No. 18-7739

IN THE

Supreme Court of the United States

GONZALO HOLGUIN-HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

JOINT APPENDIX

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Amicus Curiae in Support of Judgment Below

Petition for Writ of Certiorari Filed January 22, 2019
Certiorari Granted June 3, 2019

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50386
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GONZALO HOLGUIN-HERNANDEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:16-CR-33-3

Before BENAVIDES, HAYNES, and WILLETT, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Gonzalo Holguin-Hernandez pleaded true to the allegation that he violated a condition of his supervised release by committing a new offense, and the district court revoked his term of supervised release and sentenced him to 12 months of imprisonment, to be served consecutive to the sentence for his new conviction. Holguin-Hernandez's 12-month sentence was within the sentencing ranges recommended by the Guidelines policy statements for a Grade A violation.

For the first time, Holguin-Hernandez argues that his 12-month total sentence is greater than necessary to effectuate the sentencing goals of 18 U.S.C. § 3553(a) and is therefore unreasonable. Our review is confined to whether the sentence is substantively reasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Because Holguin-Hernandez failed to raise his challenges in the district court, our review is for plain error only. *United States v. Whitelaw*, 580 F.3d 256, 259-60 (5th Cir. 2009). Although Holguin-Hernandez acknowledges that we apply plain error review when a defendant fails to object in the district court to the reasonableness of the sentence imposed, he notes there is a circuit split on the issue and seeks to preserve the issue for possible further review.

Holguin-Hernandez has failed to show that the imposition of the 12-month total sentence constituted a clear or obvious error. The 12-month revocation sentence is within the applicable advisory Guidelines policy statement ranges. *See* U.S.S.G. § 7B1.4(a). The district court's order that the revocation sentence run consecutively to the illegal reentry sen-

tence is consistent with U.S.S.G. § 7B1.3(f), p.s., which provides that "[a]ny term of imprisonment imposed upon the revocation of . . . supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving."

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA,	§	
	§	
vs.	§	Criminal No. 4:16-CR-033-03 DC
	§	
GONZALO HOLGUIN-HERNANDEZ	§	
	§	

ORDER REVOKING SUPERVISED RELEASE and RESENTENCING OF DEFENDANT

On this the 24th day of April, 2018, came on to be heard the Government's Motion for Revocation of Supervised Release granted by virtue of Judgment entered on June 21, 2016, in the above numbered and styled cause.

Defendant appeared in person and was represented by attorney of record, Elizabeth Rogers. The United States was represented by Assistant United States Attorney, Monte Kimball.

After reviewing the motion and the records in this case as well as hearing testimony and arguments of counsel, the court is of the opinion that said Defendant has violated the provisions of his Supervised Release and that the ends of justice and the best interests of the public and of the De-

fendant will not be subserved by continuing said Defendant on Supervised Release. Further, the Court is of the opinion that the Motion for Revocation of Supervised Release should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED that the term of Supervised Release of Defendant named above granted by the Judgment entered on June 21, 2016, and it is hereby **REVOKED** and **SET ASIDE** and the Defendant is resentenced as follows:

The Defendant, GONZALO HOLGUIN-HERNANDEZ, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Twelve (12) months. This sentence shall run consecutive to the sentence imposed in P-17-CR-354. No further supervised release is imposed.

The Clerk will provide the United States Marshal Service with a copy of this Order and a copy of the Judgment entered on June 21, 2016, to serve as the commitment of the Defendant.

SIGNED this 30th day of April, 2018.

