No. _____

In the Supreme Court of the United States

Sonny Scott, *Petitioner*,

v.

United States of America, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

CLAUDE J. KELLY
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA
CELIA C. RHOADS
COUNSEL OF RECORD

500 POYDRAS STREET, SUITE 318
HALE BOGGS FEDERAL BUILDING
NEW ORLEANS, LOUISIANA 70130
(504) 589-7930
CELIA_RHOADS@FD.ORG

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

In the years since *United States v. Booker*, federal appellate courts have struggled to balance the requirement that they afford district court sentences great deference, while also ensuring meaningful, fair, and predictable appellate review of sentencing decisions. In a trio of cases decided two years after *Booker*, this Court introduced the "reasonableness" standard now applied by appellate courts to district court sentences. The Court explained that appellate courts must examine both the procedural and substantive reasonableness of a sentence under the deferential abuse of discretion standard.

The Court did not address, however, the proper standard of review when the appellant fails to object to the sentence's reasonableness at sentencing. As a result, a multi-dimensional circuit split has emerged over the standard of review applicable to reasonableness challenges. The Fifth Circuit takes an extreme view: all reasonableness arguments must be made expressly in the district court to avoid plain error review, and a defendant must object to the substantive reasonableness of a sentence *after* its pronouncement. More broadly, appellate courts have struggled to consistently and fairly apply the reasonableness standard, leading to widely disparate reversal rates on reasonableness grounds, particularly substantive reasonableness. That is particularly apparent in the Fifth Circuit, which, one study found, affirms 99% of sentences challenged as substantively unreasonable.

Thus, the questions presented are:

(1) When—if at all—must a defendant object to the reasonableness of a sentence to preserve that argument for appellate review?

(2) What is the proper application of reasonableness review?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

IN THE
SUPREME COURT OF THE UNITED STATES

SONNY SCOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner Sonny Scott respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

On July 10, 2018, a panel of the Fifth Circuit Court of Appeals entered its unpublished opinion affirming the judgment of the United States District Court for the Eastern District of Louisiana. *United States v. Scott*, 730 F. App'x. 244 (5th Cir. 2018). A copy is attached to this petition as an appendix. App., *infra*, 1a.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals were entered on July 10, 2018. No petition for rehearing was filed. This petition is filed within 90

days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE AND SENTENCING GUIDELINE INVOLVED

Federal Rule of Criminal Procedure 51(b) provides:

> 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 4A1.3(a) of the U.S. Sentencing Guidelines provides in relevant part:

> (a) UPWARD DEPARTURES.
>
> (1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.
>
> (2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a) may include information concerning the following:
>
> (A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).
>
> (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
>
> (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
>
> (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
>
> (E) Prior similar adult criminal conduct not resulting in a criminal conviction.

STATEMENT OF THE CASE

I. District Court Proceedings

On April 6, 2017, Petitioner Sonny Scott pleaded guilty, without a plea agreement, to the single count against him: felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Mr. Scott's Pre-sentence Report (PSR) noted that he had three prior convictions. The PSR's calculated criminal history score fully accounted for all three. The first two convictions—one for possession with intent to distribute a counterfeit controlled substance and one for armed robbery—were both over 15-years-old and occurred when Mr. Scott was a young man (18 and 21 respectively). Mr. Scott's third offense, attempted possession of a firearm by a felon, arose from those first two convictions. That offense occurred in 2010, nearly a decade after his last conviction and seven years before his instant offense. According to the PSR, Mr. Scott readily admitted to the offense and took responsibility at the scene. He explained to police that he felt he needed the gun for protection that day, having just witnessed a shooting at a second-line parade. In addition to those three convictions, the PSR noted a single arrest. Seventeen years earlier, at the age of 20, Mr. Scott was arrested while driving a car that earlier had been reported stolen. Nothing came of that arrest, and the PSR provided few details indicative of its relevance or reliability.

Despite the staleness of the first two convictions and the relatively minor nature of the third, all three factored heavily into Mr. Scott's sentence, punishing him again and again for that same conduct. First, the convictions served as the basis for his instant offense—being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1).

Second, each of the three prior convictions received three criminal history points apiece, the maximum permitted under the Guidelines. U.S.S.G. § 4A1.1(a). Those points alone accounted for a multi-year increase in the top of Mr. Scott's Guidelines range. *See* U.S.S.G. Sentencing Table. Third, Mr. Scott received a significantly higher base offense level, because the older two convictions qualified as a crime of violence and a controlled substance offense. *See* U.S.S.G. § 2K2.1(a)(2). This too resulted in a significant increase in the top of Mr. Scott's Guidelines range, skyrocketing his base offense level to 24. *See id*. Thus, Mr. Scott's criminal history—including two crimes that were over 15-years-old and occurred when Mr. Scott was very young—not only served as the basis for his conviction, but also factored into his Guidelines' range in multiple ways.

Mr. Scott's nine criminal history points placed him in criminal history category IV. This, combined with a base offense level of 21 (after a reduction for acceptance of responsibility), produced a Guidelines range of 57 to 71 months of imprisonment. The PSR did not suggest that Mr. Scott's criminal history score might be under-representative, no doubt because all of Mr. Scott's convictions already had significantly and repeatedly increased the punishment he faced. Indeed, the probation officer did not identify "any factors that would warrant a departure from the applicable guideline range."

