No. 19-7182

IN THE SUPREME COURT OF THE UNITED STATES

CIRILO MANCILLA LOPEZ, 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

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Petitioner contends (Pet. 6-7) that the court of appeals erred in applying plain-error review to his claim that the district court at sentencing improperly relied on the fact that he had previously received a 90-month sentence for a similar offense, after petitioner failed to object on that ground in the district court. He asserts (ibid.) that a similar issue was presented in Holguin-Hernandez v. United States, No. 18-7739 (Feb. 26, 2020), and asks that his petition be disposed in light of the decision in that case. This Court recently issued its decision in Holguin-Hernandez, and nothing in that decision affects the court of

appeals' analysis or the proper disposition of this case. The petition for a writ of certiorari should be denied.

1. Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of illegally reentering the country after removal following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). Pet. App. A1. The Probation Office's presentence report calculated an advisory Sentencing Guidelines range of 10 to 16 months of imprisonment. C.A. ROA 105. The presentence report also informed the district court that, between 1998 and 2008, petitioner had been convicted of seven drug offenses and two illegal-reentry violations, and that his 2008 illegal-reentry conviction had resulted in a sentence of 90 months of imprisonment. Presentence Investigation Report ¶¶ 30-38. Petitioner maintained that a sentence within the Guidelines range was appropriate because, as relevant here, his wife and children had relocated to Mexico and he had not committed any crimes since his 2008 illegal-reentry conviction, other than again unlawfully reentering the United States. C.A. ROA 75-76.

The district court sentenced petitioner to 36 months of imprisonment, to be followed by three years of supervised release. Pet. App. A2; C.A. ROA 78. The court found that a sentence within the Guidelines range would have been insufficient, "particularly in view of [petitioner's] repeated history of illegal re-entering the country, his two prior convictions [for illegal reentry], [and]

his prior sentence of 90 months." C.A. ROA 78; see also id. at 74 (finding "really troubling" that petitioner's prior 90-month sentence had failed to deter him). The court also stated that "something greater than 90 months * * * would be too much of an upward departure." Id. at 78. Petitioner "object[ed] to the reasonableness of the sentence." Id. at 79.

On appeal, petitioner claimed that his sentence was "substantively unreasonable" for the two reasons he had pressed in seeking a shorter sentence in the district court: his family ties in Mexico and the contrast between his older and more recent criminal history. Pet. C.A. Br. 5, 7. In addition, petitioner argued for the first time that his sentence was unreasonable because the district court had relied on his prior 90-month sentence, and because in his view that sentence was based on an enhancement that no longer applied in light of intervening case law. Id. at 8-9. The court of appeals reviewed for abuse of discretion petitioner's "preserved arguments regarding his family in Mexico and his criminal history," but applied plain-error review to petitioner's "unpreserved argument regarding the district court's comments about the 90-month sentence [petitioner] received for a previous illegal reentry conviction." Pet. App. A2. The court then determined that the district court had not "reversibly erred." Ibid.

2. The court of appeals correctly determined that petitioner's forfeited claim that the district court improperly

relied on his prior 90-month sentence was subject to plain-error review, and this Court's recent decision in Holguin-Hernandez does not affect the proper disposition of this case.

As explained in the government's brief in opposition in White v. United States, cert. denied, No. 18-9692 (Nov. 12, 2019), the reasons for requiring a contemporaneous objection under Federal Rule of Criminal Procedure 51(b) apply with full force to procedural claims such as petitioner's claim that the district court relied on an impermissible factor at sentencing. See Gov't Br. in Opp. at 7-10, White, supra (No. 18-9692).[1] Here, petitioner did not object at sentencing to the district court's reliance on his prior 90-month sentence. Pet. App. B3. He instead argued that "his family [ties] in Mexico and his criminal history" warranted a sentence within the applicable Guidelines range, Pet. App. A2; see C.A. ROA 75-77, and then made a general "reasonableness" objection after the court imposed its sentence, C.A. ROA 79. But at no point did petitioner put the district court on notice that he believed the court's reliance on his prior 90-month sentence was improper. Petitioner therefore did not adequately preserve his claim that the district court erred in considering that factor.

