No._____

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**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term 2018**

GONZALO HOLGUIN-HERNANDEZ, PETITIONER

V.

UNITED STATES OF AMERICA

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

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## QUESTION PRESENTED FOR REVIEW

Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.

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Gonzalo Holguin asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on December 27, 2018.

## PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

## OPINION BELOW

The unpublished opinion of the court of appeals is attached to this petition as Appendix A.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on December 27, 2018. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 51 provides in pertinent part:

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Federal Rule of Criminal Procedure 52 provides in pertinent part:

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

## STATEMENT

Petitioner Gonzalo Holguin was convicted in 2016 of possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. § 841. He was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. Fifth Circuit Electronic Record on Appeal 34-35. In November 2017, Holguin was arrested in Culberson County, Texas, and again charged with possessing marijuana with the intent to distribute it. EROA.47-48.

After that arrest, a petition to revoke Holguin's supervised-release term was filed. EROA.47-48; EROA.62-63. By the time of the revocation hearing, Holguin had pleaded guilty in the new case brought against him to possession of more than 100 kilograms of marijuana with the intent to distribute it. Right before the revocation hearing occurred, the district court sentenced Holguin to 60 months' imprisonment−the statutorily required minimum sentence−on that new case. See EROA.73-74.

The district court explained the allegations of the revocation petition to Holguin. The court asked Holguin how he pleaded to the allegations. EROA.72-73. Holguin answered "True." EROA.72-73.

The district court determined that the most serious of the two revocation violations fell within Class A, that the applicable criminal history category was I, and that the sentencing range suggested by the policy statements in Chapter Seven of the U.S.

Sentencing Commission's *Guidelines Manual* was 12 to 18 months' imprisonment. EROA.73-74; *see also* EROA.65 (written revocation order).

Holguin's attorney asked for a concurrent sentence on the revocation, arguing that, because the required 60-month sentence on the new case more than doubled the sentence Holguin had received for his prior marijuana offense, a consecutive sentence on the revocation would neither provide any additional deterrent effect nor advance any other interest set out in 18 U.S.C § 3553 and incorporated into § 3583(e). EROA.74-75. Counsel alternatively argued that, if the court imposed a consecutive sentence, a sentence below the 12 to 18 month policy statement range would be sufficient. EROA.75. The district court revoked Holguin's supervised release. It imposed a 12-month sentence that it ordered to run consecutively to the sentence imposed for the new marijuana conviction. EROA.65; EROA.76.

Holguin appealed. He contended that the 12-month fully consecutive revocation sentence was substantively unreasonable because it was greater than necessary to account for the factors set out by 18 U.S.C. § 3553(a) and § 3583(e). The Fifth Circuit ruled that, because he had "failed to raise his challenges in the district court" Holguin's claim warranted only plain-error review. Appendix at 2 (citing *United States v. Whitelaw*, 580 F.3d 256 (5th Cir. 2009)). The court affirmed the 12-month consecutive sentence. Appendix at 2.

## REASONS FOR GRANTING THE WRIT

### THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A DEFENDANT MUST MAKE A FORMAL OBJECTION AFTER PRONOUNCEMENT OF SENTENCE TO RECEIVE FROM THE APPELLATE COURT REASONABLENESS REVIEW OF THE LENGTH OF A SENTENCE.

Gonzalo Holguin's counsel made it clear to the district court that a concurrent sentence below the advisory guideline range of 12 to 18 months' imprisonment was the appropriate sentence upon revocation of Holguin's supervised release. Counsel engaged in a discussion with the district court about Holguin's revocation-causing conduct, the statutory mandatory-minimum five-year sentence the court had just imposed upon Holguin, and the reasons why a revocation sentence run concurrently with the mandatory sentence was the appropriate sentence under the factors set out in 18 U.S.C. § 3553(a) and § 3583(e). *Cf. Dean v. United States*, 137 S. Ct. 1170 (2017) (explaining § 3553(a)'s parsimony principle). The district court imposed a within-range sentence of 12 months' imprisonment and ordered the sentence to run consecutively to the five-year mandatory-minimum sentence on Holguin's new case.

