

No. 19-5269

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD CHRISTOPHER GILBERT, PETITIONER

v.

UNITED STATES OF AMERICA

**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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GILBERT'S CASE WOULD BE ANALYZED DIFFERENTLY UNDER REASONABLENESS REVIEW.

Reginald Gilbert had his supervised release revoked. At the revocation hearing, defense counsel and Gilbert discussed with the district court circumstances regarding the reasons revocation had been sought, Gilbert's history, and his efforts at rehabilitation. These circumstances related to the sentencing factors set out by Congress in 18 U.S.C. § 3553 and incorporated into revocation sentencing by 18 U.S.C. § 3583(e). Before sentence was announced, Gilbert specifically asked the district court not to sentence him above the 11-month guideline maximum he faced. The district court imposed the statutory maximum sentence of 36 months' imprisonment.

Gilbert's counsel did not object to the 36-month sentence after it was imposed. Gilbert did appeal the sentence. He argued that the 36-month sentence was substantively unreasonable because it was greater than necessary to serve the purposes set out in sections 3553(a) and 3583(e). The U.S. Court of Appeals for the Fifth Circuit limited its review of Gilbert's challenge to a search for plain error. Finding none, it affirmed the sentence. Pet. App. 1-3.

In his petition for certiorari, Gilbert shows that the question he presents to the Court is to be considered soon in *Holguin-Hernandez v. United States*, No. 18-7739. He asks that his case be held pending a decision in *Holguin-Hernandez*. If the Court rules in favor of Mr. Holguin-Hernandez, Gilbert asks that the Court then grant his petition for a writ of certiorari, vacate the judgment of the Fifth Circuit in this case, and remand for review under the appropriate standard.

The government contends that Gilbert's petition should not be held pending *Holguin-Hernandez*, but should be denied. It admits that the court of appeals applied plain-error review to Gilbert's case, Resp. 2-4, but claims that application of that incorrect standard of review did not affect Gilbert's case, Resp.4-5. This claim is incorrect.

Plain-error review differs in a crucial way from abuse-of-discretion reasonableness review of the length of a sentence. Reasonableness review looks to see whether the sentence imposed comported with the overarching command of § 3553(a) that a sentence not be greater than necessary. *See, e.g. Dean v. United States*, 137 S. Ct. 1170 (2017). It requires the reviewing court to consider whether the sentencing court weighed the § 3553 factors reasonably against the overarching command that the sentence be not great than necessary. That consideration is necessarily nuanced, even though the court is examining the factors within a framework that respects the sentencing court's discretion. By contrast, plain-error review looks, as its name suggests, only for obvious error. *See, e.g., United States v. Olano*, 507 U.S. 725, 734 (1993).

The government suggests that, in affirming Gilbert's sentence under plain-error review, the court of appeals concluded that the sentence did not exceed that permitted by § 3553(a), and so the result would not be different under the proper standard of review. Resp. 4-5. This view is mistaken. First, the court of appeals appears to have equated § 3553(a) substantive reasonableness under the plain-error standard with a sentence within the statutory maximum for revocation sentences. *See* Pet. A at 3. That is not the standard for determining the reasonableness of a sentence under the parsimony principle that §

3553(a) and 3583(e) embody. *Cf. Kimbrough v. United States*, 552 U.S. 85, 101 (2007). The standard is whether the sentence is greater than necessary. *Id.* That question requires consideration and review of the particular case facts in the light of the § 3553(a) factors and command, not mere reference to the statutory maximum.

Second, substantive reasonableness review does not turn on whether obvious error appears, but on whether the district court abused its discretion—that is, whether the district court unreasonably concluded that “the 3553(a) factors, on the whole, justified the sentence.” *Gall v. United States*, 552 U.S. 38, 51 (2007). Under reasonableness review, the court of appeals would have had to engage with the arguments Gilbert made about how the sentencing court improperly weighed the sentencing facts and factors in this case; that is, how it had abused its discretion. Plain-error review in this case meant that the court did not so engage. Indeed, the Fifth Circuit itself has acknowledged that its plain-error standard “erects a more substantial hurdle to reversal of a sentence than does the reasonableness standard.” *United States v. Peltier*, 505 F.3d 389, 391 (5th Cir. 2007). Thus, it is clear that the court of appeals would analyze Gilbert’s sentence differently if it applied substantive reasonableness review.

Third, the circumstances of Gilbert’s case show that a different result is probable under reasonableness review. Gilbert’s case presented a couple of striking facts—that revocation had been sought because of Gilbert’s reluctance to talk in a group setting about being a victim of molestation and that Gilbert had voluntarily sought out a rehab program. Gilbert argued that the district court had imposed a greater-than-necessary sentence, in part,

because it had accorded these factors no weight, despite the command of § 3553(a)(1) and § 3583(e) to consider the history of the defendant and the nature and circumstances of the revocation offense. The court of appeals opinion does not mention these facts. Had the court of appeals considered Gilbert's argument more fully, as reasonableness review would have required it do, there is a reasonable likelihood that these facts would have led it to reach a different result.

CONCLUSION

FOR THESE REASONS, as well as those in his petition, Gilbert asks that the Court hold this petition pending a decision in *Holguin-Hernandez*, and then, if the Court rules favorably to Mr. Holguin Hernandez, that it grant a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals.

Respectfully submitted.

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November 5, 2019