No. _____

In the
Supreme Court of the United States

_____

JAIME SHAKUR GARCIA,
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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QUESTIONS PRESENTED

I. Should this Court hold this Petition until the court below renders its forthcoming *en banc* decision in *United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*)?

II. Must parties to a federal criminal proceeding object to the substantive reasonableness of the sentence in order to avoid plain error review of that issue?

III. Should this Court grant *certiorari*, vacate the judgment, and remand in light of *Chavez-Meza v. United States*, __U.S.__, 138 S.Ct. 1959 (June 18, 2018), an authority that post-dated the opinion below?

PARTIES TO THE PROCEEDING

Petitioner is Jaime Shakur Garcia, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jaime Shakur Garcia respectfully 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 first sentencing decision was documented in a written judgment, reprinted as Appendix A. The first opinion of the court of appeals vacating the sentence was published as *United States v. Garcia*, 857 F.3d 708 (5th Cir. 2017), and is reprinted as Appendix B. The district court's resentencing decision – imposing an identical sentence in spite of a reduced Guideline range – was also documented in a written judgment, reprinted as Appendix C. The second opinion of the court of appeals, which was unpublished, affirmed the sentence, and may be accessed at *United States v. Garcia*, 2018 U.S. App. LEXIS 14183 (5th Cir. May 30, 2018)(unpublished). It is reprinted as Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

18 U.S.C. §3553(a) provides, in pertinent part:

> (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 51 provides:

(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.

Section 924(c) of Title 18 provides in part:

(c)(1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

***

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Section 1951 of Title 18 provides in part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
> >
> > (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

1. Proceedings in the trial court

On October 20, 2015, Petitioner Jaime Shakur Garcia and two accomplices robbed a gun shop. *See* (ROA.71-73).[1] During the crime, two of the robbers exchanged gun fire with an employee and injured him in the ankle. *See* (ROA.71-73). Four days after the robbery, Mr. Garcia turned himself into authorities. *See* (ROA.195).

Mr. Garcia pleaded guilty to one count of interference with interstate commerce by robbery under 18 U.S.C. §1951(a) (Hobbs Act robbery), and one count of possessing a firearm in connection with a crime of violence under 18 U.S.C. §924(c). *See* (ROA.68-74). A plea agreement exchanged the defendant's guilty plea and cooperation with law enforcement for a government agreement to recommend the low end of the Guidelines. *See* (ROA.181). Mr. Garcia retained his right of appeal. *See* (ROA.178-183).

A Presentence Report (PSR) calculated a Guideline range of 51 to 63 months for the Hobbs Act robbery count. *See* (ROA.206). This range included a two level adjustment for the "physical restraint" of a victim under USSG §2B3.1(b)(4)(B). *See* (ROA.197). The government – joined by the defense – objected to this adjustment. *See* (ROA.214-219). Probation rejected the objection, and the district court overruled it. *See* (ROA.154-155, 221-222).

At sentencing, the district court had before it letters from three of the victim employees, all of whom urged the maximum possible sentence. *See* (ROA.209-213). Two

[1] Record citations are included in hopes they are of use to the government in answering the Petition or to the Court in evaluating it.

of those victims showed up in person to ask again for the maximum. *See* (ROA.157-158). The court imposed a term of 51 months imprisonment for the Hobbs Act robbery and ten years imprisonment for the violation of 18 U.S.C. §924(c). *See* (ROA.83). Its explanation for the sentence selected was as follows, and in its entirety:

> I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.

(ROA.163).

2. First appeal

The court of appeals vacated the sentence, agreeing with Mr. Garcia that the facts did not show physical restraint within the meaning of USSG §2B3.1(b)(4). *See* (ROA.100). It affirmed the defendant's conviction under 18 U.S.C. §924(c), rejecting his claim that §924(c)(3)(B) was unconstitutionally vague. *See* (ROA.100).

Petitioner sought *certiorari*, asking the Court to consider whether the robbery provisions of 18 U.S.C. §1951(a) could be a predicate "crime of violence" under 18 U.S.C. §924(c). He noted the pendency of *Sessions v. Dimaya*, __U.S.__, 138 S.Ct. 1204 (2018), which would later invalidate 18 U.S.C. §16(b), a provision textually identical to 18 U.S.C. §924(c)(3)(B). This Court denied *certiorari*, after receiving assurance from the Solicitor General that:

> after the court of appeals resolves petitioner's pending appeal from the district court's revised judgment, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims arising from the disposition of his second appeal, in a single petition for a writ of certiorari.