Petitioner nonetheless contends (Pet. 7) that this Court's decision in Holguin-Hernandez could "invalidate[] the sole basis

[1] We have served petitioner with a copy of the government's brief in opposition in White.

for the decision * * * below." That is incorrect. In Holguin-Hernandez, this Court recently determined that a "defendant's district-court argument for a specific sentence (namely, nothing or less than 12 months) preserved his claim on appeal that the 12-month sentence was unreasonably long." Holguin-Hernandez v. United States, No. 18-7739 (Feb. 26, 2020), slip. op. 2. For at least two reasons, Holguin-Hernandez does not provide any sound basis to believe that the court of appeals erred in applying plain-error review to petitioner's claim.

First, Holguin-Hernandez involved the preservation requirement applicable to a criminal defendant's claim that his sentence is substantively unreasonable, not to claims of procedural error such as petitioner's. See slip op. 5-6; see also id. at 1 (Alito, J., concurring). The Court held that a criminal defendant who has advocated for a shorter term of imprisonment at sentencing on a particular ground has timely "inform[ed] the court * * * of the action the party wishes the court to take," Fed. R. Crim. P. 51(b), with respect to the court's obligation to select a "sufficient, but not greater than necessary" punishment for the offense, 18 U.S.C. 3553(a). See Holguin-Hernandez, slip op. 4. But as the Court acknowledged, that holding does not mean that such a defendant has preserved other challenges to his sentence. See id. at 6.

Petitioner's attack on the district court's reliance on his prior sentence challenges the court's procedure in imposing its

sentence, not the sentence's substantive reasonableness. As this Court explained in Gall v. United States, 552 U.S. 38 (2007), a claim that a sentence is substantively unreasonable asserts that "the District Judge abused his discretion in determining that the § 3553(a) factors supported [the] sentence." Id. at 56. In other words, it challenges the result of the sentencing court's evaluation process. Petitioner's claim that the court relied on an improper factor (i.e., his 90-month sentence's failure to deter petitioner from reentering the United States), in contrast, is an objection to the court's evaluation process itself, not a challenge to the length of the sentence selected. Cf. id. at 51 (explaining that procedural errors include "failing to consider the § 3553(a) factors" and "selecting a sentence based on clearly erroneous facts"). Because this Court's decision in Holguin-Hernandez did not excuse defendants from preserving procedural claims, that decision does not affect the proper disposition of this case. See slip op. 6.[2]

Second, even assuming that petitioner's claim could be construed as a challenge to his sentence's substantive

[2] In the proceedings below, the parties and the court of appeals assumed, without discussion, that petitioner's claim challenged his sentence's substantive reasonableness. See Pet. App. A2; Gov't C.A. Br. 5-10; Pet. C.A. Br. 5-10. That assumption is inconsistent with this Court's decision in Gall. In any event, as explained below, petitioner's request would be unsound even if his claim could be construed as a challenge to the sentence's substantive reasonableness. See pp. 6-8, infra.

reasonableness, it still would not implicate the question presented in Holguin-Hernandez. As noted, the only question before the Court in Holguin-Hernandez was whether, to properly preserve a substantive-reasonableness claim, a criminal defendant who requests a shorter term must also object to the reasonableness of a longer term of imprisonment after it is ordered. See slip op. 2, 6. Here, the cause of the court of appeals' application of plain-error review to petitioner's claim was not petitioner's failure to reiterate his objection after the district court imposed its sentence. Pet. App. A2. Indeed, petitioner lodged a formal "reasonableness" objection after the district court imposed its sentence, which would have satisfied the post-hoc-objection requirement that this Court rejected in Holguin-Hernandez. See C.A. ROA 79.

The court of appeals instead applied plain-error review because petitioner had failed to identify at sentencing the particular ground for the reasonableness challenge that he raised on appeal -- i.e., the district court's reliance on his 90-month sentence. See Pet. App. A2; see also Fed. R. Crim. P. 51(b) (requiring parties to identify "the grounds for [their] objection"); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174 (1988). This Court in Holguin-Hernandez did not adopt the view that an argument for a lower sentence on one ground preserves an appellate substantive-reasonableness claim based in circumstances that were never urged at sentencing in the first place. See slip

op. 6 (declining to "decide when a party has properly preserved the right to make particular arguments supporting its claim that a sentence is unreasonably long"); id. at 1 (Alito, J., concurring) (explaining that "we do not suggest that a generalized argument in favor of less imprisonment will insulate all arguments regarding the length of a sentence from plain-error review").

Accordingly, no "reasonable probability" exists "that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" in light of Holguin-Hernandez. Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam). The petition for a writ of certiorari should therefore be denied.[3]

Respectfully submitted.

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Solicitor General

MARCH 2020

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