No. _____

In the

Supreme Court of the United States

Jason Alfred Martinez,

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

Brandon E. Beck
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
1205 Texas Ave. #507
Lubbock, Texas 79401
(806) 472-7236
brandon_beck@fd.org

QUESTIONS PRESENTED

I. Did the court of appeals err when it reviewed the district court's sentence for plain reasonableness?

II. Did the district court impose a plainly unreasonable revocation sentence upon Mr. Martinez?

PARTIES TO THE PROCEEDING

Petitioner is Jason Alfred Martinez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Martinez*, 818 F. App'x 371 (5th Cir. 2020)
- *United States v. Martinez*, No. 4:11-cr-192-3 (N.D. Tex. 2019)

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 14.1(b)(iii) STATEMENT iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND RULES PROVISIONS 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THIS PETITION 5

I. Circuits are divided over whether to apply a "plainly unreasonable" standard to preserved revocation sentences. Here, the Fifth Circuit erred when it did so 5

II. The sentence was substantively unreasonable under the correct standard of review 12

CONCLUSION 15

APPENDICES

Fifth Circuit Opinion ..... App. A

District Court Opinion ..... App. B

TABLE OF AUTHORITIES

Page(s)

Cases

Holguin-Hernandez v. United States,
__U.S. __, 140 S.Ct. 762 (2020) .....*passim*

Puckett v. United States,
556 U.S. 129 (2009) 10

United States v. Alonzo,
435 F.3d 551 (5th Cir. 2006) 12

United States v. Booker,
543 U.S. 220 (2005) .....*passim*

United States v. Cotton,
399 F.3d 913 (8th Cir.2005) 6

United States v. Crudup,
461 F.3d 433 (4th Cir. 2006) 6

United States v. Cuddington,
812 F. App'x 241 (5th Cir. 2020) (unpub.) 7

United States v. Johnson,
529 U.S. 53 (2000) 14

United States v. Kizeart,
505 F.3d 672 (7th Cir.2007) 6

United States v. Lewis,
424 F.3d 239 (2d Cir. 2005)..... 6

United States v. Martinez,
818 F. App'x 371 (5th Cir. 2020)..... 1

United States v. Merritt,
809 F. App'x 243 (5th Cir. 2020) (unpub.) 7

United States v. Miller,
634 F.3d 841 (5th Cir. 2011) 6, 8

United States v. Miller,
634 F.d 841 (5th Cir. 2011) 11

United States v. Miqbel,
444 F.3d 1173 (9th Cir. 2006) 6

United States v. Mondragon-Santiago,
564 F.3d 357 (5th Cir. 2009) 12

United States v. Nikonova,
480 F.3d 371 (5th Cir. 2007) 12

United States v. Olano,
507 U.S. 725 (1993) 10

United States v. Sanchez,
900 F.3d 678 (5th 2018)..... 6, 7, 8

United States v. Stiefel,
207 F.3d 256 (5th Cir.2000) 5

United States v. Sweeting,
437 F.3d 1105 (11th Cir.2006) 6

Woodford v. Garceau,
538 U.S. 202 (2003) 11

Statutes

18 U.S.C. § 922(g)(8) 2

18 U.S.C. § 3553(a) 1, 9, 14

18 U.S.C. §3583..... 10

18 U.S.C. §3742(e)..... 5, 6, 8, 12

18 U.S.C. §3742(e)(2) 5

18 U.S.C. §3742(e)(4) 5, 6, 11

21 U.S.C. §§ 841(a)(1) and (b)(1)(C) 3

28 U.S.C. § 1254(1) 1

28 U.S.C. §2254(d)(1)..... 10

AEDPA 11

Other Authorities

Fifth and Sixth Amendments 10

Federal Rule of Criminal Procedure 32.1 10

Federal Rule of Criminal Procedure 52(b) 10

Rule 52(b)'s 7

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Alfred Martinez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is *United States v. Martinez*, 818 F. App'x 371 (5th Cir. 2020). It is reprinted in Appendix A to this Petition. The judgment of the district court is reprinted in Appendix B to this Petition.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on August 25, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves 18 U.S.C. § 3553(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.[1]

(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.