(Brief in Opposition, at p.6).

3. Resentencing

On remand, the PSR calculated a new Guideline range of 41-51 months imprisonment on the Hobbs Act robbery, and 120 months on the §924(c) count. *See* (ROA.247). The government again expressly recommended a sentence at the bottom end of the Guidelines. *See* (ROA.168). Defense counsel also urged a sentence at the low end of the new Guidelines, noting that Mr. Garcia acted out of fear of his co-defendants, that he turned himself in, and that he cooperated with law enforcement. *See* (ROA.171-173).

Two victims also addressed the court at sentencing. One of them asked the court to increase the sentence above the level imposed at the first sentencing hearing, (ROA.170), while the other asked "that the law will continue on and the sentence will remain the same." (ROA.170).

The court imposed the same 171 month sentence: 51 months for the Hobbs Act robbery and 120 months imprisonment for violating 18 U.S.C. §924(c). *See* (ROA.176). It did not respond to the specific arguments for leniency, nor explain why it thought the reduced Guideline range to be irrelevant. Instead, it offered a boilerplate explanation for the sentence, precisely identical to that provided in the first sentencing:

> I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.

(ROA.176). Immediately after pronouncing sentence, the court said "you may stand aside," and there was no objection. (ROA.176).

4. Second appeal

Petitioner appealed again, making three arguments. First, he argued that the sentence was substantively unreasonable. *See* (Initial Brief, at pp.8-16). The district court's decision to impose an identical sentence despite a reduced Guideline range, argued Petitioner, gave insufficient value to the Commission's conclusion that the presence or absence of physical restraint should affect a robbery sentence. He also argued that it gave insufficient weight to the government's recommendation for a low-end sentence, and to Petitioner's cooperation and decision to turn himself in. Petitioner conceded that he had not objected – he was effectively forbidden to do so by the district court's instruction to "stand aside" after pronouncing sentence – but argued to preserve review that no such objection should be necessary. That position was foreclosed by *United States v. Peltier*, 505 F.3d 309 (5th Cir. 2007).

Second, Petitioner argued that the sentence was procedurally unreasonable because the court's scant explanation – the same 14 words used at the first sentencing – addressed none of the arguments for leniency proffered by the defense, and did not discuss the changed circumstance of a reduced Guideline range. *See* (Initial Brief, at pp.16-27). Further, Petitioner noted that the sole argument against a low-end sentence had been offered by a victim who asked for a higher sentence on remand. This, he argued, created the appearance of a vindictive motive.

Third, Petitioner argued that the court of appeals should vacate his conviction under 18 U.S.C. §924(c). *See* (Initial Brief, at pp.27-32). Hobbs Act robbery, he argued, could not qualify as a "crime of violence" under 18 U.S.C. §924(c) without resort to 18 U.S.C.

924(c)(3)(B). But that provision, he contended, ran afoul of the due process prohibition on unconstitutionally vague criminal laws.

The court of appeals affirmed again, after expressly applying plain error to each claim. *See* [Appx. D, at pp. 2-4]. As to the claim of procedural reasonableness, the court of appeals found the explanation "legally sufficient" because the court considered the parties' evidence and argument. *See* [Appx. D, at pp. 2-3]. It tied that conclusion, however, to the plain error standard of review. *See* [Appx. D, at p.3]["Garcia has not shown the requisite clear or obvious error with respect to the claimed procedural error concerning the adequacy of the reasons for the imposed sentence."].

The court also rejected the substantive reasonableness claim, though it appeared to conflate substantive and procedural reasonableness review. *See* [Appx. D, at pp.3-4]. Rather than addressing the length of the sentence or the factors used in its determination, the court reiterated that the district "court acknowledged the assertions regarding the decrease in the advisory Guidelines sentencing range, the Government's recommendation for a sentence at the low end of that range, and Garcia's cooperation with authorities." [Appx. D, at pp. 3-4]. Again, it framed its ultimate conclusion in terms of the plain error standard. [Appx. D, at p.4]["In short, he has not shown plain error as to the substantive reasonableness of his sentence."].

