No. _____

In the

Supreme Court of the United States

_____

Andrea Lamont Medlock,

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

Whether sentences of imprisonment following the revocation of supervised release should be reviewed for reasonableness or plain unreasonableness?

PARTIES TO THE PROCEEDING

Petitioner is Andrea Lamont Medlock, 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 Andrea Lamont Medlock seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgement and sentence is attached as Appendix B. The opinion of the Court of Appeals is electronically reported at *United States v. Medlock*, 2023 WL 4421385 (5th Cir. July 10, 2023) (unpublished). It is reprinted in Appendix A to this Petition.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 10, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 18 U.S.C. §3742, which states:

> (a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [1] than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.
>
> (b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) 1 than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea Agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on Review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and Disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing Upon Remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a Sentence by a Magistrate Judge.—

An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline Not Expressed as a Range.—

For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

STATEMENT OF THE CASE

I. Facts and District Court Proceedings

Petitioner Andrea Lamont Medlock received a 48-month term of imprisonment for possessing a firearm after a felony conviction, to be followed by three years of supervised release. *See* (ROA.23-24). On May 6, 2022, Probation petitioned the court for a violator's warrant, alleging several violations of the conditions of release. *See* (ROA.28-33).

Specifically, the Petition alleged that Petitioner assaulted his girlfriend, failed to tell Probation about the resulting arrest, lived outside the district without permission, tested positive for methamphetamine, missed his drug tests, and paid only $864.74 of his $1,000 fine. *See* (ROA.31). The defense filed a notice reflecting an intent to admit all allegations save the assault and methamphetamine use. *See* (ROA.48-51). As respects the assault, however, the notice said that Petitioner would waive all objections to the government's manner of proof, acquiescing in its proof by hearsay documents and exhibits, and foregoing any right of cross-examination. *See* (ROA.48-51). Petitioner personally confirmed the representations in this notice at the revocation hearing. *See* (ROA.71-73).

To show the assault, the government introduced a police report and a brief doorbell video. *See* (ROA.84-85). The report said that Petitioner and his girlfriend had argued in bed the night of the incident, during which time he threw a pillow at her she shoved his head away from hers. *See* (ROA.128). At that point, according to the

report, Petitioner rose from the bed; his girlfriend ran outside in front of the doorbell camera to capture any assault that might follow. *See* (ROA.128).

The video shows the victim running onto the porch, exhorting Petitioner to "come outside and do it." (Government's Exhibit 2). He follows and can be seen hitting her four times in as many seconds. *See* (Government's Exhibit 2, at 0:06-0:10). She then kicks him away, receives one more punch, and tells him six or seven times that he is going to jail. *See* (Government's Exhibit 2, at 0:10-0:30).

The district court found all of the violations to be true and revoked supervised re-lease. See (ROA.105-106). Because Petitioner had been convicted of a Class C felony, he faced two years imprisonment upon revocation, plus a new term of supervision equal to three years minus the term of imprisonment imposed upon revocation. *See* 18 U.S.C. §§922(g), 3559, 3583(e),(h). The non-binding policy statements found at USSG §7B1.4 recommended a sentence of 21-24 months. See (ROA.153). The district court imposed 24 months imprisonment, the maximum prison sentence permitted by law, and no further supervision. *See* (ROA.109).

II. Proceedings in the Court of Appeals

Petitioner appealed contending that a sentence at the statutory maximum represented a plainly unreasonable application of the factors enumerated at 18 U.S.C. 3583(e) and 3553(a). Specifically, he noted that he had held stable employment during his term of release and accepted responsibility for his misconduct, something to which a maximum sentence definitionally gave no mitigating weight.

Although the court below has held that revocation sentences can be reviewed only to determine whether they are "plainly unreasonable," to preserve review, Petitioner argued that courts of appeal should offer relief upon a finding that the sentence is "unreasonable" even if it is not plainly so. He noted that the "plainly unreasonable" standard of review comes from 18 U.S.C. §3742(e)(4), which directs the court of appeals to reverse a sentence that "was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable." However, he noted, *United States v. Booker*, 543 U.S. 220 (2005), "severed and excised" all of 18 U.S.C. §3742(e), replacing it with review for "reasonableness." *Booker*, 543 U.S. at 245 ("We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e), which depends upon the Guidelines' mandatory nature.").

The court of appeals affirmed. It expressly applied the "plainly unreasonable" notwithstanding the preservation of error. [Appx. A, at 1-2]; *United States v. Medlock*, No. 22-11217, 2023 WL 4421385, at *1 (July 10, 2023)(unpublished)("When a defendant properly preserves an objection for appeal, revocation sentences are reviewed under a "plainly unreasonable" standard.")(citing *United States v. Warren*, 720 F.3d 321, 326 (5th Cir. 2013)). And it affirmed under that standard:

> The record indicates the district court employed an individualized, reasoned, and fact-specific analysis consistent with the permissible § 3553 (a) factors. Specifically, the district court addressed Medlock's history and characteristics and found that deterring criminal conduct while protecting the public from Medlock was the dominant, overriding factor, considering the evidence that Medlock committed an assault. Medlock fails to show the court's weighing of these factors **was plainly unreasonable.**

Medlock, 2023 WL 4421385, at *1 (emphasis added)(internal citations omitted)(citing *Warren*, 720 F.3d at 332-33).

REASONS FOR GRANTING THIS PETITION

There is a long-standing division of federal authority regarding the proper standard of review for terms of imprisonment following the revocation of supervised release.

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 the 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. Indeed, 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 objections – and declared it irrelevant to closely related issues. *See United States v. Merritt*, 809 F. App'x 243, 244 (5th Cir. 2020)(unpublished)("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)(unpublished)("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)).

Petitioner's case provides an appropriate vehicle to address this conflict. The court below expressly applied the "plainly unreasonable" standard of review. *See* [Appx. A, at 1-2]; *United States v. Medlock*, No. 22-11217, 2023 WL 4421385, at *1

(July 10, 2023)(unpublished). Indeed, its analysis concluded with the statement that "Medlock fails to show the court's weighing of these factors was plainly unreasonable." [Appx. A, at 2]; *United States v. Medlock*, No. 22-11217, 2023 WL 4421385, at *1. It thus did not pass on the reasonableness of the sentence, but only on its ability to survive its relaxed standard of review for revocations.

The standard of review thus may well have decided the outcome of the case. This Court should grant certiorari to resolve the issue that has divided the courts of appeals and then either decide the merits of the case or remand to the Fifth Circuit.

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 6th day of October, 2023.

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