/s/David Counts
David Counts
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. 4:16-CR-033
vs.	)	Alpine, Texas
GONZALO HOLGUIN-HERNANDEZ	)	April 24, 2018
	)	9:38 a.m.
Defendant.	)	

TRANSCRIPT OF REVOCATION
BEFORE THE HONORABLE DAVID COUNTS
UNITED STATES DISTRICT JUDGE

APPEARANCES:
FOR THE GOVERNMENT:
MR. MONTY W. KIMBALL, AUSA
Office of the United States Attorney
Alpine Division
2500 North Highway, 18, Suite A200
Alpine, Texas 79830

FOR DEFENDANT:
MS. LIZ ROGERS

Attorney at Law
204 W. Avenue A
Alpine, Texas 79830

COURT REPORTER:
MS. ANN M. RECORD, RMR, CRR, CMRS, CRI
200 East Wall Street, Suite 222
Midland, Texas 79701
(432) 685-0361
ann_record@txwd.uscourts.gov

Proceedings reported by machine shorthand reporter. Transcript produced by Computer-Aided Transcription.

P R O C E E D I N G S

(At 9:38 a.m., proceedings commenced with the assistance of the official court interpreter)

(Defendant present)

THE COURT: Going then into U.S. vs. Gonzalo Holguin-Hernandez, Pecos 16-CR-33, for final revocation hearing in that cause. Same attorneys are here. Mr. Holguin continues to be here.

And, Mr. Holguin, have you reviewed this petition that was filed in your case?

THE DEFENDANT: Yes.

THE COURT: The petition was filed November 29, 2017. It states that Judge Montalvo sentenced you back in June 2016 for possessing with intent to distribute less than 100 kilograms of marijuana, and that now the U.S. Probation Office is claiming that

you failed to comply with two conditions set by Judge Montalvo. I'll ask you each one, and you tell me if it's true or not true.

They stated that you failed to comply with this condition. The defendant shall not commit another federal, state, or local crime during the term of supervision. Is that true or not true?

THE DEFENDANT: True.

THE COURT: And then if the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. And if the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

They claim you failed to do that. Is that true or not true?

THE DEFENDANT: That's true.

THE COURT: Mr. Kimball, is there a factual basis?

MR. KIMBALL: Yes, Your Honor.

On November 15, the defendant and four other individuals were arrested by Border Patrol agents in Culberson County, Texas, for trafficking of 123.45 kilograms of marijuana in the United States. He was charged in that case with aiding and abetting possession with intent to distribute over 100 kilos of

marijuana. He was just sentenced in that case. And he did not report to his probation officer when he entered the United States.

THE COURT: Thank you.

The Court finds the factual basis does support the allegations as well as the pleas of true by the defendant to each of the allegations.

Finds the most serious violation to be Grade A.

Criminal history category I.

Range of punishment under the guidelines is 12 to 18 months. The maximum of three years -- statutory maximum of three years imprisonment.

And life of supervised release is available.

Ms. Rogers.

MS. ROGERS: Your Honor, I know it is very normal when sentencing judges have somebody on a revocation that you want to make it sting and make them feel it for having a repeat offense. But on these drug cases, the business model that the cartels control is to line up five to six men at a time, which is the routine we see; and the client never has anything to do with the quantity. They carry what they can carry, but they're grouped up by people pushing them across. So it doesn't make them more guilty.

On his original case, he got 24 months; and that was clearly because of the quantity of drugs on a first-time offender. And now the sentence, the mandatory minimum, makes it more than double. So he's not twice as guilty. I mean, it is just like jumping at more than a hundred percent to go to the five years.

It's an incredibly expensive proposition to keep a man like this in prison for five years much less for six or six and a half. There would be no reason under 3553 that an additional consecutive sentence would get his attention any better than five years does.

These people routinely are very economically motivated, and my fear for him -- and I've explained career offender to him. He's 22 years old now. If he comes back, he's going to serve his life in prison. And sometimes perhaps they're not strong enough to be able to stay no when they're tapped to do this kind of job. He did not allege torture or coercion, but I think we all understand the likelihood of his being able to get -- extricate himself from it if he's trying to cross.

So I'm asking you in this case, because of the powerful sentence below, that you consider no additional time or certainly less than the guidelines. If you're going to add it consecutive, would you please depart from below because it is a substantial sentence and to me overrepresents the role that he played in this. Thank you.