18 U.S.C. § 922(g)(8).

STATEMENT OF THE CASE

This is a direct appeal from a judgment revoking supervised release and imposing a revocation sentence.

On July 31, 2012, the district court sentenced Mr. Martinez to 97 months imprisonment, followed by a three-year term of supervised release, for Conspiracy to Possess with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). On September 14, 2015, the district court entered a new judgment, reducing Mr. Martinez's sentence from 97 months to 78 months, effective November 2, 2015.

Mr. Martinez's supervision commenced on October 31, 2016. Nearly three years later, on August 26, 2019, the district court signed a Petition for Offender under Supervision and issued a warrant for Mr. Martinez's arrest. The Petition alleged that Mr. Martinez violated his conditions of supervised release by possessing and using a variety of drugs—including marijuana, methamphetamine, and opiates—and testing positive for opiates and methamphetamine. He also, on three occasions, failed to submit a urine specimen and failed to report to the U.S. Probation Office. The noncompliance all occurred between May and August of 2019. On September 26, the district court signed an addendum to the Petition for Offender under Supervision, which alleged more instances of drug possession and use and additional failures to report in August and September of 2019.

The district court held its revocation hearing on December 17, 2019. There, Mr. Martinez pleaded true to the allegations and requested a sentence of imprisonment

below the policy statement range of 4 to 10 months. After hearing mitigation arguments, the district court varied upwardly, imposing a sentence of 12 months imprisonment, followed by a six-month term of supervised release.

This appeal follows.

REASONS FOR GRANTING THIS PETITION

I. Circuits are divided over whether to apply a "plainly unreasonable" standard to preserved revocation sentences. Here, the Fifth Circuit erred when it did so.

1. The courts are divided.

Section 3742(e) of Title 18 provides a standard of review for the appeal of federal criminal sentences. Specifically, it provides that sentences should be reviewed to determine whether they were "imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. §3742(e)(2). But under the statute a sentence "for which there is no applicable sentencing guideline" is reviewed to determine whether it is "plainly unreasonable." 18 U.S.C. §3742(e)(4). Because revocation of supervised release is governed by policy statements rather than sentencing guidelines, revocation sentences were long thought to be reviewed only for "plain unreasonableness." *See e.g. United States v. Stiefel*, 207 F.3d 256, 259 (5th Cir.2000).

United States v. Booker, 543 U.S. 220 (2005), however, severed and excised this portion of the criminal code. *Booker* held that the facts determining the maximum of a defendant's mandatory guideline sentence must be determined by a jury and proven beyond a reasonable doubt. *See Booker*, 543 U.S. at 226-227. But it further concluded that Congress would have preferred advisory guidelines to mandatory guidelines whose factual components were decided by a jury beyond a reasonable doubt. *See id.* at 245. In order to effectuate what it perceived as Congress's second choice, it "severed and excised" those portions of the Code that enforced or contemplated mandatory Guidelines. *See id.* at 245. Section 3742(e) was among those provisions, and was

replaced by a single standard of review for "reasonableness." *See id.* at 259, 261. The Court did not distinguish between different portions of 18 U.S.C. §3742(e). *See id.* at 259, 261.

The result of the *Booker* opinion on this point has been a deep and persistent circuit split on the current standard of review for sentences of imprisonment following the revocation of supervised release. Some circuits understand the *Booker* opinion to mean what it says – that none of 18 U.S.C. §3742(e) is enforceable, including §3742(e)(4), and that all of it has been supplanted by review for reasonableness. *See United States v. Lewis*, 424 F.3d 239, 243 (2d Cir. 2005); *United States v. Cotton*, 399 F.3d 913, 916 (8th Cir.2005); *United States v. Miqbel*, 444 F.3d 1173, 1176, n.5 (9th Cir. 2006); *United States v. Sweeting*, 437 F.3d 1105, 1106-1107 (11th Cir.2006). But other courts, like the one below, have concluded that the standard for revocation sentences remains "plain unreasonableness." *See United States v. Crudup*, 461 F.3d 433, 437 (4th Cir. 2006); *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011); *United States v. Sanchez*, 900 F.3d 678, 682 (5th 2018); *United States v. Kizeart*, 505 F.3d 672, 674–75 (7th Cir.2007).