Finally, the court of appeals rejected the challenge to the conviction. *See* [Appx. D, at p.2]. As the court recognized, Petitioner's claim was foreclosed by *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017), which held that Hobbs Act robbery requires the use or

threatened use of force against the person of another, and accordingly falls within 18 U.S.C. §924(c)(3)(A). *See* [Appx. D, at p.2].

REASONS FOR GRANTING THE PETITION

I. This Court should hold this Petition until the court below issues its *en banc* decision in *United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*), so that it may remand if the resulting opinion is favorable to Petitioner.

Section 924(c)(1)(A)(ii) of Title 18 of the United States Code makes it a crime to brandish a firearm in connection with a "crime of violence." The term "crime of violence" is defined as any felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §924(c)(3). A provision bearing wording identical to Subsection (B) of this statute has been held unconstitutionally vague. *See Sessions v. Dimaya*, __U.S.__, 138 S.Ct. 1204 (2018).

As to Subsection (A) – the "force clause" – the court below has issued two conflicting lines of authority regarding the meaning of "force" in this and similar provisions. One line of authority, generally addressing state crimes, has held that force and injury are distinct concepts. Under these authorities, a statute that prohibits the threat or infliction of physical injury does not require proof of the use or threat of force to convict. *See United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017), *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004)(*en banc*); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276-277 (5th Cir. 2010); *United States v.*

Martinez-Mata, 393 F.3d 625, 629 (5th Cir. 2003); *United States v. De La Rosa-Hernandez*, 264 Fed. Appx. 446, 449 (5th Cir. 2008)(unpublished); *United States v. Johnson*, 286 Fed. Appx. 155, 157 (5th Cir. 2008)(unpublished).

On the other hand, the court below has held that federal statutes requiring the threat of bodily injury do require threatened force as an element. *United States v. Stoker*, 706 F.3d 643 (5th Cir. 2013)(mailing threats of injury); *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017)(Hobbs Act robbery); *United States v. Brewer*, 848 F.3d 71 (5th Cir. 2017)(bank robbery).

Petitioner's offense directly implicates these conflicting lines of authority. The Hobbs Act expressly defines robbery to encompass the taking of property "by means of actual or ***threatened force***, or violence, ***or fear of injury***..." 18 U.S.C. §1951(b)(1)(emphasis added). Accordingly, if threatened injury is not always threatened force, the Hobbs Act manifestly captures conduct that falls outside the definition of threatened force. Indeed, it expressly criminalizes inflicting "fear of injury" ***in addition to*** "threatened force," suggesting that it contemplates different meaning for these terms.

In *United States v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. February 6, 2018), *rehearing en banc granted by* 892 F.3d 800 (5th Cir. June 15, 2018), a panel of the Fifth Circuit held that the Missouri offense of Voluntary Manslaughter lacks force as an element, precisely because injury is not always force. The government has successfully petitioned for *en banc* review. *See United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*). In the event the defendant prevails in *Reyes-Contreras en banc*, a uniform rule distinguishing force and injury will necessarily prevail in the Fifth Circuit. It is difficult

to see how one could distinguish force and injury, and yet hold that Hobbs Act robbery always requires threatened force.

The pending *en banc* decision in *Reyes-Contreras* represents a source of controlling legal authority that would call for a different outcome than the decision below. In these circumstances, it is appropriate to hold the instant Petition until the resolution of *Reyes-Contreras*, and to grant *certiorari*, vacate the judgment below, and remand for reconsideration in the event that it produces an opinion favorable to Petitioner's claim here. *See Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996). *Reyes-Contreras* is to be argued September 17, 2018.

II. This Court should issue a plenary grant of *certiorari* to address a long-standing division of circuit authority regarding the need for a separate objection to the substantive reasonableness of federal criminal sentences.

The circuit courts of appeal manifest a clear division over the standard of review when a defendant fails to lodge a post-sentencing objection to the "reasonableness" of his sentence. The Fifth Circuit has taken a unique and harsh position—that even if a defendant engages in extensive sentencing advocacy before the district court, the subsequent sentence will be reviewed only for plain error unless the defendant takes the formalistic step of lodging an objection to the "reasonableness" or "substantive reasonableness" of the sentence after it is announced.