Holguin's counsel did not make a formal exception or objection to that sentence after it was announced. The question presented by this case is whether counsel needed to do so in order to obtain review of the sentence under the abuse-of-discretion, reasonableness standard this Court set out in *Gall v. United States*, 552 U.S. 38 (2007). This question has divided the courts of appeals.

The division among the circuits means sentences are reviewed differently, and the purposes of sentencing set out in 18 U.S.C. § 3553 are applied differently, in different circuits. The Fifth Circuit holds, as it did in this case, that counsel must object to the sentence imposed after it is announced to obtain reasonableness review on appeal. Appendix at 2; *see also United States Heard,* 709 F.3d 413, 425 (2013); *United States v. Peltier,* 505 F.3d 389, 391-92 (5th Cir. 2007). Other circuits hold that no post-sentence objection is required, reasoning that the determination of the substantive reasonableness of the length of the sentence imposed constitutes an appellate function that is unaffected by whether the defendant objected to the sentence. *United States v. Castro-Juarez,* 425 F.3d 430 (7th Cir. 2005); *United States v. Autery*, 555 F.3d 864, 869-71 (9th Cir. 2009). The Court should grant certiorari to decide which of these approaches better comports with its teachings about § 3553(a) sentencing and thus to resolve whether a post-sentence objection is necessary to obtain reasonableness review of a sentence. The answers to these questions will help to bring consistency to appellate review of federal sentences.

### A. This Court's Sentencing Opinions Establishing Reasonableness Review as the Standard.

The Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), rendered the U.S. sentencing guidelines advisory, and, in so doing, changed the way district courts determined sentences. *Booker* also changed the way sentences are reviewed on appeal. It held unconstitutional the subsection of 18 U.S.C. § 3742(e) that set forth the standards governing appellate review of sentences. The Court filled the gap created by the statute's unconstitutionality with a standard "familiar to appellate courts: review for

`unreasonableness.'" 543 U.S. at 259-61. Despite its familiarity, the unreasonableness standard led to application questions. The Court began to address some of those questions in *Rita v. United States*, 551 U.S. 338 (2007).

*Rita* established that reasonableness review was an appellate standard, not a sentencing standard to be used by the district courts. 551 U.S. at 350-51. The Court clarified that neither § 3553 nor *Booker* directed a sentencing court to determine whether a sentence was reasonable before imposing it. 551 U.S. at 350-51.The sentencing court's task was to weigh the facts of the case against the purposes and considerations set out by Congress in § 3553, before deciding upon a sentence. *Id.*

The Court further clarified the reasonableness standard in *Gall* and *Kimbrough. Gall* explained that the courts of appeals "must review" a sentence for "abuse of discretion," and that those courts should review a sentence for both procedural and substantive reasonableness. 552 U.S. 38, 50-51 (2007). *Kimbrough* reiterated that reasonableness was an appellate standard, not a standard for the district courts to use in imposing sentence. The sentencing court's standard, *Kimbrough* explained, was to satisfy the "overarching demand" of § 3553(a): that a sentence be "sufficient but not greater than necessary" to achieve the goals of that statute. *Kimbrough v. United States,* 552 U.S. 85, 101 (2007); *see also Dean,* 137 S. Ct. at 1175 (reaffirming primacy of parsimony principle). It was for the appellate court to resolve the "ultimate question," which was "whether the sentence was reasonable—*i.e.*, whether the District Judge abused his discretion in determining that the § 3553(a) factors" supported the sentence imposed. *Kimbrough,* 552 U.S. at 111.

**B. The Circuits Are Divided as to Whether a Post-Sentence Objection is Required.**

*Rita, Gall,* and *Kimbrough* all state that the reasonableness of a particular sentence is a question for the appellate court, not the district court. Despite these statements, the circuits have divided over whether reasonableness review is available on appeal if the defendant did not object to the sentence after the district court pronounced it; that is, if the defendant did not offer the district court an opportunity to opine on the reasonableness of its own sentence. The Fifth Circuit holds that reasonableness review of a sentence is available only when a defendant objects to the district court that the sentence is unreasonable. *See, e.g.*, Appendix at 2; *United States v. Peltier*, 505 F.3d 389, 391-92 (2007). If no objection was made, the Fifth Circuit reviews the sentence for plain error pursuant to Federal Rule of Criminal Procedure 52. *Peltier,* 505 F.3d at 391-92.

