluded with a request that the district

¹ Mr. Johnson also pleaded guilty to a simple battery charge, for which the state court sentenced him to a concurrent, six-month sentence.

court take the memorandum and accompanying exhibits into consideration in deciding the appropriate sentence.

In its response to Mr. Johnson's sentencing memorandum, the Government acknowledged that the Sentencing Guidelines Manual "recommends that the term of imprisonment [imposed at revocation] be consecutive to any sentence Johnson is currently serving for the criminal conduct." Accordingly, the Government stated that it supported "any imposition of a consecutive sentence." The Government did not urge the court to impose a consecutive sentence, nor did it take a position on whether a consecutive sentence would necessarily be appropriate in this particular case.

During the revocation hearing, the district court stated that it had reviewed Mr. Johnson's motion but nevertheless intended to impose consecutive sentences. The court noted that the case law is clear that the district court has discretion to impose consecutive sentences upon revocation of supervised release, and that the Sentencing Commission recommends consecutive sentences at revocation. After reciting the applicable statutory maximum sentences and the Sentencing Guidelines range (24 to 30 months), and stating that it had considered the policy statements in the Guidelines, the district court allowed Mr. Johnson and his counsel to make statements on Mr. Johnson's behalf. Mr. Johnson's counsel reminded the court that Mr. Johnson would be supervised on parole following his state sentence, and Mr. Johnson explained to the court that, in accepting the plea deal that he was offered in state court, he was given a specific "out date" of when he would get to return to his family. Mr. Johnson also requested that the district court give him the minimum

sentence possible and remand him to federal custody. Mr. Johnson’s counsel similarly requested that Mr. Johnson be transferred directly to federal custody to serve his sentence.

After confirming with Mr. Johnson that his guilty plea in state court was made truthfully, the district court explained its understanding that Mr. Johnson would finish his state sentence in a state institution before being turned over to the federal government to finish his federal sentence. The court then imposed a five-year revocation sentence, consisting of the maximum revocation sentence for each of his two supervised release terms—24 months for Count 1 and 36 months for Count 2—which would be run consecutively with each other. The court also ordered that the five-year revocation sentence be served “consecutively to the sentence the defendant is currently serving in connection with Orleans Parish Criminal Docket No. 517-803L.” Mr. Johnson filed a timely notice of appeal on June 22, 2018.

On appeal, Mr. Johnson challenged the district court’s decision to run the federal revocation sentences consecutively with his twenty-year state sentence as substantively unreasonable. Specifically, Mr. Johnson argued that the district court clearly erred in balancing the relevant sentencing factors and failed to account for the need to avoid unwarranted sentencing disparities pursuant to 18 U.S.C. § 3553(a)(6), the sentence purposes described in § 3553(a)(2)(B)-(D), and the kinds of sentences available when it imposed the consecutive, five-year sentence. Mr. Johnson emphasized that the state court had expressly instructed that Mr. Johnson’s lengthy state sentence should run concurrently with any federal revocation sentence and

argued that, in contradicting the state court's order, the district court effectively imposed a sentence that would make Mr. Johnson's length of incarceration dependent upon the location of primary custody and jurisdiction rather than his actual conduct. The sentence therefore promotes rather than avoids unwarranted sentencing disparities, because an identically situated individual who happened to serve his federal sentence first would ultimately serve five fewer years in prison than Mr. Johnson. Mr. Johnson further argued that the district court's decision to ignore the state court order was unreasonable because the state court was the court most familiar with the circumstances of the offenses underlying the revocation proceeding and necessarily considered sentencing goals similar to those enumerated in § 3553(a)(2) in determining the appropriate sentence for Mr. Johnson's conduct. Finally, Mr. Johnson noted that the district court had a wide range of sentences available and argued that the decision to impose the maximum possible sentence and run it consecutively with the state court's sentence, despite the state court's express instruction to the contrary, resulted in a sentence that is greater than necessary to comply with the purposes outlined in § 3553(a)(2).

Consistent with circuit precedent, the Fifth Circuit reviewed Mr. Johnson's revocation sentence under the heightened "plainly unreasonable" standard. *United States v. Johnson*, 764 F. App'x 440, 441 (5th Cir. 2019). Under that standard, the court will only reverse an unreasonable sentence imposed by a district court if it determines that "the error was obvious under existing law." *Id.* In Mr. Johnson's case, the court held simply that, "given the deference owed the district court's sentencing

decision, Johnson has not established his sentence is substantively unreasonable.”

Id. Despite listing all of Mr. Johnson’s assertions in its order, the Fifth Circuit did not actually address or discuss any of Mr. Johnson’s specific arguments and challenges to the reasonableness of his sentence in the decision.

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. Johnson 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. That is exceedingly clear from the Fifth Circuit’s lack of a detailed explanation for its rejection of Mr. Johnson’s

claim, justifying it only by “the deference owed the district court’s sentencing decision.” 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. *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 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. Johnson to the longest possible sentence and ran it consecutively to the state sentence he was serving, despite the fact that the state court and all of the parties to the state proceedings clearly understood and intended that the sentences would run concurrently. On appeal, Mr. Johnson explained why that aspect of the court's sentence was substantively unreasonable and an abuse of discretion based on the individualized circumstances of this case. Mr. Johnson identified several specific sentencing factors that the district court necessarily ignored or improperly weighed in reaching its decision. But, applying the "plainly unreasonable" standard, the Fifth Circuit rejected Mr. Johnson's appeal without any analysis of his specific arguments, relying simply on the amount of discretion afforded to district courts to justify affirmance. The Fifth Circuit's heightened standard of review effectively insulated the district court's

sentence from scrutiny and deprived Mr. Johnson of any meaningful review of his sentence. As a result, Mr. Johnson will serve an additional five-year prison term following the completion of his state sentence, without even the consolation of legitimate appellate review of his sentence. Mr. Johnson'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 9th of July, 2019,

/s/ Samantha Kuhn
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