THE COURT: Mr. Holguin, what would you like to say?

THE DEFENDANT: No.

THE COURT: Mr. Kimball?

MR. KIMBALL: Nothing, Your Honor.

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it is ordered that the term of supervised release in this case is revoked.

The Court has reviewed the policy statements contained in Chapter 7 of the guidelines in determining the appropriate disposition of this matter in relation to the defendant's violations of his conditions of release.

The defendant is committed to the custody of the United States Bureau of Prisons to serve a term of imprisonment of 12 months to run consecutively to the sentence in Pecos 17-CR-354.

There will be no supervised release to follow the 12 months in this case.

Ms. Rogers, while I don't disagree with your argument -- I think it is a good argument -- I do believe the underlying case, the original case means something and so thus the sentence. Anything further, ma'am?

MS. ROGERS: No, Your Honor. Thank you very much.

THE COURT: And, Mr. Kimball.

MR. KIMBALL: Nothing, Your Honor.

THE COURT: Sir, you are remanded into the custody of the United States Marshals to serve your sentence. I wish you the best, and I hope you're able to withstand the pressure next time and not to do what you've done a few times now already. I wish you the best. Good luck.

(Proceedings concluded at 9:44 a.m.)

C E R T I F I C A T E

I, ANN M. RECORD, RMR, CRR, CMRS, CRI, Federal Official Court Reporter, certify that the foregoing is a correct transcript from the proceedings in the above-entitled matter.

Date: 6/5/2018

/s/Ann M. Record

Ann M. Record, RMR, CRR, CMRS, CRI
United States Court Reporter
200 East Wall Street, Suite 222
Midland, Texas 79701
Telephone: (432) 685-0361
e-mail: ann_record@txwd.uscourts.gov

APPENDIX D

UNITED STATES DISTRICT COURT
for
Western District of Texas
Petition for Warrant or Summons for Offender Under Supervision

Name of Offender: Gonzalo Holguin-Hernandez
Case Number: PE:16-CR-00033-FM(3)

Name of Sentencing Judicial Officer: Honorable Frank Montalvo, U.S. District Judge

Date of Original Sentence: June 21, 2016

Original Offense: Possessing With Intent to Distribute less Than 100 Kilograms of Marijuana and Aiding and Abetting (21 U.S.C. § 841 & 18 U.S.C. § 2)

Original Sentence: 24 months imprisonment followed by 2 years supervised release

Type of Supervision: Supervised Release

Date Supervision Commenced: October 18, 2017

Assistant U.S. Attorney: Sandy Stewart

Defense Attorney: Jesse Gonzales. Jr. (Appointed)

PREVIOUS COURT ACTION

Not applicable.

PETITIONING THE COURT

☒ The issuance of a warrant

☐ The issuance of a summons

The probation officer believes that the offender has violated the following condition(s) of supervision:

Violation Number	Nature of Noncompliance
1	"The defendant shall not commit another federal, state, or local crime during the term of supervision."
	"If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office."
Nature of Non-compliance	On or about November 15, 2017, the defendant and four other individuals were arrested by United States Border Patrol (USBP) agents in Culberson County, Texas, for trafficking 123.5 kilograms of marijuana into the United States.

The defendant was charged with Aiding and Abetting Possession With Intent to Distribute Marijuana and in Case No.: P:17-M-2067 (DF) in the Western District of Texas, Pecos Division, and the case remains pending.

U.S. Probation Officer Recommendation: In light of the defendant's violation, it is recommended the term of probation be revoked.

