No. _____

In the

Supreme Court of the United States

STEVEN DEWAYNE GILBERT
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

_____

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

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. This Court in *Holguin-Hernandez* recently held that a defendant's argument in the district court for a lower sentence preserves appellate review to the substantive reasonableness of the sentence imposed. This Court has yet to address whether that holding applies to procedurally unreasonable sentences, such as in this case, where the district court offered no reasons for rejecting a defendant's comprehensive request for a below-guidelines sentence. Given that a sentencing court is obligated not only to provide a substantively reasonable sentence but also to provide adequate reasons for the sentence, should the logic of *Holguin-Hernandez*'s holding be extended to provide that an argument for a lower sentence preserves review of a claim that the district court's reasons for sentence are inadequate?

2. There is a deep split in the circuits regarding whether the career-offender guideline applies to inchoate drug offenses. Given the dramatic effect that the application of that guideline can have on a defendant's sentence (as illustrated by his case), this circuit split has and will continue to generate vastly disparate sentences among similarly situated defendants. Should this Court grant certiorari to resolve this important federal question and heal the jurisprudential divide?

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Petition for Certiorari

Steven Dewayne Gilbert respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered below.

Opinion Below

The unpublished opinion of the Court of Appeals is attached as an Appendix to this Petition.

Jurisdiction

The Court of Appeals for the Fifth Circuit rendered judgment on May 14, 2021. This petition is filed within 150 days of that date. *See* SUP. CT. R. 13.1, 13.3, 30.1; Supreme Court Order of March 19, 2020, extending filing deadlines. Section 1254(1), 28 U.S.C., confers jurisdiction on this Court to review the judgment through certiorari.

Authority Involved - Issue 1

Federal Rule of Criminal Procedure 51 provides in pertinent part:

> (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.

Federal Rule of Criminal Procedure 52 provides in pertinent part:

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

Authority Involved - Issue 2

Section 4B1.2 of the 2016 U.S. Sentencing Guidelines provides:

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 to § 4B1.2 states:

> 1. Definitions. --For purposes of this guideline--"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

Statement of the Case

Steven Dewayne Gilbert pleaded guilty to one count of conspiracy to distribute cocaine. Based on a relevant drug quantity of 56 grams, the probation officer in preparing Gilbert's presentence investigation report determined that the base offense level was 14. In light of Gilbert's criminal history, however, the probation officer determined that the career-offender guideline U.S.S.G. § 4B1.1 applied, thus establishing an offense level of 34, which he then reduced by three points for acceptance of responsibility resulting in a total offense level of 31. With a criminal history category of VI, the applicable guideline range is 188 to 235 months.

But for the application of the career-offender guideline, Gilbert's guideline range would have been 30 to 37 months. Because the career-offender guideline "drastically and dramatically" increased the otherwise applicable sentencing range, Gilbert, through an 8-page counseled motion, urged the court to impose a downward variant sentence, modestly requesting a sentence within a range of 115 and 162 months.

Gilbert identified seven factors in support of his request: "(1) his timely acceptance of responsibility and assistance in the prosecution; (2) his personal history and challenging childhood; (3) the offense nature and circumstances; (4) the nature and details of his criminal history and previous offenses; (5) his family support and obligations to his children; (6) his lack of education; and (7) his continuous struggles with substance abuse." Gilbert elaborated on each factors, notably emphasizing that the current offense as well as his prior drug offenses all involved relatively small amounts of drugs and that Gilbert's offenses were largely motivated by a lifelong struggle with drug addiction, which originated in a troubled and tragic childhood, during which Gilbert lost both of his parents.

Gilbert also relied on a district court case from Iowa, in which the court conducted an extensive analysis of the applicability of the career-offender guideline, concluding: "Low-level, nonviolent drug addicts who participate in the drug trade to support their habits are hardly the kind of individuals Congress had in mind when it directed the Sentencing Commission to promulgate the Career Offender guideline. Congress's directive was clearly aimed at 'drug trafficking offense[s]' involving large amounts of drugs."[1]

After counsel filed the aforementioned motion, Gilbert sent the district court a pro se letter likewise noting that his prior drug convictions were all for small amounts of drugs, that the scope of the charged conspiracy was small in terms of participants and drug quantity, and that his involvement was motivated by his need to obtain drugs to feed his own addiction. Gilbert also correctly pointed out that in requesting a sentence within a guideline range of 115 to 162 months,

[1] *United States v. Newhouse*, 919 F. Supp. 2d 955, 974 (N. D. Iowa) (citing S. Rep. No. 98-225 at 175 (1983)).

his attorney had referred to a sentencing range that does not actually exist in the guidelines. Gilbert correctly noted that 115 months is associated with a range of 92 to 115 months. He thus requested a sentence of 92 months, which would still be roughly three times the guideline sentence that would apply but for the career-offender guideline.

