

No. --

IN THE
SUPREME COURT OF THE UNITED STATES

CIRILO MANCILLA LOPEZ,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

KEVIN JOEL PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

QUESTIONS PRESENTED FOR REVIEW

1. Whether claims of substantive unreasonableness must be preserved by specific objection?
SUBSIDIARY QUESTION: Whether the Court should hold the case pending the resolution of *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting *certiorari*), and potentially grant *certiorari*, vacate the judgment below, and remand in light of that case?

PARTIES

Cirilo Mancilla Lopez is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cirilo Mancilla Lopez 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Cirilo Mancilla Lopez*, 778 Fed. Appx. 336 (5th Cir. October 3, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment of conviction and sentence was issued November 30, 2018, and is also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on October 3, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND FEDERAL RULE INVOLVED

18 U.S.C. § 3553(a) 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.

Federal Rule of Criminal Procedure 52(b) provides:

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. Proceedings in the District Court

Nearly twenty years ago, Petitioner Cirilo Mancilla Lopez suffered a series of Texas drug convictions. *See* (Record in the Court of Appeals,89-92). Although they arose from just two arrests, they resulted in seven convictions. *See* (Record in the Court of Appeals,89-92). In 2001 and again in 2008, he sustained two convictions for illegal re-entry to the United States, the latter of which resulted in a 90 month sentence of imprisonment, and, of course, another removal. *See* (Record in the Court of Appeals,92-93). But in February of 2018, he was found again in the United States, caught up as collateral damage when immigration authorities targeted the owner of a car he happened to borrow. *See* (Record in the Court of Appeals,86). He pleaded guilty to illegally re-entering the country, and this plea represents the instant offense. *See* (Record in the Court of Appeals,22-25).

Probation ultimately calculated a Guideline range of 10-16 months imprisonment. *See* (Record in the Court of Appeals,105). It also noted that Mr. Lopez's wife and all his children live in Mexico. *See* (Record in the Court of Appeals,94).

At sentencing, the defense emphasized Mr. Lopez's law-abiding life-style – apart from his mere presence – since his re-entry. *See* (Record in the Court of Appeals,76). Counsel argued that the last re-entry was motivated by a desperate and emergent need for income to pay for medical care on behalf of Mr. Lopez's mother. *See* (Record in the Court of Appeals,75-77). Having succeeded in paying this debt, argued trial counsel, Mr. Lopez would have little additional draw to the United States. *See* (Record in the Court of Appeals,75-77). And that draw would be further reduced by the presence of his wife and all of his children in Mexico. *See* (Record in the Court of Appeals,75-77). Counsel also noted that in spite of the re-entry convictions, the number of actual removals was not atypical of re-entry defendants *See* (Record in the Court of Appeals,77).

The district court, however, imposed a sentence of 36 months, more than doubling the maximum of the applicable range, and nearly quadrupling its minimum. *See* (Record in the Court of Appeals,78). It explained that the prior 90 month sentence reflected an enhanced need for

deterrence, and also noted the defendant's prior re-entry convictions. *See* (Record in the Court of Appeals,78). The defense objected to the sentence as substantively unreasonable, which objection the court overruled. *See* (Record in the Court of Appeals,79-80).

B. Proceedings in the Court of Appeals

On appeal, Petitioner challenged the substantive reasonableness of his sentence. More particularly, he contended that the district court overlooked or undervalued the reduced need for deterrence occasioned by the relocation of Petitioner's family to Mexico. He also argued that it had overlooked or undervalued the significance of the 20 year stretch Mr. Lopez enjoyed without arrest in the United States. Finally, he noted that the district court had considered the prior 90 month sentence for illegal re-entry as an aggravating factor, but had overlooked an obvious legal error that led to that sentence in the prior proceedings.

Petitioner, he noted, had been previously sentenced on the assumption that his prior Texas drug offenses constituted "drug trafficking offenses" within the meaning of the then applicable version of USSG §2L1.2. That was evident from his prior offense level of 22, which would depend on a 16 level prior-conviction enhancement under the then-applicable version of USSG §2L1.2. *See* Appellant's Brief in *United States Mancilla-Lopez*, No. 08-11092, 2009 WL 3267067, at *3 (5th Cir. March 20, 2009)(noting the offense level of 22); USSG §2L1.2(b)(1)(A), & comment. (n. (1)(B)(iv))(2007). The only arguably qualifying convictions were Mr. Lopez's Texas drug offenses. *See* (Record in the Court of Appeals,89-93).