The term of supervision should be

☒ revoked. (Maximum penalty; 3 years imprisonment; Up to life supervised release; and payment of any unsatisfied monetary sanction previously imposed)

☐ extended for __ years for a total term of __ years

The conditions of supervision should be modified as follows:

Approved by:
/s/ Karrie Bragg
Karrie Bragg
Supervising U.S. Probation Officer
Telephone: (432) 445-8621

Respectfully submitted by:
/s/ Kristen Burnham
Kristen Burnham
Senior U.S. Probation Officer
Telephone: (432) 445-8623
Date: November 21

2017

KAB

cc: ADCUSPO, Del Rio
Sandy Stewart
Assistant U.S. Attorney

THE COURT ORDERS:

☐ No action.
☒ The issuance of a warrant,
☐ The issuance of a summons.
☐ Other:_____

/s/ Frank Montalvo
Honorable Frank Montalvo
U.S. District Judge
11/28/17
Date

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA	
v.	Case Number: PE: 16-CR-00033-FM(3)
GONZALO HOLGUIN-HERNANDEZ	USM Number: 66274-380
Defendant.	

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, GONZALO HOLGUIN-HERNANDEZ, was represented by Jesse Gonzales, Jr.

The defendant pled guilty to the Indictment on March 11, 2016. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
21 U.S.C. 841 & 18 U.S.C. 2 Possessing With Intent To Distribute > 100 Kilo-	01/22/2016	One

grams of Marijuana and Aiding and Abetting

As pronounced on June 21, 2016, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 1st day of July, 2016.

/s/ FRANK MONTALVO
FRANK MONTALVO
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of twenty-four (24) months. The defendant is only to be released to the Custody of the Immigration and Customs Enforcement Agency.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence at F. C. I. Big Spring, Texas.

That the defendant participate in the Bureau of Prisons' Inmate Job Training Program while incarcerated.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on non-reporting supervised release for a term of two (2) years.

While on non-reporting supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment; and shall comply with the following additional condition:

☒ The mandatory drug testing provision of the Violent Crime Control and Law Enforcement Act of 1994 is suspended.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not unlawfully possess a controlled substance.

3) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be meliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

4) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

5) The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

6) The defendant shall cooperate in the collection of DNA as directed by the probation officer, if the collection of such a sample is authorized

pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

7) If convicted of a sexual offense and required to register under the Sex Offender and Registration Act, that the defendant comply with the requirements of the Act.

8) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

9) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family obligations, and shall comply with the terms of any court order or order of an administrative process requiring payments by the defendant for the

support and maintenance of a child or of a child and the parent with whom the child is living.

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time, at home or elsewhere, and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that my be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications, and to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sex offense as described in the Sex Offender Registration and Notification Act or has a prior conviction of a State or local offense that would have been an offense as described in the Sex Offender Registration and Notification Act if a circumstance giving rise to federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be de-

termined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) The defendant shall participate in a cognitive behavioral treatment program as directed by

the probation officer, and if deemed necessary by the probation officer. Such program may include group sessions led by a counselor or participation in a program administered by the probation office. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

18) The defendant shall participate in workforce development programs and services as directed by the probation officer, and if deemed necessary by the probation officer, which include occupational/career development, including but not limited to assessment and testing, education, instruction, training classes, career guidance, job search and retention services until successfully discharged from the program. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

19) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

20) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

21) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

22) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

The Court further adopts such of the following special conditions applied to the supervised person by the judge at the time of sentencing:

1) **Community Confinement:** The defendant shall reside in a Community Corrections Center for a period of _N/A_ months to commence on _____. Further, once employed, the defendant shall pay 25% of his/her weekly gross income for his/her subsistence as long as that amount does not exceed the daily contract rate.

Location Monitoring Program:

2) ***Radio Frequency Monitoring***: The defendant shall participate in the Location Monitoring Program with Radio Frequency Monitoring for a period of _N/A_ days/months. You shall abide by the rules and regulations of the Participant Agreement Form. During this time, you will remain at your place of residence except for employment and other activities approved in advance by your probation officer. You will maintain a telephone at your place of residence without "caller ID," "call forwarding," "call waiting," "call back/call block," a modem or a portable cordless telephone for the above period as directed by the probation officer. You will wear an electronic monitoring device and follow location monitoring procedures specified by your probation officer. You shall pay all or part of the costs of the program based on the ability to pay as directed by the probation officer.