The Fifth Circuit follows this course because it believes that, "*Booker* did not change the imperative to preserve error." *Peltier,* 505 F.3d at 392. The Fifth Circuit rationalized its post-sentence objection requirement on grounds that it "serves a critical function by encouraging informed decision making and giving the district court an opportunity to correct errors before they are taken up on appeal. *Booker* has changed many things, but not this underlying rationale." *Id.* at 392. In setting out this requirement, the Fifth Circuit has opined that a post-sentence objection rule is needed "to induce the timely raising of claims" and to give the district court "the opportunity to consider and resolve them." *Id.* at 391-92. The Fifth Circuit viewed its post-sentence objection rule as advancing the interests identified by this Court in cases such as *United States v. Dominguez Benitez,*

542 U.S. 74, 82 (2004) (stating that plain-error rule preserves judicial resources), and *Puckett v. United States*, 556 U.S. 129, 134 (2009). *Puckett* explained that plain-error review of non-raised, forfeited error discourages a litigant from "'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." 556 U.S. at 134.

All of these concepts inform plain-error review under this Court's Rule 52 precedents, but it is unclear whether those precedents apply in the sentence-review context established by and after *Booker*. When a defendant has made his sentencing request obvious to the district court, he has done what the contemporaneous-objection rule encourages him to do. *Cf. Puckett*, 556 U.S. at 134 (explaining that requesting action or relief gives district court opportunity to decide). The Fifth Circuit's requirement of a formal objection, after sentence has been imposed, that the sentence is unreasonable, seems to exalt form over substance. It also privileges the policy behind plain-error review over this Court's post-*Booker* sentence-review precedents and over the plain language of Federal Rule of Criminal Procedure 51.

Those precedents and Rule 51's language have led most of the circuit courts to conclude that a post-sentence objection is not required to invoke substantive reasonableness review of a sentence on appeal. *See United States v. Flores-Mejia*, 759 F.3d 253, 256-57 (3d Cir. 2014) (en banc); *United States v. Curry*, 461 F.3d 452, 459 (4th Cir. 2006); *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc); *United States v. Castro-Juarez*, 425 F.3d 430, 433–34 (7th Cir. 2005); *United States v. Wiley*, 509 F.3d

474, 476–77 (8th Cir. 2007); *United States v. Autery*, 555 F.3d 864, 868–71 (9th Cir. 2009); *United States v. Torres-Duenas*, 461 F.3d 1178, 1182–83 (10th Cir. 2006); *United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007). These courts focus on the entire sentencing proceeding, not on whether a defendant made a final, formal exception to the sentence.

These circuits have relied on the principle that substantive reasonableness is an inapt concept at sentencing and thus a post-sentencing objection can find no footing in this Court's precedent. These circuits find this principle in this Court's teachings that reasonableness "is the standard of *appellate* review[.]" *Bras,* 483 F.3d at 113 (emphasis original) (citing *Booker*, 543 U.S. at 262); *see also Kimbrough,* 552 U.S. at 111. From this, they conclude that reasonableness is not "an objection that must be raised upon the pronouncement of a sentence." *Bras,* 483 F.3d at 113. The Sixth Circuit has explained that a defendant "has no duty to object to the reasonableness of the length of a sentence (or to the presumption of reasonableness) *during* a sentencing hearing, just a duty to explain the grounds for leniency. That is because reasonableness is the standard of *appellate* review, not the standard a district court uses in imposing a sentence." *Vonner,* 516 F.3d at 389 (emphases original) (citing *Rita,* 551 U.S. at 350-51).