At that time, however, a "drug trafficking offense" under USSG §2L1.2 could not be committed by an "offer to sell" a controlled substance. ***Compare*** USSG §2L1.2, comment. (n. (1)(B)(iv))(2007)(omitting "offers to sell" from the definition of "drug trafficking offense") ***with*** USSG §2L1.2, comment. (n. (1)(B)(iv))(2008)(including "offers to sell" in this definition); *United States v. Garza-Lopez*, 410 F.3d 268, 274-275 (5th Cir. 2005)(holding that "offers to sell" a controlled substance did not constitute a "drug trafficking offense"). And the court below, he noted, has since recognized that all of Mr. Lopez's Texas drug offenses are indivisible from "offers to sell"

a controlled substance for the purposes of sentence enhancement. *See United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir. 2017), *op. on reh'g*, 854 F.3d 284 (5th Cir. 2017); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016). Accordingly, Petitioner's very lengthy prior sentence stemmed from a Guideline calculation error. Finally, he contended that aggravating use of an obviously erroneous prior sentence overstated the need for deterrence, just punishment, and incapacitation, as determined by the Sentencing Commission, promoted unwarranted disparity, and undermined respect for the law.

The court of appeals affirmed. The court rejected the first two bases of the reasonableness challenge – the relocation of Petitioner's family, and his lack of recent criminal history – on the merits. *See* [Appx. A, at p.2]. But it expressly applied plain error to the final challenge, related to the past Guideline error. *See* [Appx. A, at p.2]. Without holding the sentence reasonable, it found no plain error. *See* [Appx. A, at p.2].

REASONS FOR GRANTING THE PETITION

- I. The Court should hold the case pending the resolution of *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting certiorari), and potentially grant certiorari, vacate the judgment below, and remand in light of that case.**

The length of a federal sentence is determined by the district court's application of 18 U.S.C. §3553(a). *See United States v. Booker*, 543 U.S. 220, 261 (2005). A district court must impose a sentence that is adequate, but no greater than necessary, to achieve the goals set forth in 18 U.S.C. §3553(a)(2). *See* 18 U.S.C. §3553(a)(2). The district court's compliance with this dictate is reviewed for reasonableness. *See Rita v. United States*, 551 U.S. 338, 359 (2007). In *Gall v. United States*, 552 U.S. 38 (2007), this Court emphasized that all federal sentences, “whether inside, just outside, or significantly outside the Guidelines range” are reviewed on appeal “under a deferential abuse-of-discretion standard.” *Gall*, 552 U.S. at 51. This review “take(s) into account the totality of the circumstances, including the extent of any variance from the Guidelines range.” *Id.* And “a major departure should be supported by a more significant justification than a minor one.” *Id.* at 50.

In the court below, parties must raise a specific objection to the substantive reasonableness of the sentence in order to preserve such a claim. *See United States v. Preciado-Delacruz*, 801 F.3d 508, 511 (5th Cir. 2015). That requires the appealing party to show: 1) error, 2) that is clear or obvious, 3) that affects substantial rights, and 4) that affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). The failure of Petitioner's final substantive reasonableness claim: that the district court unreasonably used a prior sentence that arose from a Guideline error. *See* [Appx., at p.2].

This Court will decide in *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting certiorari) whether a separate objection must be offered to preserve substantive reasonableness review. If it decides that no such objection is

necessary, it will have invalidated the sole basis for the decision to below as to Petitioner's final claim. This Court may grant *certiorari*, vacate the judgment below, and remand for reconsideration (GVR) in light of developments following an opinion below when those developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation..." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Further, it will hold Petitions that may be affected by the decisions of upcoming cases. *Lawrence*, 516 U.S. at 181 ("We regularly hold cases that involve the same issue as a case on which *certiorari* has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.") (Scalia, J., dissenting). *Holguin-Hernandez* stands to reveal error in the judgment and opinion below. This Court should hold the Petition, and then, potentially, grant *certiorari*, vacate the judgment below and remand.

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. Alternatively, he prays for such relief as to which he may justly be entitled.

Respectfully submitted this 2nd day of January, 2020.

/s/ Kevin Joel Page
KEVIN JOEL PAGE
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746