At sentencing, which was conducted via video teleconference and punctuated by technical difficulties, Gilbert, through counsel, reurged the matters presented in the sentencing memorandum, and he submitted letters by two of Gilbert's family members. A third family member, Gilbert's older sister, was called to testify, but after she answered just a few preliminary questions, the court stated, "I have all this information." Counsel explained that the witness would confirm the information contained in the sentencing memorandum but that Gilbert would submit without her testimony based on the court's representation.

On his own behalf, Gilbert apologized to the court and to his family and purported to take "full responsibility" for his actions. He closed by asking the court to be lenient for his sake and for the sake of his children. The Government remained silent throughout the sentencing proceeding, and at no time did the Court ask any questions of the defendant or his counsel with respect to his request for a downward variance.

Immediately following Gilbert's allocution, the district court declared that it was adopting the factual findings in the PSR (which were never in dispute) and then pronounced a sentence of 188 months, stating simply: "This sentence was selected after considering all the factors of 3553, your history, your personal characteristics, and your involvement in the offense." The court never addressed or even acknowledged Gilbert's request for a downward variance or any of the matters offered in support of that request.

Following the imposition of all the terms of sentencing, defense counsel stated: "We would just ask that you respectfully note our objections, for appeal purposes, as to the sentence."

On appeal, Gilbert argued that the district court's reasons for sentence were insufficient under 18 U.S.C. § 3553(c). He also argued that in light of the reasoning underlying this Court's holding in *Holguin-Hernandez v. United States*,[2] he sufficiently preserved full appellate review of the adequacy of the reasons for sentencing by advocating for a lower sentence and thereafter objecting to the sentence imposed. Furthermore, by letter filed pursuant to Rule 28(j), FED. R. APP. P., Gilbert challenged the application of the career-offender guideline, citing a newly released decision from the Third Circuit that conflicted with the holdings in the Fifth Circuit.

The court of appeals rejected Gilbert's claim that he had preserved review of his challenge to the sufficiency of the reasons for sentence and further held that the district court committed no plain error in its sentencing decision. The court of appeals declined to review Gilbert's challenge to the application of the career-offender guideline because Gilbert had not raised initially the issue in his opening brief.

[2] 140 S. Ct. 762 (2020).

Reasons for Granting the Petition

1. Though left open by this Court in its recent decision in *Holguin-Hernandez*, the sheer force of the reasoning in that case compels the conclusion that a defendant's argument for a lower sentence not only preserves review to the length of the sentence but also to the adequacy of the district court's reasons given for that sentence.

This Court in *Holguin-Hernandez v. United States* recently held that a challenge to the substantive reasonableness of a sentence is preserved for review on appeal whenever the defendant advocates in the district court for a sentence shorter than the one thereafter imposed by the district court.[3] This Court noted that Rule 51, FED. R. CRIM. P., dispensed with the need for formal exceptions to the trial court's rulings and that a party may satisfy the objection requirement even before the court issues its ruling.[4] The only question, the Court held, is whether the claimed error was "brought to the court's attention."[5] Although the Court indicated that it was not deciding what constitutes a sufficient objection to preserve a claim of procedural error,[6] the logic of its holding applies with equal strength to a claimed procedural error, insofar as that error concerns the adequacy of the court's reasons for sentence.

Thus, just as a district court must, in all cases, impose a sentence that is not substantively unreasonable, a court must, in all cases, provide adequate reasons for the sentence imposed.[7] As the Fourth Circuit has noted, "[b]y drawing arguments from § 3553 for a sentence different than the one

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[3] 140 S. Ct. at 766-67.

[4] *Id.* at 766. *See* FED. R. CRIM. P. 51(b) ("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** . . . .") (emphasis added).

[5] 140 S. Ct. at 766.

[6] *Id.*

[7] *Gall v. United States*, 552 U.S. 38, 50 (2007).