3) ***Global Positioning Satellite (GPS)***: The defendant shall participate in the Location Monitoring Program for a term not to exceed _N/A_ days/months, which will include remote location monitoring using ____ Active _____ Passive Global Positioning Satellite (GPS) tracking. You shall abide by the rules and regulations of the Participant Agreement Form. During this time, you will remain at your place of residence except for employment and other activities approved in advance by your probation officer. You will maintain a

telephone at your place of residence without "caller ID," "call forwarding," "call waiting," "call back/call block," a modem or a portable cordless telephone for the above period as directed by the probation officer. At the direction of the probation officer, you shall wear a transmitter and be required to carry a tracking device. You shall pay all or part of the costs of the program based on the ability to pay as directed by the probation officer.

4) **Community Service**: The defendant shall perform _N/A_ hours of community service work without pay, at a location approved by the probation officer, at a minimum rate of four hours per week, to be completed during the first ____ months of supervision.

5) **Sex Offender Search & Seizure Condition**: If required to register under the Sex Offender Registration and Notification Act, the defendant shall submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

CRIMINAL MONETARY PENALTIES/ SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 525 Magoffin Avenue, Room 105, El Paso, Texas 79901.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Fine	Restitution
TOTAL:	$100.00	$.00	$.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $100.00.

Fine

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned

payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30440

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LARRY PAUL PELTIER,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Louisiana

Before HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Larry Peltier appeals as unreasonable his above-guideline sentence for possession of a firearm as a convicted felon. Because the district court did not commit plain error, we affirm.

I.

Peltier pleaded guilty to one count of possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1). While executing a warrant to search for illegal narcotics in Peltier's residence, agents found

cocaine residue, large amounts of cash, and an old, rusty .12 gauge shotgun stashed in an outdoor shed.

Peltier had felony convictions for cocaine distribution, simple burglary, and second degree battery. He admitted that he knew those felonies prohibited him from possessing the firearm, but he kept it for personal protection.

Peltier had a base offense level of 20, subject to a three-point reduction for acceptance of responsibility. He also had a criminal history category of V, based on five prior convictions—the three felony convictions and two misdemeanor drunk driving convictions. This resulted in a guidelines range of 46 to 57 months.

Peltier urged the district court to consider deviating below the guidelines range, and he suggested that he would benefit from a halfway house. The court, however, explained at the sentencing hearing that the guideline range did "not adequately address the very true and real concerns this Court has about Mr. Peltier [and] the policies and the factors reflected in 18 U.S.C. § 3553(a)." Specifically, the court noted Peltier's long criminal history, his violence and anger problems, the dangers posed by his drunk driving, and his addiction to drugs. The court invoked numerous § 3553(a) factors, including the need for the sentence to promote respect for the law, to afford adequate deterrence, to protect the public from future crimes, and to provide needed "vocational training, medical care, or other correctional treatment in the most effective manner." *See* § 3553-(a)(2)(A)-(D). The court added,

> I don't think he's going to be able to beat his addiction on the outside by himself. I don't think he's going to be able to handle his anger problems on the outside by himself. I don't think he has the means to be able to have the money to be able to get psychological counseling he needs in order to keep him from hitting the next time someone calls him a derogatory term or driving under the influence of either drugs or alcohol, and he could kill somebody next time.

The court sentenced Peltier to 120 months, which is the statutory maximum penalty and more than twice the maximum under the advisory guideline range. The court further explained, "[I]n part this was done to give him full opportunity to be able to get the treatment that he needs, to get the counseling that he needs because I don't think a one- or two-year program is going to help this." The court recommended that Peltier be placed in a facility with the most extensive drug treatment program. Peltier did not object to the sentence.

II.