Nonetheless, the day before Mr. Scott's scheduled sentencing hearing, the district court notified the parties that it was "considering an upward departure pursuant to [U.S.S.G. §] 4A1.3(a) . . . as reliable information indicates that

defendant's criminal history category substantially under-represents the seriousness of defendant's criminal history and the likelihood that the defendant will commit other crimes." "Alternatively," the court warned that it was "considering an upward variance for the reasons set forth in Title 18 U.S.C. §3553(a)." At Mr. Scott's request, the scheduled sentencing hearing was continued, and the court gave Mr. Scott's counsel a little over a week to file written objections to the potential departure or variance.

Mr. Scott's counsel submitted written objections to the proposed departure. Specifically, she urged that any deviation from the Guidelines "would create a substantially unreasonable sentence" and reminded the court that its sentencing decision must be guided by the principle that a sentence be "'sufficient, but not greater than necessary' to achieve the purposes of sentencing listed in §3553(a)(2)." She pointed out that Mr. Scott's criminal history already was adequately represented in the PSR, and, furthermore, that Mr. Scott's criminal history had already factored *heavily* into his Guidelines range. She warned the court that penalizing Mr. Scott for those convictions yet again would result in unreasonable over-punishment.

At sentencing, prior to the court's pronouncement of the sentence, Mr. Scott's counsel orally renewed her written objections to the district court's proposal to go above the calculated Guidelines. She again urged that Mr. Scott "had . . . a base offense level of 24, which arguably [had] enhanced his sentence already, tak[ing] into consideration his record." And she reiterated that Mr. Scott's "guideline range ha[d] been adequately presented through the [PSR]." Mr. Scott also spoke, noting his youth

at the time of his first two convictions, describing for the court his difficult family situation, and acknowledging that he struggled with drug addiction.

The district court agreed that Mr. Scott's arrest at age 20—which did not result in a conviction—should not factor into the departure or variance decision. The court also agreed that Mr. Scott was relatively young at the time of his first two offenses. Nonetheless, the court concluded that a Guidelines range of 57 to 71 months was "not appropriate in this particular case as it is too lenient[.]" The court then determined that it would "incrementally review other criminal history categories within base offense level 21 before [arriving] at an appropriate sentence." The district court jumped from Mr. Scott's criminal history category of IV to the maximum criminal history category of VI, stating, "even when considering criminal history category 6 and a base offense level of 21, the Court does not find that range to be appropriate in this case," stating that "the extent and nature of [Mr. Scott's] criminal history taken together are sufficient to warrant an upward departure from criminal history category 6."

The court continued to move down the sentencing table, now above the Guidelines range for even those with the absolute worst criminal history category. The court finally landed on the range produced by a maximum criminal history category VI and base offense level 23: 92 to 115 months of imprisonment—years above Mr. Scott's actual Guidelines range. In total, this constituted a movement of four total spaces on the Guidelines table: two increases in criminal history category, and two increases in base offense level. *See* U.S.S.G. Sentencing Table. Having arrived at this

new, much higher range, the district court sentenced Mr. Scott to 100 months of imprisonment, a 40% increase over the top of his actual Guidelines range.

Mr. Scott's counsel did not—yet again—renew her objection on the ground that such an above-Guidelines sentence was substantively unreasonable, no doubt, because she already had done so twice before and the district court was well aware of her objection.

II. Fifth Circuit Affirmance

On appeal, Mr. Scott argued that the district court abused its discretion both by imposing an above-Guidelines sentence pursuant to U.S.S.G. § 4A1.3 and by deviating from the Guidelines to such an extreme degree—above the maximum criminal history category. He further noted that even if the court reviewed the district court's departure alternatively as a variance, the above-Guidelines sentence nonetheless constituted an abuse of discretion. He urged that the sentence was substantively unreasonable, because it gave excessive weight to a single sentencing factor—Mr. Scott's criminal history. He argued, as his counsel had below, that his past criminal conduct already was well accounted for and thus could not support an above-Guidelines sentence based on underrepresented criminal history. Moreover, Mr. Scott noted, no compelling circumstances justified elevating Mr. Scott's sentence above the Guidelines range for worst-of-the-worst offenders: those with the maximum criminal history category of VI.

In its response, the Government acknowledged that Mr. Scott's counsel had urged in her objections that departing upward would create a substantively

unreasonable sentence. The Government urged, however, that counsel did not object "to the *extent* of the selected departure range"—which of course was unknown at the time of counsel's objections—and therefore that the substantive unreasonableness challenge should be reviewed for plain error only. Similarly, the Government argued that counsel did not object to the substantive unreasonableness of the 100-month sentence after it was pronounced, so that argument too should be subjected to the plain error standard. This, despite the fact that counsel clearly and repeatedly stated that *any* sentence above the Guidelines would be substantively unreasonable. Finally, because counsel used the term "departure" when objecting on substantive reasonableness grounds, the Government urged that any substantive reasonableness issues related to the court's decision, in the alternative, to vary upward based on the same reasoning (Mr. Scott's underrepresented criminal history) must receive plain error review only.