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."[8] Gilbert's extensive and detailed arguments for a below-Guidelines sentence, followed by an objection to the sentence imposed, brought to the court's attention the need to fulfill its statutory obligation to provide reasons for rejecting those arguments. This conclusion is also consistent with the holding in *Holguin-Hernandez*, which further suggests that a post-ruling objection is not even necessary.

The Fifth Circuit rejected without reasons the foregoing argument and applied plain error in this case. This Court should grant certiorari to address whether the holding in *Holguin-Hernandez*, extends to the adequacy of the reasons imposed for sentence and to resolve the split among the circuits on this issue.

2. This Court must resolve the deep split in the circuits regarding whether the career-offender guideline may be applied to inchoate drug offenses, a split that continues to result in dramatic sentencing disparities among similarly situated defendants.

If Gilbert had pleaded guilty in the Third, Sixth, or D.C. Circuits, he could not have been sentenced under the career-offender guideline because those circuits have concluded that the plain-text definition of "controlled substance offense" in § 4B1.2(b) does not include inchoate offenses and therefore controls, notwithstanding that the commentary to that guideline expands the

[8] *United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010). *See United States v. Boulware*, 604 F.3d 832, 838 (4th Cir. 2010) (following rule in *Lynn*); *United States v. Tate*, 630 F.3d 194, 197-99 (D.C. Cir. 2011) (counsel's pre-ruling arguments for a lower sentence based on crack/powder disparity preserved claim of procedural unreasonableness without need for post-ruling objection). *See also United States v. Copeland*, 826 F. App'x 292, 293 (4th Cir. 2020) (acknowledging viability of *Lynn* rule post *Holguin-Hernandez*);*United States v. Carpenter*, 818 F. App'x 235, 237 (4th Cir. 2020) (same); *United States v. Rivera*, 819 F. App'x 139 (4th Cir. 2020) (same).

definition to include attempt, conspiracy, and aiding and abetting.[9] Eight other circuits have taken a contrary view, concluding that inchoate offenses are controlled-substance offenses in light of the guideline commentary,[10] though notably, the Fifth and Ninth Circuits have recently expressed agreement with the reasoning of the minority circuits, though they were constrained by their own precedent not to follow those circuits.[11]

These competing interpretations of the scope of § 4B1.2(b) can result in dramatically disparate treatment of similarly situated defendants, as illustrated by this case, in which Gilbert was given a guidelines sentence under Fifth Circuit jurisprudence that is 600% greater than his guideline sentence would have been under the law in the in Third, Sixth, or D.C. Circuits. This Court should grant certiorari to resolve the split among the circuits regarding the application of this important Sentencing Guideline provision.

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[9] *United States v. Nasir*, 982 F.3d 144, 160 (3rd Cir. 2020) (en banc) ("inchoate crimes are not included in the definition of "controlled substance offenses" given in section 4B1.2(b) of the sentencing guidelines.), *vacated on other grounds*, ___ S. Ct. ___, 2021 WL 4507560 (Oct. 4, 2021); *United States v. Havis*, 927 F.3d 382, 287 (6th Cir. 2019) (en banc) ("The Guidelines' definition of "controlled substance offense" does not include attempt crimes."); *United States v. Winstead*, 890 F.3d 1082 (D. C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses.").

[10] *United States v. Lewis*, 963 F.3d 16, 21 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151, 155 (2d Cir. 2020); *United States v. Kennedy*, 32 F.3d 876, 891 (4th Cir. 1994); *United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997); *United States v. Adams*, 934 F.3d 720, 729-30 (7th Cir. 2019); *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995); *United States v. Crum*, 934 F.3d 963, 966-67 (9th Cir. 2019); *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017).

[11] *United States v. Goodin*, 835 F. App'x 771, 782 (5th Cir. 2021) ("If Goodin did not have the other two qualifying offenses and we were not constrained by *Lightbourn*, our panel would be inclined to agree with the Third Circuit['s holding in *Nasir*]."); *Crum*, 934 F.3d at 966-67 (explaining that it is "troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of 'controlled substance offense' in this way, without any grounding in the text of § 4B1.2(b) and without affording any opportunity for congressional review," but that it was "was nonetheless compelled" by a prior Ninth Circuit decision to conclude that "the term controlled substance offense' as defined in § 4B1.2(b) encompasses both solicitation and attempt offenses").

Conclusion

For either or both of the foregoing reasons, this Court should grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,

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