A large majority of circuits have held that objections to the substantive reasonableness of the sentence—to the length of term of incarceration—are preserved without a post-sentencing objection. This Court should grant this Petition and hold

that a party need not raise a separate objection to the substantive reasonableness of a sentence.

A. The circuits are divided.

The courts of appeals have reached starkly different conclusions regarding the actions a party must take in the district court to fully preserve review for reasonableness in the court of appeals. The conflict has been acknowledged expressly by courts and commenters. *See, e.g.*, *United States v. Ruiz-Huertas*, 792 F.3d 223, 228 (1st Cir. 2015); *United States v. Autery*, 555 F.3d 864, 870–71 (9th Cir. 2009); *see also* Benjamin K. Raybin, Note, *"Objection: Your Honor is Being Unreasonable!"—Law and Policy Opposing the Federal Sentencing Order Objection Requirement*, 63 VAND. L. REV. 235, 244–50 (Jan. 2010) (collecting and discussing cases).

In *United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007), the court below held that a defendant who fails to object specifically to the reasonableness of a sentence can obtain only plain error review on appeal. *See Peltier*, 505 F.3d at 392. The court acknowledged that its position was contrary to that of the Seventh Circuit, which had held that no post-sentencing objection is required. *See United States v. Castro-Juarez*, 425 F.3d 430, 434 (7th Cir. 2005). Relying on traditional concerns of the plain error rule—"encouraging informed decision-making and giving the district court an opportunity to correct errors before they are taken up on appeal"—the Fifth Circuit rejected the approach of the Seventh Circuit. *Peltier*, 505 F.3d at 392.

In the present case, counsel argued for a sentence at the bottom of the Guidelines, noting the government's recommendation to that effect, the defendant's cooperation, and his

decision to turn himself in. *See* (ROA.171-173). However, Petitioner did not lodge a separate, post-sentencing objection to the "reasonableness" of the sentence imposed. *See* (ROA.176). He instead deferred to the court's instruction to "stand aside." (ROA.176). Under Fifth Circuit precedent, he forfeited his right to plenary review of the sentence. *See Peltier*, 505 F.3d at 392.

A panel of the First Circuit concluded in 2015 that this was also the law of that court. *See Ruiz-Huertas*, 792 F.3d at 228. Tracing the rule back to its foundation in First Circuit law, that court concluded that the objection requirement for substantive reasonableness claims rested on a precedent that "has nothing to do with a claim that a sentence is substantively unreasonable." *Id.* at 228, n.4. Further, it recognized that the rule applied in that court placed it in the minority, joined only by the Fifth Circuit. *See id.* at 228 (***contrasting*** *Peltier, supra*, ***with*** *Autery*, 555 F.3d at 871, *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (*en banc*), *United States v. Wiley*, 509 F.3d 474, 476-77 (8th Cir. 2007), *United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007), *United States v. Torres-Duenas*, 461 F.3d 1178, 1182-83 (10th Cir. 2006), and *Castro-Juarez*, *supra*). Nonetheless, at least two First Circuit cases embrace the proposition that a failure to object to the substantive reasonableness of a sentence begets plain error. *See United States v. Castro-Caicedo*, 775 F.3d 93, 103 (1st Cir. 2014); *United States v. Tavares*, 705 F.3d 4, 33 (1st Cir. 2013).

At least seven other circuits have rejected the rule of *Peltier*. As *Peltier* noted, the Seventh Circuit took a contrary position shortly after *United States v. Booker*, 543 U.S. 220 (2005). In *United States v. Castro-Juarez*, 425 F.3d 430 (7th Cir. 2005), the government

asserted that the defendant's substantive reasonableness claim should be reviewed only for plain error. *See Castro-Juarez*, 425 F.3d at 433. In response, however, the Seventh Circuit found that "[t]o insist that defendants object at sentencing to preserve appellate review for reasonableness would create a trap for unwary defendants and saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case." *Id.* at 433–34. The court also noted that a district court confronted with a separate "reasonableness" objection "will have already heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence." *Id*. at 434. Accordingly, there is no benefit to "requiring the defendant to then protest the term handed down as unreasonable." *Id.* In other words, the Seventh Circuit recognized the defendant's prior request for a lower sentence as the defendant's effort to "infor[m] the court—when the court ruling or order is made or sought—of the action the party wishes the court to take," and any objection after the request for a lower sentence had been rejected would be an unnecessary "exception." FED. R. CRIM. P. 51(a).