The circuits that review all sentences for substantive reasonableness discern in Rule 51 and the policies governing preservation of error a need to develop a record and make a party's request known to the district court, rather than a concern with formalistic objections. "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 434. The Seventh Circuit explained that, in taking this view, it was not abandoning "our longstanding insistence on proper objections as to other sentencing issues[.]" *Id.* "All we conclude here is that our review of a sentence for reasonableness is not affected by whether the defendant had the foresight to label his sentence "unreasonable" before the sentencing hearing adjourned." *Id.* The court explained in another sentencing appeal that "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[.]" *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009).

Exceptions to rulings "are unnecessary." FED. R. CRIM. P. 51(a). A party preserves error when it informs the court of the action it wishes the court to take. FED. R. CRIM. P. 51(b). To require a defendant to formally except to an imposed sentence as unreasonable does not put relevant information before the sentencing court. It merely forces a defendant to ask the district court "for reconsideration, in order to preserve for appeal a contention that the length of the sentence is unreasonable." *Wiley*, 509 F.3d at 477. No basis for that requirement exists in the plain language of Rule 51 or in this Court's precedent. No purpose of error preservation is furthered by imposing such a requirement.

*Booker*, *Rita*, *Gall*, and *Kimbrough* formulated and explicated a single standard of review for federal sentences. Because of the division among the circuits, that single standard has become two standards. That circuit split is firmly entrenched. The Seventh

Circuit decided Castro-*Juarez* in 2005, not long after *Booker* was decided. The Fifth Circuit decided *Peltier* in 2007. Since then the split has deepened, and neither side is inclined to change its rule. *See, e.g., United States v. Heard*, 709 F.3d 413, 425 (5th Cir. 2009) (reaffirming *Peltier* standard in Fifth Circuit). This Court should grant certiorari to resolve the division among the circuits.

**C. Holguin's Case Is a Good Vehicle.**

Holguin's case is an appropriate vehicle for resolving the circuit split, even though it arose in the context of a revocation case. The parsimony principle of § 3553(a) applies to the total sentence necessary to meet the § 3553 factors. *Cf. Dean*, 137 S. Ct at 1174-75 (explicating principle in cases involving mandatory sentence). Holguin's case presents a record in which the sentencing considerations were clearly put before the district court. Counsel made clear that Holguin sought a below-guideline sentence, and she explained the factual and legal reasons why such a sentence was appropriate under §3553(a) and § 3583€. EROA.74-75. An objection, after the district court had rejected the request, would have served no purpose in the district court, and the absence of an objection should have had no effect on the appellate review of the sentence.

Holguin's case illustrates how important and necessary the reasonableness review mandated by this Court since *Booker* is to ensuring that the purposes of § 3553(a) sentencing are met. Holguin informed the district court of the relevant facts of his case and made his request, including his reasons why a below-range sentence was warranted. The facts Holguin put before the court about his background were relevant to the § 3553 factors.

See 18 U.S.C. § 3553(a)(1) (history of defendant and circumstances of the offense); § 3553(a)(2)(B) (need for deterrence); § 3553(a)(2)(C) (need, if any, to protect community from defendant). Holguin's allocution and his counsel's statements provided the district court with the information necessary to understand Holguin's position on sentencing. The Fifth Circuit, however, held Holguin's failure to make a post-sentence objection mandated plain-error review. The record of this case therefore clearly presents the objection issue.

No one could reasonably assert that the district court, which had been unpersuaded by Holguin's presentation, would suddenly have reconsidered and reversed itself upon hearing the words "We object," from counsel following pronouncement of sentence. The record in this case thus demonstrates the exception-like nature of the Fifth Circuit's post-sentencing objection requirement.

A court applying reasonableness review would have thought searchingly about whether the sentence was longer than necessary to achieve the § 3553(a) purposes, and whether the district court had abused its discretion. *Cf. Gall,* 552 U.S. at 49-51; *Kimbrough*, 552 U.S. at 101. Under its plain-error review, the Fifth Circuit conducted only limited review, never truly engaging with the arguments Holguin raised. The case therefore presents a good example of why the circuit split over post-sentence objections matters.

## CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

____/s/ Philip J. Lynch_____
PHILIP J. LYNCH
*Counsel of Record for Petitioner*

DATED: January 22, 2019.