The Fifth Circuit, in a brief per curium opinion, noted that Mr. Scott's counsel "filed a written objection, contending an upward departure would result in an unreasonable sentence." *United States v. Scott*, 730 F. App'x 244, 245 (5th Cir. 2018). The Court stressed, however, that Mr. Scott's counsel "did not object *after* the sentence was imposed." *Id.* (emphasis added). Moreover, the Court noted, "[b]ecause Scott did not object in district court to the *extent* of the departure, his challenge to the extent is reviewed only for plain error." *Id.* at 246 (emphasis added). Accordingly, citing Fifth Circuit precedent, the court analyzed the substantive reasonableness of the length of Mr. Scott's sentence and the extent of the departure for plain error only.

The court provided little analysis stating: "[T]his court must extend deference to the court's ruling the 18 U.S.C. § 3553(a) factors warranted the departure, even if this court would have imposed a different sentence. Further, this court has affirmed departures considerably larger than the 29-month departure in this instance." *Id.* at 246–47 (internal citations omitted). The court then affirmed Mr. Scott's 100-month, above-Guidelines sentence.

REASONS FOR GRANTING THE PETITION

In the years since *United States v. Booker*, 543 U.S. 220 (2005), federal appellate courts consistently have struggled to balance the requirement that they afford district court sentences great deference, while also ensuring meaningful, fair, and predictable appellate review of sentencing decisions. In a trio of cases decided two years after *Booker*— *Rita v. United States*, 551 U.S. 338 (2007), *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007)—this Court introduced the "reasonableness" standard (consisting of procedural and substantive reasonableness) now applied by appellate courts to district court sentences. But in the decade since, appellate courts have been unable to apply that standard consistently, leading to confusion and disparate results among circuits. Two particularly fraught issues are presented by Mr. Scott's case.

First, this Court has not squarely addressed the preservation requirements applicable to reasonableness arguments and the proper standard of review applicable when an appellant fails to adequately object to a sentence's reasonableness at sentencing. As a result, the issue is the subject of a long-entrenched, multi-dimensional circuit split, in which courts have taken widely varying approaches. For example, some circuits have held that defendants are not required to object on substantive reasonableness grounds to preserve that issue for appeal. Others hold that an objection is required for certain types of substantive reasonableness claims, but not others. And, finally, the circuits disagree about whether a defendant must object to the reasonableness of a sentence *after* the sentence is pronounced, regardless

of whether the arguments were raised previously. The Fifth Circuit has adopted the most restrictive approach, illustrated by Mr. Scott's case. That court requires express objections for all types of reasonableness claims and holds that defendants must object to the specific sentence imposed *after* it has been pronounced to avoid plain error review of its length or the extent of its aberration from the Guidelines. Settling the circuit split over this issue—which impacts scores of criminal defendants—is reason enough for this Court to grant certiorari in Mr. Scott's case. But correction of the Fifth Circuit's unduly restrictive approach to error preservation is also necessary.

Second, a broader problem also is apparent in the Fifth Circuit's treatment of Mr. Scott's claims: varying degrees of deference applied by circuit courts to district court sentences and widespread refusal among many to engage in any meaningful reasonableness review. The Fifth Circuit is the least likely court to reverse a sentence on substantive reasonableness grounds—upholding 99% of sentences in the face of such a challenge, according to a recent study. Mr. Scott's case illustrates the Fifth Circuit's thin review of substantive reasonableness, which essentially constitutes no meaningful review at all. This approach represents improper application of *Gall* and illustrates the court's abandonment of meaningful reasonableness review. In sum, substantive reasonableness has become a hallow protection and futile path for appellate argument in the Fifth Circuit and elsewhere.

This Court should clarify both the standard of review and the appropriate method for reviewing sentences for reasonableness—issues relevant to all criminal appeals and deserving of this Court's attention.

I. This Court should clarify the standard of review and preservation requirements applicable to reasonableness challenges.

In *United States v. Gall*, this Court held that post-*Booker*, appellate review of sentencing decisions is limited to determining whether sentences are reasonable. 552 U.S. at 46. The Court broadly outlined a two-step process by which appellate courts must conduct reasonableness review of sentences. First, an appellate court must ensure that a sentence is procedurally reasonable.[1] *See id.* at 51. Second, the appellate court must consider the substantive reasonableness of the sentence, looking to the totality of the circumstances and the extent of the deviation from the Guidelines, while giving "due deference" to the district court's weighing of the § 3553(a) factors. *Id.* at 51. In other words, *Gall "*required a deferential—but real—inquiry into the substance of sentences." Note, *More Than A Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 Harv. L. Rev. 951, 957 (2014).

Importantly, *Gall* explained that the abuse of discretion standard applies to appellate review of all reasonableness sentencing questions. *Id.* at 594. But the Court did not indicate whether this abuse of discretion standard applies even when a party fails to object at sentencing to the reasonableness of the sentence. This open question has led to confusion and disagreement among circuit courts, which are divided on when an objection is necessary to preserve a reasonableness claim for appeal. In other

---

[1] Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Id.* at 51.

words, when a defendant does not object on reasonableness grounds in the district court, is that error reviewed for abuse of discretion or plain error? The answer to that question varies by circuit, leading to disparate review and results for similarly situated defendants.