In the court below, this means that some acknowledged errors in revocation cases will be affirmed because they are not clearly established under existing law, even if error has been impeccably preserved. *See Miller*, 634 F.3d at 844 ("…the court clearly considered § 3553(a)(2)(A) and in doing so, that court erred. Despite this mistake, the district court's error was not plainly unreasonable. When the district court sentenced Miller, our circuit's law on this question was unclear and therefore,

that court's consideration of § 3553(a)(2)(A) was not an obvious error.") (footnote omitted); *Sanchez*, 900 F.3d at 682 ("…the 'plainly unreasonable' standard, … has two steps… At the second step, however, we vacate the sentence only if the identified error is 'obvious under existing law,' such that the sentence is not just unreasonable but plainly unreasonable….Law from the 'obviousness' prong of Rule 52(b)'s plain error test informs this latter inquiry, …. notwithstanding that the error was in fact preserved.") (internal citations omitted).

And as this case shows, that view has persisted in the court below even after *Holguin-Hernandez v. United States*, __U.S. __, 140 S.Ct. 762 (2020), which mandated substantive reasonableness review for a sentence imposed following revocation. The court below has repeatedly held that *Holguin-Hernandez* is limited to the narrow question presented -- whether substantive reasonableness review must be preserved by an objection – and declared it irrelevant to closely related issues. *See United States v. Merritt*, 809 F. App'x 243, 244 (5th Cir. 2020) (unpub.) ("The Supreme Court's decision in *United States v. Holguin-Hernandez* is inapplicable to this case of alleged procedural error…"); *United States v. Cuddington*, 812 F. App'x 241, 242 (5th Cir. 2020) (unpub.) ("Our case law requiring a specific objection to preserve procedural error remains undisturbed, as we have previously held in at least one unpublished decision.") (citing *United States v. Gonzalez-Cortez*, 801 F. App'x 311, 312 n.1 (5th Cir. 2020)). And the published opinion below rejects any suggestion that *Holguin-Hernandez* changed the standard of review in revocations from "plain unreasonableness" to "reasonableness." *See Garner*, 969 F.3d at 553, n.12.

2. The conflict merits this Court's attention.

As noted, the division of authority as to the standard of review for revocation cases has persisted for 15 years. It is balanced. And while there is good reason to think that *Holguin-Hernandez* has made this Court's position clear, the court below has passed on the opportunity to reevaluate its position in light of that guidance. Indeed, it has done so now in a published opinion. *See Garner*, 969 F.3d at 553, n.12. Finally, as noted above, there is a vast and growing population of federal supervised releases, each of whom may be subject to revocation. The standard of review is a basic and frequently litigated issue in the appeals of revocation sentences, and may affect the care with which revocation sentences are adjudicated in district court. It is an important issue that ought not depend on the accident of geography.

3. The position of the court below is wrong on the merits.

The court below holds that it must ignore errors in the revocation of supervised release so long as they are not clearly established. *See Miller*, 634 F.3d at 844; *Sanchez*, 900 F.3d at 682 .This is almost certainly wrong, for three reasons.

First, the plain language of *Booker* severs and excises 18 U.S.C. §3742(e), replacing it with a general standard of reasonableness. *See Booker*, 543 U.S. at 245.

Second, any doubt ought to have been resolved by *Holguin-Hernandez*. That case plainly overruled the requirement of showing plain error in supervised release cases, at least when the defendant has objected to the sentence below. In *Holguin-Hernandez*, the defendant received a revocation sentence of 12 months, after requesting no additional prison time. *See Holguin-Hernandez*, 140 S.Ct. at 764. This

Court held that this request, unreinforced by an objection to the reasonableness of the sentence, "preserved his claim on appeal that the 12-month sentence was unreasonably long." *Id*. In doing so, it held that "the question for an appellate court is simply, as here, whether the trial court's chosen sentence was 'reasonable' or whether the judge instead 'abused his discretion in determining that the § 3553(a) factors supported' the sentence imposed." *Id*. (quoting *Gall v. United States*, 552 U.S. 38, 56 (2007), and citing *Booker*, 543 U.S. at 261-262).