The Seventh Circuit has been joined by the Third, Fourth, Sixth, Eighth, Ninth, Tenth and D.C. Circuits[2] in explicitly rejecting a requirement for a "reasonableness" objection in the district court to preserve a claim that the sentence was substantively unreasonable. *See United States v. Flores-Mejia*, 759 F.3d 253, 257 (3rd Cir. 2014)(*en banc*)("While a

[2] The Second Circuit has reserved the question. *See United States v. Hause*, 690 Fed. Appx. 68, 69, n.1 (2d Cir. 2017)(unpublished)(citing *United States v. Thavaraja*, 740 F.3d 253, 258 n.4 (2d Cir. 2014)). The Eleventh Circuit has also reserved the question, though it expressed skepticism about the *Peltier* rule. *See United States v. Florez-Vasquez*, 651 Fed. Appx. 861, 869 (11th Cir. 2016)(unpublished)("The government urges that we should apply a plain error standard because Flores-Velasquez failed to challenge the substantive reasonableness of his sentence in the district court. However, the government has not cited any case in which we applied the plain error standard to review the *substantive* reasonableness of a sentence challenged for the first time on appeal.")(emphasis in original).

substantive objection to the sentence that a court will impose is noted when made and need not be repeated after sentencing, a procedural objection is to the form that the sentencing procedure has taken, e.g., a court's failure to give meaningful review to a defendant's substantive arguments."); *United States v. Curry*, 461 F.3d 452, 459 (4th Cir. 2006) (holding that a party's failure to "restate its position after the sentence was announced, by lodging a futile objection at the end of a sentencing colloquy, is without consequence"); *United States v. Morace*, 594 F.3d 340, 348, n.6 (4th Cir. 2010)(recognizing that a request for a different sentence preserves reasonableness review); *Vonner*, 516 F.3d at 391 (agreeing that "a defendant need not 'label his sentence "unreasonable" before the sentencing hearing adjourned' in order to preserve a reasonableness challenge on appeal")(quoting *Bras*, *infra*); *United States v. Townsend*, 618 F.3d 915, 920 (8th Cir. 2010)("In contrast to procedural errors, a defendant does not forfeit an attack on the substantive reasonableness of a sentence by failing to object in the district court."); *Autery*, 555 F.3d at 871 ("We find *Castro-Juarez*'s reasoning more persuasive than *Peltier*'s."); *United States v. McClendon*, 609 Fed. Appx. 488, 489 (9th Cir. 2015)(unpublished)(following *Autery*); *United States v. Walker*, 844 F.3d 1253, 1256 (10th Cir. 2017)("Generally, claims of substantive reasonableness need not be raised in district court."); *United States v. Brown*, 808 F.3d 865, 870 (D.C. Cir. 2015)("There is no preservation requirement for reasonableness review.") As the D.C. Circuit persuasively reasoned in *United States v. Bras*, 483 F.3d 103 (D.C. Cir. 2007): "Reasonableness . . . is the standard of appellate review, . . . not an objection that must be raised upon the pronouncement of a sentence." *Bras*, 483 F.3d at 113.

The present case thus presents an issue that has squarely divided the courts of appeals, though the overwhelming majority have sided with Petitioner's position.