Because Peltier did not object, we must determine the proper standard of review.[2] Ordinarily we review non-guideline sentences for "unreasonableness" and "apply an abuse of discretion standard of

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[2] In his brief, Peltier appears to concede that we should review for plain error. Nevertheless, we must consider the standard *sua sponte* because "no party has the power to control our standard of review." *United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992).

review to the reasonableness inquiry."[3] Where the defendant fails to preserve an error, however, we generally apply a plain error standard, which requires considerable deference to the district court and erects a more substantial hurdle to reversal of a sentence than does the reasonableness standard.[4]

This court has not yet determined whether a defendant's failure to object at sentencing to the reasonableness of his sentence triggers plain error review.[5] Although other circuits have held to the contrary,[6] the Seventh Circuit has held that a defendant

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[3] *United States v. Booker*, 543 U.S. 220, 261 (2005); *United States v. Reinhart*, 442 F.3d 857, 862 (5th Cir.), *cert. denied*, 127 S. Ct. 131 (2006). After *Booker*, "reasonableness" has become both a substantive standard to be applied by the district court and a standard of review to be applied on appeal in assessing a district court's exercise of its sentencing discretion. *Booker*, 543 U.S. at 259-61. This court has equated *Booker*'s "unreasonableness" standard with the abuse-of-discretion standard that governed our review of departure decisions before Congress amended the sentencing statute in 2003. *United States v. Smith*, 417 F.3d 483, 489-90 (5th Cir. 2005).

[4] Plain error must be "error so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice." *United States v. Fortenberry*, 914 F.2d 671, 673 (5th Cir. 1990); *United States v. Adkins*, 741 F.2d 744, 748 (5th Cir. 1984) (quoting *United States v. Howton*, 688 F.2d 272, 278 (5th Cir. 1982)).

[5] In the two cases in which the issue has arisen, we did not find need to reach the question. *See United States v. Hunter*, 188 F. App'x 315, 319 (5th Cir. 2006); *United States v. Gonzalez-Zuniga*, 230 F. App'x 404, 405 (5th Cir. 2007).

[6] *See United States v. Villafuerte*, 2007 WL 2737691, at *2-*3 (2d Cir. Sept. 21, 2007) (applying plain error standard to un-

need not object at sentencing to preserve the error, because such a strict requirement 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." *United States v. Castro-Juarez*, 425 F.3d 430, 433-34 (7th Cir. 2005). Although that rationale could apply to any number of errors beyond the reasonableness of a sentence, the Seventh Circuit appears to have taken a *Booker*-is-different approach to the plain error requirement, observing that "the absence of any need to object to a sentence as unreasonable after its pronouncement" had been "an unstated assumption in our post-*Booker* decisions." *Id*. at 433.

This circuit, however, has not adopted the *Booker*-is-different approach. We have called the rule requiring objection to error "one of the most familiar procedural rubrics in the administration of justice."[7] *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir.

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preserved claim of *Booker* unreasonableness); *United States v. Eversole*, 487 F.3d 1024, 1029 (6th Cir. 2007) (same), *petition for cert. filed* (Aug. 14, 2007) (No. 07-5985); *United States v. Traxler*, 477 F.3d 1243, 1250 (10th Cir. 2007) (same), *cert. denied*, 2007 WL2030503 (U.S. Oct. 1, 2007) (No. 07-5301); *United States v. Dragon*, 471 F.3d 501, 505 (3d Cir. 2006) (same); *United States v. Knows His Gun, III*, 438 F.3d 913, 918 (9th Cir.) (same), *cert. denied*, 126 S. Ct. 2913 (2006).

[7] *See also United States v. Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'") (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

1994) (en banc). It serves a critical function by encouraging informed decisionmaking and giving the district court an opportunity to correct errors before they are taken up on appeal.[8] *Booker* has changed many things, but not this underlying rationale. Indeed, unlike the Seventh Circuit, we have held that defendants sentenced before *Booker* forfeited their right to resentencing if they did not preserve the Sixth Amendment error in the district court.[9] *Booker* did not change the imperative to preserve error in that instance or here.