As an initial matter, many courts (but not all) have distinguished between substantive and procedural reasonableness when determining the appropriate standard of review, holding that procedural errors must be expressly identified at sentencing to preserve them for appeal. For example, courts often (but not always) have held that "a party's failure to object on the ground that the district court did not sufficiently address and apply the factors listed in § 3553(a) triggered plain error review." *United States v. Autery*, 555 F.3d 864, 869 (9th Cir. 2009) (internal quotation marks and citation omitted); *see also United States v. Torres-Duenas*, 461 F.3d 1178, 1182–83 (10th Cir. 2006) (explaining that plain-error review applies to defendants' challenges to the "method by which the sentence was determined" in the absence of an objection but stating that "when the claim is merely that the sentence is unreasonably long, we do not require the defendant to object in order to preserve the issue"); *United States v. Flores-Mejia*, 759 F.3d 253, 255 (3d Cir. 2014) ("[W]hen a party wishes to take an appeal based on a procedural error at sentencing—such as the court's failure to meaningfully consider that party's arguments or to explain one or more aspects of the sentence imposed—that party must object to the procedural error complained of after sentence is imposed in order to avoid plain error review on appeal."); *United States v. Villafuerte*, 502 F.3d 204, 211 (2d Cir. 2007) ("We now hold

that plain error analysis in full rigor applies to unpreserved claims that a district court failed to comply with § 3553(c)"). *But see United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007).[2]

Nonetheless, there remains conflict over preservation of procedural errors, such as when such objections must be made to preserve them for review. *Compare, e.g.*, *Flores-Mejia*, 759 F.3d at 257 (requiring procedural reasonableness objections at the time a sentence is pronounced), *with United States v. Lynn*, 592 F.3d 572, 578–79 (4th Cir. 2010) (reasoning that Federal Rule of Criminal Procedure 51 "does not require a litigant to complain about a judicial choice after it has been made" and noting that "[b]y 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" (internal quotation marks omitted)).

Circuit caselaw on substantive reasonableness review is even more tangled. *Compare, e.g.*, *United States v. Heard*, 709 F.3d 413, 425 (5th Cir. 2013) ("This court requires an objection to preserve a claim that the sentence is substantively

---

[2] *See also United States v. Vonner*, 516 F.3d 382, 395 (6th Cir. 2008) (Clay, J., dissenting) ("Because Rita and Gall do not require a defendant to object to the procedural or substantive reasonableness of his sentence at the time of sentencing, and indeed suggest that it would be improper to raise such an objection with the district court, I find the majority's application of plain error review inappropriate. . . . In contrast to the majority, I do not believe that plain error is the appropriate standard of review to apply to Vonner's procedural reasonableness challenge. Because reasonableness is the *appellate* standard of review, Vonner was not required to object to either the procedural or substantive reasonableness of his sentence at the time of sentencing, and thus should not face plain error review for failure to raise such an objection." (internal citations omitted)).

unreasonable."), *Autery*, 555 F.3d at 869–71 (standard of review of sentence's substantive reasonableness is abuse of discretion, regardless of objection below), *and United States v. Castro-Juarez*, 425 F.3d 430, 433–34 (7th Cir. 2005) (same). Some circuits have held that the standard of review for a sentence's substantive reasonableness is abuse of discretion—not plain error—regardless of whether there was an objection below. *See, e.g.*, *Autery,* 555 F.3d at 870–71 (outlining the split); *Bras,* 483 F.3d at 113; *Torres–Duenas,* 461 F.3d at 1182–83; *Castro–Juarez,* 425 F.3d at 433–34.

For example, the D.C. Circuit has explained: "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 (emphasis in original) (internal citation omiited). And, from a practical perspective, the Seventh Circuit has noted:

> To 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. Since the district court will already have heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence, we fail to see how requiring the defendant to then protest the term handed down as unreasonable will further the sentencing process in any meaningful way.

Castro-Juarez, 425 F.3d at 433–34.

Even among circuits that reject strict preservation requirements for substantive reasonableness, however, there is conflict. For example, some circuits distinguish between different types of substantive errors, requiring express objections in some situations, but not others. *See, e.g.*, *Vonner*, 516 F.3d at 385 ("If a sentencing judge asks [whether the parties have any objections after a sentences is

pronounced] and if the relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court."); *id.* at 391 ("Nor is it the case that a request for a variance in the district court by itself preserves *all* procedural and substantive challenges to a sentence."); *United States v. Mancera-Perez*, 505 F.3d 1054, 1059 (10th Cir. 2007) ("We therefore clarify *Torres-Duenas*'s exception allowing reasonableness review of unpreserved substantive sentencing challenges to require that the defendant have at least made the argument for a lower sentence before the district court.").[3]

The Fifth Circuit has adopted the strictest approach to preservation of reasonableness challenges. All types of reasonableness objections—both procedural and substantive—must expressly be raised below to avoid plain error review. *See, e.g.*, *United States v. Peltier*, 505 F.3d 389, 391–92 (5th Cir. 2007); *United States v. Rodriguez-De la Fuente*, 842 F.3d 371, 374 (5th Cir. 2016); *United States v. Cancino-Trinidad*, 710 F.3d 601, 605 (5th Cir. 2013); *United States v. Powell*, 732 F.3d 361, 381 (5th Cir. 2013).

---

[3] Moreover, even *within* circuits, caselaw on standards of review applicable to reasonableness claims is inconsistent. D.C. Circuit caselaw is particularly confusing. That court appeared early on to adopt a blanket rule that *no* reasonableness claims (procedural or substantive) must be preserved, but now appears to have walked that stance back somewhat. *Compare, e.g.*, *Bras*, 483 F.3d at 113 (stating broadly that "reasonableness" is the appellate standard, not an objection that must be preserved, and rejecting the government's insistence that the court "may review this claim only for 'plain error,' because Bras did not . . . object that the court did not adequately consider the factors set forth in § 3553" (internal quotation marks omitted)), *with United States v. Wilson*, 605 F.3d 985, 1034 (D.C. Cir. 2010) (en banc) (stating, without discussion, that "[w]here a defendant failed to make a timely objection to the alleged procedural error in the district court, . . . our review is for plain error.").

