

No. _____

In the
Supreme Court of the United States

Robert Keith Kinsey,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Must challenges to the procedural reasonableness of a sentence be preserved by a separate “reasonableness” objection in district court?

PARTIES TO THE PROCEEDING

Petitioner is Robert Keith Kinsey, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Keith Kinsey seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Robert Keith Kinsey*, 777 Fed. Appx. 774 (5th Cir. September 19, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B. The district court's judgment revoking supervised release is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on September 19, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

Federal Rule of Criminal Procedure 51 provides:

(a) Exceptions Unnecessary.

Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error.

A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

LIST OF RELATED PROCEEDINGS

1. *United States v. Robert Keith Kinsey*, 3:13-CR-00251-B. United States District Court, Northern District of Texas. Judgment entered April 10, 2014.

2. *United States v. Robert Keith Kinsey*, 3:13-CR-00251-B, United States District Court, Northern District of Texas, petition for offender under supervision. Petition filed January 17, 2019. Judgment revoking supervised release while imposing an 18-month term of imprisonment and an 18-month term of supervised release was entered on January 28, 2019.

5. *United States v. Robert Keith Kinsey*, CA No. 19-10109, United States Court of Appeals for the Fifth Circuit. Opinion and judgment affirming the sentence entered September 19, 2019.

STATEMENT OF THE CASE

Robert Keith Kinsey was originally sentenced on April 10, 2014, to 60 months in prison and two years of supervised release after he pled guilty one count of bank robbery. (ROA.48–52).¹ Kinsey began his period of supervised release June 26, 2016. (ROA.82). That term of supervision was revoked on January 28, 2019, and he was sentenced to 18 months in prison and an 18-month term of supervised release. (ROA.91–95).

On appeal, Kinsey argued that, because the district court failed to consider the advisory imprisonment range before determining Kinsey’s sentence, the district court imposed a procedurally unreasonable sentence. Kinsey argued that he preserved his challenge by requesting that the court order rehabilitation in lieu of revocation; the Government argued that review should be for plain error because Kinsey only made a general objection to the sentence imposed. The court of appeals, held that the court’s procedures did not result in error, plain or otherwise. *See* Appendix A.

¹ For the convenience of the Court and the parties, the Petitioner has included citations to the page number of the record on appeal below.

REASON FOR GRANTING THIS PETITION

I. The courts of appeals are divided as to whether a defendant must lodge a separate objection to the district court's failure to respond to arguments for leniency.

The conclusion of the court below implicates an entrenched division of circuit authority. Federal Rule of Criminal Procedure 51 requires the party seeking relief on appeal to “inform[] the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.” Fed. R. Crim. P. 51(b). As the Fourth Circuit has persuasively reasoned, presenting a ground for lesser sentence informs the court that the party would like it addressed. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010) (“By drawing arguments from § 3553 for a sentence different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim.”).

Similarly, the Seventh Circuit has vacated without the use of plain error where the district court simply passed over compelling mitigation arguments in silence. *See United States v. Cunningham*, 429 F.3d 673, 675-680 (7th Cir. 2005) (Posner, J.). And the D.C. Circuit has likewise declined to apply plain error to a defendant's failure to consider the §3553(a) factors. *See United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007).

It is unclear from its brief decision which type of review the court below applied to its review of Petitioner's claim of procedural reasonableness. See Appendix A.

However, the Fifth Circuit case law mandates that it apply plain error review in cases where a revocation release makes a general objection to the sentence imposed. *See e.g. United States v. Culbertson*, 712 F.3d 235, 243 (5th Cir. 2013). It is joined in this approach by the First, Second, Sixth, Eighth, Ninth, and Tenth Circuits, all of which require a separate objection to a court's failure to explain the sentence. *See United States v. Gilman*, 478 F.3d 440, 447 (1st Cir. 2007); *United States v. Villafuerte*, 502 F.3d 204, 208-09 (2nd Cir. 2007); *United States v. Penson*, 526 F.3d 331, 337 (6th Cir. 2008); *United States v. Bistrup*, 449 F.3d 873, 883-84 (8th Cir. 2006), *United States v. Knows His Gun, III*, 438 F.3d 913, 918 (9th Cir. 2006), and *United States v. Romero*, 491 F.3d 1173, 1176-77 (10th Cir. 2007).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 18th day of December, 2019.

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