We therefore review here for plain error. We may correct the sentencing determination only if (1) there is error (and in light of *Booker*, an "unreasonable" sentence equates to a finding of error); (2) it is plain; and (3) it affects substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). "Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"" *Id.* (citation omitted).

III.

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[8] *See Calverley*, 37 F.3d at 162 ("'This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact.'") (quoting *United States v. Atkinson*, 297 U.S. 157, 159 (1936)).

[9] *United States v. Guidry*, 406 F.3d 314, 322 (5th Cir. 2005); *United States v. Freeman*, 434 F.3d 369, 379 (5th Cir. 2005).

Although Peltier's 120-month sentence for keeping a rusty shotgun in a shed raises concerns about its reasonableness, any error does not appear so plain to us as to warrant reversal. Under *Booker*, the sentencing court must determine the applicable guidelines range and, if deviating from it, must give persuasive reasons for the deviation based on the factors listed in § 3553(a). A sentence is unreasonable if it "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006).

Peltier argues that the district court gave insufficient weight to the applicable guidelines range and to the need to avoid unwarranted disparity in sentencing. *See* 18 U.S.C. § 3553(a)(4), (6). He bases this on the fact that his sentence is more than twice the length of the sentence advised by the guidelines and roughly 40 months longer than the mean sentence for firearms offenses nationally.

The court, however, did consider the guideline range but concluded that Peltier's long history of recidivism made his situation stand out from the norm. In its stated reasons, the court explained, "Mr. Peltier's criminal conduct . . . starts at age 18, and it continues without interruption, but with escalation all the way up to the present . . . ." Much of this criminal history was not reflected in Peltier's criminal history category calculated under the guide-

lines.[10] In the district court's view, the guidelines do not reflect Peltier's unusually long history of recidivism, and such circumstance warrants a lengthier sentence.[11]

This court has affirmed two similar above-guideline sentences where a defendant's criminal history score understated his true history and risk of recidivism.[12] Although the district court deviated strikingly far above the guidelines range, we cannot conclude that any insufficient weight given to the guidelines constitutes plain error.

Peltier argues that the court gave significant weight to the improper factor of his socioeconomic status. The guidelines contain a policy statement specifically deeming a defendant's socioeconomic status irrelevant to his sentence.[13] By statute, Congress

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[10] The PSR indicates ten criminal convictions dating from age 18 in 1984 through age 34 in 1999. The criminal history category reflects only five of those convictions. Moreover, Peltier had twice violated the terms of his probation by committing subsequent crimes while on probation.

[11] *See* § 3553(a)(1) (history and characteristics of the defendant); § 3553(a)(2)(A) (promote respect for the law); § 3553(a)(2)(B) (provide adequate deterrence); § 3553(a)(2)(C) (protect the public from future crimes).

[12] *United States v. Smith*, 417 F.3d 483 (5th Cir. 2005) (affirming sentence almost three times the top of the guideline range); *United States v. Smith*, 440 F.3d 704 (5th Cir. 2006) (affirming sentence more than twice the top of the guideline range).

[13] *See* U.S.S.G. § 5H1.10; 18 U.S.C. § 3553(a)(5) (guidelines policy statements are a factor to be considered at sentencing).

has also prohibited consideration of socioeconomic status.[14]

Peltier points to two references by the district court to his socioeconomic status. The court observed, "I don't think [Peltier] has the means to be able to have the money to be able to get the psychological counseling he needs," and the court later reiterated to Peltier, "I just don't think you have the resources available to you to get the help you need." Those two statements, however, emerged in context of the court's general discussion of Peltier's need for anger management and substance abuse treatment. That concern was proper and indeed related to § 3553(a)(2)(D)'s specific directive to consider the need for medical or other treatment. The district court observed Peltier's repeated failures to complete treatment and concluded that he could not "beat his addiction on the outside by himself."