This Court thus directly stated the standard of review in cases arising from supervised release revocations like the one before it: "whether the trial court's chosen sentence was 'reasonable'..." Indeed, it repeatedly stated that the particular standard of review appropriate to the defendant's case was reasonableness review, not review for plain unreasonableness. *See id*. 766 ("Nothing more is needed to preserve the claim that a longer sentence is unreasonable."), *id*. ("Our decisions make plain that reasonableness is the label we have given to 'the familiar abuse-of-discretion standard' that 'applies to appellate review' of the trial court's sentencing decision.").

The very point of *Holguin-Hernandez* is that the defendant did not need to lodge a reasonableness objection to avoid plain error review of his reasonableness claim. *See id.* 766. The decision would have been puzzling and pointless if the defendant, by mere virtue of his revocation status, were forced to show plain error anyway. As such, supervised release defendants need no longer show that the district court's error is free from doubt.

Third, even if the court below were correct in believing that the "plain unreasonableness" standard survived both *Booker* and *Holguin-Hernandez*, it would still be wrong to think that the standard compels the courts of appeals to ignore legal error. Supervised release revocations are governed by 18 U.S.C. §3583, by Federal Rule of Criminal Procedure 32.1, and by the protections of the Fifth and Sixth Amendments. The text of these provisions does not vary by judicial district. Accordingly, federal district courts ought not be permitted to apply widely different standards in supervised release proceedings, so long as they do not exceed some zone of reasonable disagreement.

There are some provisions that require courts to ignore legal error, so long as it does not represent a clear or obvious legal error. Federal Rule of Criminal Procedure 52(b) requires a showing of clear or obvious error when a party fails to object in district court. *See United States v. Olano*, 507 U.S. 725, 732 (1993). Section 2254 of Title 28 requires a state habeas petitioner seeking relief in federal court to show that his or her claim is based on "clearly established federal law." 28 U.S.C. §2254(d)(1).

But these provisions vindicate interests that are not at all implicated by the appeal of a supervised release revocation. The plain error rule seeks "to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them." *See Puckett v. United States*, 556 U.S. 129, 134 (2009). By contrast, the court below will ignore legal error in supervised release revocations even if the defendant objects strenuously and with perfect clarity.

Section 2254 limits relief to state prisoners to vindicate the state's independent sovereign interest in the operation of its courts, and because state prisoners seeking federal review will have already received the benefit of at least one round of appellate review. *See Woodford v. Garceau*, 538 U.S. 202, 206 (2003). ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to further the principles of comity, finality, and federalism.")(internal quotation marks, quotation, and citations omitted)(citing and quoting *Williams v. Taylor*, 529 U.S. 362 (2000), and *id.* (opinion of STEVENS, J.)). A federal supervised releasee appealing to the circuit does not challenge the decision of another sovereign, and has received only one court's efforts to interpret the governing law.

Most importantly, the language of 18 U.S.C. §3742(e)(4) does not suggest an intent to disregard plain legal error. Rather, its reference to "plainly unreasonable" sentences – applicable where there is no applicable Guideline -- suggests only an intent to permit a wide zone of discretion as to the length of the sentence. It does not suggest an intent to immunize from review every antecedent legal error committed in the sentencing process.

The Fifth Circuit's decision in *United States v. Miller*, 634 F.d 841 (5th Cir. 2011), holds that preserved legal errors must be ignored in revocations unless they are clear or obvious. This holding is bizarre, and accomplishes no policy goal other than the abdication of meaningful review. Its continued application ignores multiple contrary Supreme Court decisions (*Booker* and *Holguin-Hernandez*), and it enjoys

little support from the text of 18 U.S.C. §3742(e), a statute that has been excised in any case. This Court should overrule it.

II. The sentence was substantively unreasonable under the correct standard of review.

Within-Guidelines sentences, unlike non-Guidelines sentences, are entitled to a presumption of reasonableness. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 360-361 (5th Cir. 2009). That presumption, however, is rebuttable. *See United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006). To determine the reasonableness of a sentence, courts examine whether the sentence failed to "account for a factor that should have received significant weight," gave "significant weight to an irrelevant or improper factor," or represented "a clear error of judgment in balancing the sentencing factors." *United States v. Nikonova*, 480 F.3d 371, 376 (5th Cir. 2007). Here, the sentence represents a plain failure to accord significant weight to Mr. Martinez's history and characteristics.