And, as Mr. Scott's case illustrates, the Fifth Circuit has applied this requirement to mandate that a defendant expressly object to the precise length of a sentence—or the extent of a variance or departure—*after* the sentence is pronounced, even if the defendant previously argued for a sentence within a certain range or against an above-Guidelines deviation. *See, e.g.*, *Peltier*, 505 F. 3d at 390–92 (plain error review applied when no objection on basis of reasonableness after statutory maximum and above-Guidelines sentence was announced, despite counsel's earlier argument for a below-Guidelines sentence); *United States v. Whitelaw*, 580 F.3d 256, 259–60 (5th Cir. 2009); *see also* Benjamin K. Rabin, Note, *"Objection: Your Honor Is Being Unreasonable!"—Law and Policy Opposing Federal Sentencing Order Objection Requirement*, Note, 63 Vand. L. Rev. 235, 244–50 (2010) (describing the circuit split over preserving error to procedurally and substantively unreasonable sentences); Charles C. Bridge, Note, *The Bostic Question*, 126 Yale L.J. 894, 897 & n.21 (2017) (examining the split and observing that "[o]nly in the Fifth Circuit must defendants lodge a post-imposition substantive-reasonableness objection to avoid plain-error review.").

The long-standing disparate treatment of reasonableness review among the circuits is reason enough for this Court to clarify this issue. But so too is the need to correct the Fifth Circuit's strict preservation approach illustrated here, which is unduly burdensome and practically flawed. Indeed, the Fifth Circuit's rule makes particularly little sense in the context of substantive reasonableness claims, as compared to other types of errors. As the Ninth Circuit has explained:

> This [strict preservation] rationale makes sense in many contexts, such as where the court miscalculates the Guidelines sentencing range or neglects to consider an essential statutory factor. But in a substantive reasonableness challenge, the parties have already fully argued the relevant issues (usually both in their briefs and in open court), and the court is already apprised of the parties' positions and what sentences the parties believe are appropriate. In such a case, requiring the parties to restate their views after sentencing would be both redundant and futile, and would not "further the sentencing process in any meaningful way."

Autery, 555 F.3d at 871 (quoting *Castro–Juarez*, 425 F.3d at 434).

For these reasons, the Ninth Circuit rejected the Fifth Circuit's approach and held that "the substantive reasonableness of a sentence—whether objected to or not at sentencing—is reviewed for abuse of discretion." *Id*. Other circuits similarly have rejected the Fifth Circuit's approach to preserving substantive reasonableness arguments. *See United States v. Curry,* 461 F.3d 452, 459 (4th Cir. 2006) (stating 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. Swehla,* 442 F.3d 1143, 1145 (8th Cir. 2006) ("Once a defendant has argued for a sentence different than the one given by the district court, we see no reason to require the defendant to object to the reasonableness of the sentence after the court has pronounced its sentence."); *Castro-Juarez,* 425 F.3d at 433–34 (stating that the court "fail[ed] to see how requiring the defendant to then protest the term handed down as unreasonable [after arguing for a lower sentence at the hearing and in a previously filed sentencing memorandum] will further the sentencing process in any meaningful way"). *But see Vonner*, 516 F.3d at 385 ("If a sentencing judge asks [whether the parties have any objections after a sentences is pronounced] and if the

relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court."); *id.* at 391 ("Nor is it the case that a request for a variance in the district court by itself preserves *all* procedural and substantive challenges to a sentence.").

The Fifth Circuit's approach also violates the plain meaning of Federal Rule of Criminal Procedure 51, which governs how parties preserve claims for appeal. That rule states that "[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." Fed. R. Crim. P. 51(b). As Judge Greenaway on the Third Circuit has explained:

> While "made" denotes that a request (e.g., objection) can be raised after the order, the "or sought" language anticipates a party preserving a claim prior to the court's ruling. "To seek" means "to ask for" or "to try to obtain," which necessarily takes place prior to the court's ruling. . . . Under the plain language of Rule 51, an objection—which can indeed only take place after the court's ruling—is only one way, not "the" way, to preserve a claim. The rule expressly provides that parties may also preserve a claim for appeal when they inform the court "of the action the party wishes the court to take[.]"

Flores-Mejia, 759 F.3d at 261–62 (Greenaway, J., dissenting) (quoting Fed. R. Crim. P. 51(b)).

In other words, the Fifth Circuit's practice violates Rule 51(b) "by forcing a party to object after the judge has ruled instead of permitting the party to simply present its position during the argument portion of the hearing." Raybin, *supra*, at 255; *see also United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009) ("Both the Rules of Evidence and the Rules of Criminal Procedure require a litigant to make

known the position it advocates and to present evidence and argument for that position. These steps are essential to facilitate intelligent decision in the district court. Counsel present positions, and judges then decide. But the rules do not require a litigant to complain about a judicial choice after it has been made. Such a complaint is properly called, not an objection, but an exception. The rule about exceptions is explicit: 'Exceptions to rulings or orders of the court are unnecessary.' [The defendant] and his lawyer argued for a lower sentence, and they gave reasons. They have preserved their appellate options." (quoting Fed. R. Crim. P. 51(a)).[4]

Finally, courts often cite the concern of "sandbagging" when advocating for strict preservation of reasonableness claims—whether substantive or procedural.