B. *Peltier* conflicts with the precedent of this Court.

The Fifth Circuit's rule requiring objections to preserve substantive reasonableness review is inconsistent with this Court's pronouncements in *Rita v. United States*, 551 U.S. 338 (2007), and *Gall v. United States*, 552 U.S. 38 (2007), and with the text of Federal Rule of Criminal Procedure 51. *Rita* approved the use of a limited appellate presumption of reasonableness for guideline sentences. *See Rita*, 551 U.S. at 347. But this presumption simply reflects the concurrence of two separate and independent efforts to apply 18 U.S.C. §3553(a) to the defendant's case, one performed "wholesale" by the Sentencing Commission, and another performed by the district court at the "retail" level. *Id*. at 348. *Rita* thus makes clear that reasonableness is merely a standard for evaluating the sentence *at the appellate level*, not a target for the district court. *Rita* and *Gall* set forth the appropriate sentencing procedures for district courts in some detail. *See Gall*, 552 U.S. at 49–50. This discussion of the appropriate sentencing procedures after *Booker* explicitly reiterated that the presumption of reasonableness was not to be applied at the district court level. Rather, the sentencing court was instructed to "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Id.*

Rita and *Gall* thus recognize that substantive reasonableness is not a species of error but a standard of review. Federal Rule of Criminal Procedure 51 does not require the parties to state the applicable standard of review in order to preserve error. The Rule instead instructs that "a party may preserve a claim of error by informing the court . . . 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." FED. R. CRIM. P. 51. Parties can thus preserve reasonableness review by requesting a lower sentence, and grounding this objection in 18 U.S.C. § 3553(a). To say otherwise is to say that imposition of a "reasonable" sentence is the "action the part[ies] wish[] the court to take." Such a holding would completely divorce the *Booker* remedy from the text of 18 U.S.C. § 3553(a). The statute does not instruct district courts to impose a "reasonable" sentence, but instead requires a sentence "no greater than necessary" to achieve certain sentencing goals. 18 U.S.C. § 3553(a)(2). Petitioner's sentencing argument urged the Court to impose a sentence at the bottom of the Guidelines. *See* (ROA.171-173). That was sufficient to preserve his reasonableness challenge for plenary appellate review.

The Solicitor General appears to have critiqued the Fifth Circuit's position in a prior Brief in Opposition filed in the Supreme Court. In *Peltier v. United States*, No. 07–8978, 128 S. Ct. 2959 (U.S. June 23, 2008), the Solicitor General commendably acknowledged that "[t]he Fifth Circuit . . . overstated the support for its position by citing . . . several cases that applied plain-error review to procedural unreasonableness claims raised for the first time on appeal." Brief in Opposition at 10, n.1, *Peltier v. United States*, No. 07-8978.

The position of the court below is not merely in conflict with the overwhelming majority of its sister circuits – it is in the teeth of the text of Rule 51 and this Court's reasoning in *Rita* and *Gall*. The government itself is reluctant to defend the rule applied below.

C. This case is an appropriate vehicle to resolve this split.

In the absence of plain error review, the sentence would likely be found unreasonable. First, by imposing the same sentence on remand that it did at the initial sentencing, the district court effectively gave no weight to a policy decision of the Sentencing Commission. Specifically, it discounted the Commission's conclusion that a robbery defendant who physically restrains the victim should receive a higher sentence than one who does not. *See* USSG §2B3.1(4)(B).

This may be permissible in a case where the Guidelines are susceptible to a reasoned critique, suggesting that some decision by the Commission has simply misapplied the required sentencing factors. *See Kimbrough v. United States*, 552 U.S. 85, 110 (2007); *Spears v. United States*, 555 U.S. 261, 264 (2009). Nonetheless, "closer review" of sentences founded on such "policy disagreement" is in order. *Kimbrough*, 552 U.S. at 109. And here, the Commission's policy is hardly controversial. A defendant who physically restrains a victim exhibits heightened depravity, and has inflicted an added quantum of terror. To disregard this as irrelevant simply does not bear scrutiny.

Further, the district ignored entirely the government's decision to recommend a sentence at the bottom of the Guidelines. *See* (ROA.181). The government's recommendation was made in consideration for the defendant's decision to plead guilty, and his decision fully to cooperate with law enforcement concerning his participation in the offense of conviction and knowledge of criminal activities. *See* (ROA.181). The government is best positioned to evaluate the extent and value of the defendant's cooperation. *See* USSG §5K1.1, comment. (n. 3)("Substantial weight should be given to the government's evaluation

of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.").

Finally, and relatedly, the district court gave no apparent weight to the defendant's decision to cooperate with the government, and in particular to his decision to turn himself in rather than wait for arrest. This Court has recognized the powerful relationship between cooperation and the defendant's potential for rehabilitation:

> Few facts available to a sentencing judge ... are more relevant to 'the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with his society than a defendant's willingness to cooperate.