The policy statement range, in this case, was 4 to 10 months. When the district court sentenced Appellant to 12 months imprisonment—above the top of the range—the court did not fully appreciate the effect that Mr. Martinez's mother death had on the progress he had made to that point.

Mr. Martinez's supervised release commenced on October 31, 2016, and he would have completed it in October 2019 but for the effect of his mother's death in April 2019. Up until that point, he was in compliance with his terms of supervised release, he was employed, and he was sober. The Petition for Offender under Supervision establishes the timeline well:

> On October 31, 2016, Jason Alfred Martinez commenced his term of supervised release in the Northern District of Texas, Fort Worth Division. He resided with his mother until she passed away in April 2019. Mr. Martinez has maintained full-time employment throughout his term of supervised release and recently became unemployed when his mother passed away.
>
> When Mr. Martinez commenced supervision on October 31, 2016, he was not referred to substance abuse treatment since he completed the 500-hour Residential Drug Abuse Treatment Program and the Transitional Drug Abuse Treatment Program while in federal custody. Mr. Martinez, however, was referred to HOPE-FTW for the random urinalysis program and successfully completed the program on September 1, 2017.
>
> Mr. Martinez was in compliance with his term of supervised release until May 2019. In May 2019, Mr. Martinez admitted to using illegal controlled substances and was immediately referred for substance abuse treatment and the random urinalysis program at HOPE FTW. Unfortunately, Mr. Martinez has failed to attend three intake appointment at HOPE FTW, and he has not reported for any urine specimens since being referred to the program in May 2019. Additionally, Mr. Martinez has not responded to any contact attempts by the U.S. Probation Office since July 8, 2019.
>
> The U.S. Probation Office has provided multiple opportunities for Mr. Martinez to attend treatment, but he has failed to attend treatment as directed. It appears that he has given up, and he continues to use illegal controlled substances despite the efforts of the U.S. Probation Office trying to gain his voluntary compliance.

The intervening event, given that the noncompliance began in May, was Mr. Martinez's mother's death. He had quit his job to take care of her when she was sick and, after she died, he simply lost hope. His counsel described the emotional impact of this event as follows:

> The reality is that he lived with his mother for more than two years-and-a-half. She was the one that when he got home from work would say, good job, son. Here is some dinner. Let's spend some time together. She was his rock. She was his motivation.
>
> When she passed away, he would go to an empty house and remember how she died in that bed. He gave up, Your Honor. After doing so good and so great, he pretty much just didn't want to have to deal with anything else, and he disappeared. I believe that this Court, by way of either his ex-girlfriend, got wind of some activity he was engaged him. I can't vouch for that. I don't know to be honest. I haven't even addressed it with Mr. Martinez, but if this Court looks briefly at his presentence report, he hardly has any criminal history. This isn't the kind of person who has been like a revolving door in and out of the system.

In response, the district court did express sympathy for Mr. Martinez's circumstances but ultimately concluded that circumstances—even extreme circumstances—cannot justify misbehavior. So, the claim here is not that the district court failed to consider the effect of Mr. Martinez's hardship on his behavior, but rather that the district court's upward variance represented a clear error of judgment in balancing the sentencing factors given Mr. Martinez's compliance before his mother's passing. *See Chandler*, 732 F.3d at 437. As a result, Mr. Martinez was given a sentence that was greater than necessary to achieve the legislature's sentencing purposes. *See* 18 U.S.C. § 3553(a). Accordingly, Mr. Martinez should be resentenced with an appropriate balancing of those factors. And while Mr. Martinez has been released from prison, the district court does have the authority to modify the term of supervised release in light of a decision on the sentence of imprisonment. *See United States v. Johnson*, 529 U.S. 53, 60 (2000).

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/Brandon Beck
Brandon Beck
Assistant Federal Public Defender
Federal Public Defender's Office
1205 Texas Ave. #507
Lubbock, TX 79424
Telephone: (806) 472-7236
E-mail: brandon_beck@fd.org

Attorney for Petitioner