---

[4] This flaw applies equally to strict preservation requirements for procedural reasonableness claims—a view more broadly adopted by circuit courts and the context from which Judge Greenaway's dissent, quoted above, arose. For example, the Third Circuit—sitting en banc and reversing circuit precedent—held that "a defendant must raise any *procedural* objection to his sentence at the time the procedural error is made, i.e., when sentence is imposed without the court having given meaningful review to the objection." *Flores-Mejia*, 759 F.3d at 256 (emphasis added). The court determined that "[u]ntil sentence is imposed, the error has not been committed." *Id*. Unlike the Fifth Circuit, the court took pains to distinguish between procedural errors and substantive ones, explaining:

> Unlike a substantive objection to a sentence, a procedural defect in a sentence may not occur until the sentence is pronounced, and, unless the objection is meaningfully dealt with earlier, no challenge to the sufficiency of the court's explanation can be made until that time. Simply put, a defendant has no occasion to object to the district court's inadequate explanation of the sentence until the district court has inadequately explained the sentence. Thus, the procedural objection can be raised for the first time only after the sentence is pronounced without adequate explanation.

Id. at 257. But Judge Greenaway's spirited dissent explained that the circuit's new rule violated the plain text of Federal Rule of Criminal Procedure 51, which does not require after-the-fact exceptions to an error and does not distinguish between substantive and procedural errors. *Id*. at 262 (Greenaway, J., dissenting) ("The majority insists that a party must re-raise any procedural objection after the pronouncement of the sentence to avoid plain error review. No such requirement appears in Rule 51.").

See, e.g., *Flores-Mejia*, 759 F.3d at 257. But, in the context of reasonableness review, "parties already have an incentive to bring errors to the district court's attention even when a claim is preserved[,] . . . because they have a better shot at correcting errors there than before an appellate court that must review under a deferential, reasonableness standard." *Id*. at 263 (Greenaway, J., dissenting). This is particularly true in the Fifth Circuit, where, as discussed below, the court almost *never* reverses sentences based on substantive reasonableness. Litigants would be wise simply to object in the district court, where correction is more likely, than seek reversal in the Fifth Circuit, where affirmance is almost certain. Moreover, district courts already are well aware that their sentences cannot be longer than necessary. *See Vonner*, 516 F.3d at 391 ("That counsel need not register a complaint with the district court that the proposed sentence is 'unreasonable' follows from the fact that the district court's job is to impose a sentence 'sufficient, but not greater than necessary' to comply with the § 3553(a) factors[.]"). Litigants do not hide the ball by failing to argue that a sentence, after its pronouncement, is "too long" when they already have made arguments in favor of the sentences they believe to be reasonable.

Mr. Scott's case in particular reveals the absurdity of the Fifth Circuit's strict preservation rule. The district court plainly was on notice that Mr. Scott's counsel believed an upward departure or variance of any kind would result in a substantively unreasonable sentence. Mr. Scott's attorney provided the district court with a lengthy explanation, both pre-sentencing and during the sentencing hearing, for why imposing an above-Guidelines sentence—and specifically doing so based on Mr.

Scott's criminal history—would be unreasonable. However, because Mr. Scott's counsel did not lodge that same objection a *third time* after the district court formally announced Mr. Scott's sentence—as expected, an above-Guidelines sentence based on Mr. Scott's criminal history—Fifth Circuit precedent limited his appeal challenging the length of the sentence and extent of the deviation to plain error.

Importantly, the circuit split over standards of review applicable to reasonableness challenges will not resolve itself without this Court's intervention. This conflict emerged over a decade ago and shows no sign of resolution. Reasonableness review continues to confuse both attorneys and judges and only has become more tangled over time. Granting certiorari in Mr. Scott's case in particular provides two benefits. This Court can resolve the layered circuit split over the standard of review applicable to reasonableness claims, while also correcting the Fifth Circuit's unduly burdensome preservation requirement, which violates the Federal Rules of Criminal Procedure and deprives defendants of the meaningful appellate review to which they are entitled.

II. This Court should clarify proper application of reasonableness review.

Mr. Scott's case illustrates another, related error that deserves this Court's attention. In the decade since *Gall*, Appellate courts have proven unable to develop consistent and sound approaches to reasonableness review, resulting in wildly varying levels of deference to district court sentences and disparate reversal rates. Commentators, the U.S. Sentencing Commission, and even judges for years have bemoaned the state of reasonableness review in the circuit courts, urging both this

Court and Congress to take action. This is particularly true of *substantive* reasonableness. And, on this issue too, the Fifth Circuit has positioned itself at one extreme in a broad spectrum of circuit approaches: almost never reversing sentences (particularly above-Guidelines sentences) on substantive reasonableness grounds and applying a level of appellate review so thin that it is nearly nonexistent.