Roberts v. United States, 445 U.S. 552, 558 (1980)(internal quotations omitted).

In short, this a case where the standard of review matters. It is therefore a fine vehicle to address this long-standing circuit split regarding the standard of review.

III. This Court should grant *certiorari*, vacate the judgment, and remand in light of *Chavez-Meza v. United States*, __U.S.__, 138 S.Ct. 1959 (June 18, 2018), an authority that post-dated the opinion below.

Prior to *United States v. Booker*, 543 U.S. 220 (2005), federal sentences were in most cases determined by application of sentencing Guidelines. *See* 18 U.S.C. §3553(b)(1). In most cases, then, the rationale for the district court's selection of sentence was elucidated by its formal rulings on Guideline objections. *See* Fed. R. Crim. P. 32(i)(B). *Booker*, however, rendered the Guidelines advisory, and substituted the open-ended factors of 18 U.S.C. §3553(a). *See Booker*, 543 U.S. at 259. It follows that after *Booker*, a district court's formal selection of a Guideline range will not fully explain its choice of sentence. This Court has

emphasized that explanation of a defendant's sentence is an essential component of a system of advisory Guidelines.

It stressed in *Rita v. United States*, 551 U.S. 338 (2007) that:

> The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority. *See, e.g., United States v. Taylor*, 487 U.S. 326, 336-337, 108 S. Ct. 2413, 101 L. Ed. 2d 297 (1988). Nonetheless, when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a) -- that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way--or argues for departure, the judge normally need say no more. Cf. § 3553(c)(2) (2000 ed., Supp. IV). (Although, often at sentencing a judge will speak at length to a defendant, and this practice may indeed serve a salutary purpose.)

Rita v. United States, 551 U.S. 338, 356-357 (2007).

Indeed, it noted two particular circumstances where more extensive explanation for the sentence will be required. Such explanation is necessary when the sentence falls outside the Guideline range, or when the court rejects non-frivolous arguments for a sentence outside the range:

> Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments. Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.

Rita, 551 U.S. at 356-357.

Chavez-Meza v. United States, __U.S.__, 139 S.Ct. 1959 (2018), applied the requirement of sentence explanation to reductions under 18 U.S.C. §3582(c). In *Chavez-Meza*, the district court reduced a drug defendant's sentence to the middle of his reduced Guidelines, following a retroactive Guideline Amendment. *See Chavez-Meza*, 139 S.Ct. at 1964. The court did so on a pre-printed form, which Mr. Chavez-Meza argued to be inadequate. *See id.* In particular, he argued that the district court's decision to impose a sentence at a different point in the Guideline range (the middle of the Guidelines, rather than the bottom, as it did the first time) called for heightened explanation. *See id.* This Court held that reviewing courts may look to the explanation provided at the original sentencing to determine the basis for the sentence ultimately imposed. *See id.* at 1965. Finding that original explanation adequate, this Court affirmed the sentence. *See id.* Reliance on remarks at the earlier sentencing was appropriate, this Court explained, because a resentencing following amendment of the Guideline range is not intended to be a "plenary resentencing." *See id.* at 1967.

Three aspects of the opinion, however, offer potential benefit to Petitioner here. First, this Court offered plenary review of the defendant's failure-to-explain claim, even though there is no evidence that Mr. Chavez-Meza ever objected to the procedural reasonableness of the sentence. *See id.; see also United States v. Chavez-Meza*, 854 F.3d 655 (10th Cir. 2017); Brief for the Petitioner in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709088, at *3-6 (Filed March 26, 2018)(detailing the case's factual background); Brief for the Respondent in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709089, at *2-8

(Filed March 28, 2018)(same). In the case at bar, the Fifth Circuit held that such claims could be reviewed only for plain error in the absence of explicit objection. *See* [Appx. D, at p.3].