We cannot easily disentangle the weight given to the proper factor of need for treatment from the weight given to the improper factor of socioeconomic status, with which the former proper factor was entwined.[15] Yet, in light of the court's strong emphasis

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[14] "The [Sentencing] Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d).

[15] *But see United States v. Valdez-Gonzalez*, 957 F.2d 643, 650 n.3 (9th Cir. 1992) ("Although departure on the basis of socioeconomic factors is generally impermissible, . . . courts can look to socioeconomic conditions in determining whether an otherwise permissible factor presents a sufficiently atypical situation to form a basis for departure."); *United States v. Lopez*, 938 F.2d

on Peltier's general need for treatment and its reliance on other proper factors such as criminal history and risk of recidivism, any erroneous reliance on socioeconomic status was neither plain nor so essential to the judgment as to affect Peltier's substantial rights.

Peltier contends the district court made a clear error of judgment in balancing the § 3553(a) factors because it did not "rationally connect" them with the facts of the case and the resulting sentence. Specifically, Peltier objects to the absence of any expert diagnosis of his anger and addiction problems. Although the court did not rely on expert diagnosis, it based its findings on the presentence investigation report ("PSR") indicating a long history of substance abuse. Peltier did not object to facts contained in the PSR, and the court did not require an expert to rely reasonably on that report.[16]

Peltier also maintains that the court did not explain why the need for treatment demanded a 120-month sentence instead of the 46- to 57-month sentence advised by the guidelines. Though the court

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1293, 1297 (D.C. Cir. 1991) ("[T]he phrase 'socio-economic status' refers to an individual's status in society as determined by objective criteria such as education, income, and employment; it does not refer to the particulars of an individual life.").

[16] *United States v. Caldwell*, 448 F.3d 287, 291 n.1 (5th Cir. 2006) ("Even after *Booker*, a PSR is presumed to be sufficiently reliable such that a district court may properly rely on it during sentencing.").

did give some explanation,[17] the fact that a particular treatment program might be completed before the sentence has been served does not necessarily make the longer sentence unreasonable.[18] That remains particularly so where, as here, factors other than treatment also support the sentence.

IV.

In addition to the substantive issue of reasonableness, Peltier objects to his sentence on two procedural grounds. First, he asserts the court erred in deviating from the guidelines without giving notice before sentencing of its intent to do so. Peltier concedes that this argument is precluded by binding circuit precedent, *United States v. Mejia-Huerta*, 480 F.3d 713, 722-23 (5th Cir. 2007), *petition for cert. filed* (Apr. 18, 2007) (No. 06-1381), but he raises the argument to preserve it for Supreme Court review.[19]

Second, Peltier maintains that the district court failed to attach a statement of reasons to its written order of judgment as required by § 3553(c)(2). Be-

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[17] The court explained, "I don't think just one or two years or even three or four years is going to be able to help you get this fixed. What I'm trying to do is give you enough time to truly make a change in your life . . . ."

[18] *See United States v. Larison*, 432 F.3d 921, 923 (8th Cir. 2006) (holding five-year sentence not unreasonable); *United States v. Dixon*, 449 F.3d 194, 205 (1st Cir. 2006) (declaring 115-month sentence not unreasonable).

[19] *United States v. Treft*, 447 F.3d 421, 425 (5th Cir.), *cert. denied*, 127 S. Ct. 555 (2006) ("Absent an intervening Supreme Court or en banc decision or a change in statutory law, we are bound to follow a prior panel's decision.").

cause Peltier did not object in the district court, we review only for plain error. It appears, however, that the court did file a statement of reasons, but that statement was erroneously omitted from the record. Counsel for the United States discovered the error after Peltier had filed his opening brief, and counsel supplemented the record by motion on March 22, 2007.

It appears the district court did in fact comply with § 3553(c)(2). Moreover, it gave a full oral explanation of its reasons at the sentencing hearing. Hence, any error that may have occurred did not affect Peltier's substantial rights.

AFFIRMED.