In 2016, an empirical review of a decade of post-*Booker* appeals found wide variation among the circuits in reversal rates of sentences based on substantive reasonableness. *See* Carrie Leonetti, *De Facto Mandatory: A Quantitative Assessment of Reasonableness Review After* Booker, 66 DePaul L. Rev. 51 (2016). The author of the study explained:

> Some circuits vest an inordinate amount of discretion at the district court level, which is unreviewable in practice. At the other end of the spectrum, other circuits vest much more discretion at the appellate level, in one of two different ways: either they retain discretion to require district courts to vary from guideline sentences for defendants whose crimes they believe the guidelines to be flawed; or they retain the discretion to require district courts to impose within-guideline sentences in all but the most extraordinary cases by setting a high threshold for sentencing variances to be affirmed on appeal.

Id. at 60.

Specifically, the study found that "[t]he First, Fifth, Tenth, and Eleventh Circuits demonstrated extraordinary deference to district court sentences in their post-*Booker* reasonableness review with little difference between their treatment of in-guideline sentences and variances on appeal." *Id.* at 71. The Fifth Circuit was the most deferential—and to an extreme degree. According to the study and the sample it examined, the Fifth Circuit almost *never* found sentences substantively unreasonable, affirming "approximately 99% of the sentences that it reviewed,"

reversing only two. *Id*. Indeed, the Fifth Circuit affirmed "all variances [it] reviewed"—69 upward and 10 downward. *Id*. at 74.

The Sixth, Seventh, and Ninth Circuits, on the other hand, showed "less deference to district court sentences on appeal and more willingness to reverse sentences that they found to be substantively unreasonable." *Id*. at 71. A third category of courts—the Second, Third, Fourth, Eighth, and D.C. Circuits—"all showed significantly more deference to guideline sentences than to variances, with overall reversal rates that were relatively high, but almost entirely due to their high rates of variance reversal." *Id*. at 72. The study concluded that this inconsistent review of sentences at the appellate level has created a "patchwork" of standards whereby "defendants' sentences are dictated more by geography than by the Supreme Court's jurisprudence." *Id* at 51.[5]

---

[5] The full findings of the study are as follows: "The United States Court of Appeals for the First Circuit affirmed 22 in-guideline sentences, reversed 1 in-guideline sentence, affirmed 10 variances, and reversed zero variances. The United States Court of Appeals for the Second Circuit affirmed 53 in-guideline sentences, reversed 1 in-guideline sentence, affirmed 33 variances, and reversed 7 variances. The United States Court of Appeals for the Third Circuit affirmed 71 in-guideline sentences, reversed zero in-guideline sentences, affirmed 25 variances, and reversed 11 variances. The United States Court of Appeals for the Fourth Circuit affirmed 73 in-guideline sentences, reversed 5 in-guideline sentences, affirmed 41 variances, and reversed 8 variances. The United States Court of Appeals for the Fifth Circuit reviewed 172 sentences for reasonableness post-*Booker*, 93 in-guideline and 79 variances, and affirmed all but 2 of those sentences, reversing 2 in-guideline sentences in a single case (involving two co-defendants). The United States Court of Appeals for the Sixth Circuit affirmed 74 in-guideline sentences, reversed 5 in-guideline sentences, affirmed 38 variances, and reversed 7 variances. The United States Court of Appeals for the Seventh Circuit affirmed 21 in-guideline sentences, reversed 1 in-guideline sentence, affirmed 13 variances, and reversed 5 variances. The United States Court of Appeals for the Eighth Circuit affirmed 29 in-guideline sentences, reversed zero in-guideline sentences, affirmed 22 variances, and reversed 5 variances. The United States Court of Appeals for the Ninth Circuit affirmed 28 in-guideline sentences, reversed 6 in-guideline sentences, affirmed

This data is consistent with the U.S. Sentencing Commission's warning about widespread confusion over application of the reasonableness standard. "Since *Booker*, where the Court anticipated that appellate review would tend to 'iron out' sentencing differences, the role of appellate review remains unclear, the standards inconsistent, and its effectiveness in achieving uniformity in sentencing is increasingly questionable." U.S. Sentencing Comm'n, Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing pt. A, at 111 (2012). Other commentators similarly have observed this confusion and inconsistency, noting that "the courts of appeals remain unclear as to the exact test to be applied when conducting substantive reasonableness review." D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After Booker*, 49 Duq. L. Rev. 641, 650 (2011)*; accord More Than a Formality*, *supra*, at 951 ("The substantive component of this review . . . is a fundament of the post-*Booker* sentencing regime, but one that courts have struggled to implement.").

Even appellate judges themselves have expressed dismay with the state of reasonableness review:

> At a public hearing in 2009, Judge Jeffrey Sutton of the Sixth Circuit stated that he was "starting to wonder" whether appellate review of

---

16 variances, and reversed 2 variances. The United States Court of Appeals for the Tenth Circuit affirmed 53 in-guideline sentences, reversed 1 in-guideline sentence, affirmed 22 variances, and reversed 3 variances. The United States Court of Appeals for the Eleventh Circuit affirmed 157 in-guideline sentences, reversed 1 in-guideline sentence, affirmed 71 variances, and reversed 5 variances. The United States Court of Appeals for the District of Columbia Circuit affirmed 5 in-guideline sentences, reversed zero in-guideline sentences, affirmed 3 variances, and reversed 2 variances." *Id.* at 69–70.