That position is refuted by this Court's treatment of the claim in *Chavez-Mez*a, which comports with well reasoned decisions of the Fourth and Seventh Circuits. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010)("By drawing arguments from § 3553 for a sentence different than the one 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."); *United States v. Cunningham*, 429 F.3d 673, 675-680 (7th Cir. 2005)(Posner, J.)(offering plenary review, and relief, to a district court's failure to address a defendant's arguments in mitigation). If the court below were to follow this Court's example in *Chavez-Meza*, it would afford plenary procedural reasonableness review. Notably, the court below expressly relied on the absence of clear error, a requirement on plain error review, but not in plenary review. *See* [Appx. D, at p.3].

Second, the *Chavez-Meza* opinion recognized that in some cases a district court's refusal to issue a "proportional reduction" during a resentencing would require a more than minimal explanation. It said:

> [t]his is not to say that a disproportionate sentence reduction never may require a more detailed explanation. It could be that, under different facts and a different record, the district court's use of a barebones form order in response to a motion like petitioner's would be inadequate. As we said above, the courts of appeals are well suited to request a more detailed explanation when necessary.

Chavez-Meza, 138 S.Ct. at 1967.

The differences between Petitioner's case and *Chavez-Meza* show that a more extensive explanation was required here. Unlike Mr. Chavez-Meza, Petitioner received a plenary resentencing for error, not a limited resentencing. *See id.* at 1967 (emphasizing this fact). At the time of Petitioner's resentencing, he had never received a sentencing proceeding free of material error. Further, the district court did not merely decline a "proportional" reduction as occurred in *Chavez-Meza*, *id*. at 1966, it declined to reduce the sentence at all, in spite of a reduced Guideline range.

That decision is all the more striking given the reason for the reduced range in Petitioner's case. The Commission did not simply change its mind about the proper application of 18 U.S.C. §3553(a), as it did in Mr. Chavez-Meza's case. *See id.* at 1964-1965. Rather, Petitioner's Guideline range was overestimated by the district court in the first sentencing proceeding. To impose the same sentence on resentencing is to hold that the presence or absence of physical restraint in a robbery bears no relation to the factors named at 18 U.S.C. §3553(a). That puzzling conclusion – quite the opposite of the Commission's, *see* USSG §2B3.1(4)(B) – calls for some explanation, at the very least. And while the district court in *Chavez-Meza* offered a meaningful explanation for the sentence at the first sentencing, *see Chavez-Meza*, 139 S.Ct. at 1965, the district court here has never given the parties any more explanation than the same 14 word script in either proceeding:

> I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.

(ROA.163, 176). This lies, to the say least, at the border of adequacy. *Cf. United States v. Grier*, 475 F.3d 556, 571 (3rd Cir. 2007)(*en banc*)(remanding for inadequate explanation

where the district court said simply "'[t]he Court believes that 100 months is reasonable in view of the considerations of section 3553(a).'")

Third, this Court in *Chavez-Meza* explained that courts of appeal may order limited remands to obtain fuller explanation of the sentence "even when there is little evidence in the record affirmatively showing that the sentencing judge failed to consider the § 3553(a) factors." *Chavez-Meza*, 139 S.Ct. at 1965. The court below has never used this procedure to rectify a potential deficiency in the explanation for the sentence. Rather, it has simply held that an incomplete explanation must be affirmed when the defendant cannot meet all four prongs of the plain error standard on the record below. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 361-365 (5th Cir. 2009). This is accordingly a new tool in failure-to-explain cases, which became available after the decision below.

This Court "regularly hold(s) 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." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, GVR is appropriate if the decision "reveal(s) 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*, 516 U.S. at 167.

Chavez-Meza meets this standard. This Court recognized in *Chavez-Meza* that more extensive explanation may be necessary in some cases involving a reduced Guideline range. The factors discussed in *Chavez-Meza* show that this is one such case. In the absence of plain

error review, or given an opportunity for a limited remand, and given the guidance of *Chavez-Meza*, it is at least reasonably that some form of relief will be granted if the case is returned to the Fifth Circuit.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted this 28th day of August, 2018,

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APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAIME SHAKUR GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Jaime Shakur Garcia, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 28th day of August, 2018

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No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

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PROOF OF SERVICE

I, Kevin Joel Page, do certify that on this date, August 28, 2018, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via Federal Express Overnight. The Solicitor General, Anderson Hatfield, Assistant U.S. Attorney, and the petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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