

No. 19-5269

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD CHRISTOPHER GILBERT, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioner contends (Pet. 7-13) that the court of appeals erred in applying plain-error review to his claim that his revocation term of imprisonment is substantively unreasonable. He notes (Pet. 7, 9, 13) that a similar issue is pending before this Court in Holguin-Hernandez v. United States, cert. granted, No. 18-7739 (June 3, 2019), and contends (Pet. 13) that his petition for a writ of certiorari should be held until Holguin-Hernandez is decided. Contrary to his contention, the petition for a writ of certiorari should be denied.

1. Following a guilty plea in the Western District of Texas, petitioner was convicted of conspiracy to possess with intent to

distribute and to distribute cocaine base and marijuana, in violation of 21 U.S.C. 841(a)(1), (b)(1)(B), (b)(1)(C), and (b)(1)(D), and 846; aiding and abetting the distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and 18 U.S.C. 2; and attempting to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). Pet. App. A1; see Judgment 1. He was sentenced to 60 months of imprisonment and five years of supervised release. Pet. App. A1-A2. After petitioner began serving his supervised-release term in 2014, his supervised release was revoked four times. Id. at A2. At a hearing after a fifth violation, petitioner attempted to downplay the seriousness of his latest violation, alluded to a non-custodial term, and requested a prison term of less than one year. 8/7/18 Tr. 4-7. The district court denied that request and imposed a term of imprisonment of 36 months, the statutory maximum. Id. at 11; see Pet. App. A2. Petitioner did not object to the term of imprisonment after it was imposed. 8/7/18 Tr. 12, 14; see Pet. App. A2.

On appeal, petitioner contended, as relevant here, that his term of imprisonment is substantively unreasonable because it is greater than necessary to accomplish the objectives set forth in 18 U.S.C. 3553(a). Pet. App. A2.¹ The court of appeals stated

¹ In the court of appeals, petitioner also contended that his term of imprisonment was unreasonable because the district court improperly considered the retributive factors in 18 U.S.C. 3553(a)(2)(A). See Pet. App. A2; Pet. C.A. Br. 11-14. Petitioner does not renew that procedural claim in this Court.

that, because petitioner did not object to the substantive reasonableness of his term of imprisonment in the district court, “review on appeal is limited to plain error.” Pet. App. A2 (citing United States v. Whitelaw, 580 F.3d 256, 259-260 (5th Cir. 2009)). The court determined, however, that petitioner “ha[d] not shown that the sentence was greater than necessary to achieve the § 3553(a) goals.” Id. at A3. Accordingly, the court concluded that “the district court’s imposition of the sentence [did not] constitute[] plain error.” Ibid.

2. For the reasons set forth in the government’s merits brief in Holguin-Hernandez, a criminal defendant who has advocated for a shorter term of imprisonment at a revocation hearing need not separately object after the term of imprisonment is announced in order to preserve a claim that a longer term of imprisonment is substantively unreasonable. Gov’t Br. at 15, 20-31, Holguin-Hernandez, supra (No. 18-7739).² The government therefore agrees that the court of appeals erred in stating that plain-error review applied to petitioner’s claim that his term of imprisonment is substantively unreasonable. However, because the decision below did not depend on the plain-error standard of review, no reason exists to grant review or to hold this petition for the Court’s decision in Holguin-Hernandez.

² We have served petitioner with a copy of the government’s brief in Holguin-Hernandez.

Plain error requires a complaining party to establish that (1) the district court committed an error; (2) the error is "clear" or "obvious" under the law at the time of review; and (3) the error "affect[ed] [the party's] substantial rights." United States v. Olano, 507 U.S. 725, 732-735 (1993). If the complaining party does so, a court may exercise its discretion to correct an error if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. at 732 (brackets, citation, and internal quotation marks omitted).

The panel in this case concluded that petitioner's substantive-reasonableness challenge failed because petitioner did not establish that the district court committed any legal error at all. See Pet. App. A2-A3. In particular, the court determined that petitioner "ha[d] not shown that the sentence was greater than necessary to achieve the § 3553(a) goals." Id. at A3. Although the court also stated that petitioner "ha[d] not shown that the district court's imposition of the sentence constituted plain error," it did so because "[t]he sentence did not exceed the 36-month statutory maximum sentence, and this court has repeatedly affirmed revocation sentences that exceed the policy statement range but do not exceed the statutory maximum sentence." Ibid. And to support that point, the court cited interchangeably circuit precedent involving both preserved and unpreserved errors. See ibid. (citing Whitelaw, 580 F.3d at 265 (finding that statutory-maximum term of imprisonment was not plain error), and United

States v. Richardson, 455 Fed. Appx. 410, 411 (5th Cir. 2011) (per curiam) (finding that term of imprisonment above recommended range was not unreasonable)). Read in context, the court's finding that petitioner's sentence was not "greater than necessary to achieve the § 3553(a) goals," ibid., refutes any claim of error, even without the additional limits that plain-error review imposes on relief for forfeited claims. See Gall v. United States, 552 U.S. 38, 56 (2007) (explaining that a substantive-unreasonableness claim asserts that "the District Judge abused his discretion in determining that the § 3553(a) factors supported [the] sentence").

Because petitioner could not make even a threshold showing of error, his substantive-unreasonableness claim would fail under any standard of review. The plain-error standard of review thus did no work in this case, and this Court's decision in Holguin-Hernandez will therefore have no effect on the correctness of the decision below. The petition for a writ of certiorari should accordingly be denied.³

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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³ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.