> sentences is "worth it" and elaborated that he was at "close to a loss . . . in what [he] . . . should be doing when it comes to reviewing sentences for substantive reasonableness." Judge Edith Jones of the Fifth Circuit has echoed this sentiment, writing that the reasonableness standard "defies appellate explanation." Judge Jones described sitting on an oral argument calendar where sentences "were shown to vary by multiples of four and more from other sentences for the same offense." Judge Jones posited that the court had "no principled way to disagree with, much less overturn, such disparate sentences" and that "[r]easonableness review has essentially become no appellate review." More bluntly voicing the frustration shared by many on the appellate bench, Chief Judge William Riley of the Eighth Circuit described appellate review as so diminished as to be a "waste of time."

More Than a Formality, *supra*, at 959–60.

In some circuits—like the Fifth—the substantive reasonableness standard is an essentially meaningless protection for defendants and a futile argument to raise on appeal. Indeed, in Mr. Scott's case, much of the Fifth Circuit's analysis of the substantive reasonableness of his above-Guidelines sentence relied on its finding that it had upheld larger deviations from the Guidelines in past cases. This is a truly baffling approach considering that, according to the 2016 empirical study, the Fifth Circuit *always* affirms variant sentences. Indeed, as the study observed, "[t]he First Circuit and Fifth Circuits affirmed *all* of the variances that they reviewed, apparently without regard to the size of the variance in relation to the underlying guideline range." Leonetti, *supra*, at 80 (emphasis added).

And, of course, merely pointing to departures or variances of similar magnitude in other cases does not justify that same departure or variance in the specific case now before an appellate court. In fact, that approach conflicts with *Gall*'s instruction that appellate courts "take into account the totality of the circumstances"

when conducting substantive reasonableness review. *Gall*, 552 U.S. at 51. As the Tenth Circuit has explained:

> Reasonableness review is guided by the factors set forth in 18 U.S.C. § 3553(a), which include the nature of the offense and characteristics of the defendant, as well as the need for the sentence to reflect the seriousness of the crime, to provide adequate deterrence, to protect the public, and to provide the defendant with needed training or treatment.

Torres-Duenas, 461 F.3d at 1183 (internal citation omitted). Comparing the sheer magnitude of a departure or variance to that given in other cases—without regard to whether those cases actually are analogous—wholly fails to capture this mandate. Nonetheless, that is the approach the Fifth Circuit takes: measuring substantive reasonableness not by examining the facts of a particular case, but instead by whether the court has upheld sentences or variances of that magnitude in other cases.

Mr. Scott's sentence is precisely the type that deserves meaningful reasonableness review. The district court abused its discretion in determining that the sentencing factors supported a significantly above-Guidelines sentence—specifically, based on the district court's assessment that Mr. Scott's criminal history was underrepresented in his Guidelines range and based on the court's unreasonable overreliance on that factor. *See Gall*, 552 U.S. at 56–57. Indeed, the court did not just go above the Guidelines—which itself would have been unreasonable—but went above the Guidelines range for defendants with the absolute worst criminal histories. Thus, both the length of the sentence and the extent of the departure or, alternatively, variance was unreasonable considering the totally of the circumstances. The Guidelines are clear: deviations above the Guidelines beyond a criminal history category VI are reserved for the most "egregious, serious criminal record[s]." U.S.S.G.

§ 4A1.3, cmt. 2(B). And courts have long held that such extreme deviations are disfavored—they should be reserved for the most unusual cases and applied for only the most compelling reasons. *See United States v. Carrillo-Alvarez*, 3 F.3d 316, 320 (9th Cir. 1993); *United States v. Mendez-Colon*, 15 F.3d 188, 190–91 (1st Cir. 1994).

The specific facts of Mr. Scott's case show that it was unreasonable to sentence him to such a long term and impose a sentence so far above his Guidelines range based on his criminal history. Over the two-decade period prior to Mr. Scott's instant offense, he had three convictions: a minor drug offense at age 18, a robbery offense at age 21, and an attempted firearm offense at age 30. Mr. Scott's criminal history score of IV accurately reflected the seriousness of his criminal record and fully accounted for his prior criminal conduct, evidenced by the fact that Mr. Scott *already* was penalized repeatedly for that same criminal conduct—much of it occurring over a decade earlier when he was a young man. Despite this, the district court *again* severely penalized Mr. Scott for his criminal history. As a result, Mr. Scott was sentenced in a Guidelines range reserved for defendants with the most egregious, serious criminal records—a category to which Mr. Scott plainly did not belong. Mr. Scott's criminal record was an unreasonable basis for sentencing him above his assigned criminal history category. And it certainly was not egregious enough to sentence him above the maximum criminal history category of VI.

Nonetheless, the Fifth Circuit refused to subject Mr. Scott's sentence to meaningful reasonableness review. This was an abdication of the Court's responsibility under *Gall* and indicative of a long-standing and pervasive flaw in

appellate review that requires this Court's correction. As one commentator noted, "[i]f sentencing is to be fair, appellate courts must do better." *More Than A Formality*, *supra*, at 951. This Court should help appellate courts do better—and resolve cross-circuit inconsistencies—by providing more robust guidance on how to apply *Gall*'s reasonableness standard.

CONCLUSION

For the foregoing reasons, Mr. Scott's petition for a writ of certiorari should be granted.

Respectfully submitted October 5, 2018,

/s/ Celia Rhoads

CLAUDE J. KELLY
CELIA C. RHOADS
Counsel of Record
Federal Public Defender
Eastern District of Louisiana