No. 18-7739

IN THE SUPREME COURT OF THE UNITED STATES

GONZALO HOLGUIN-HERNANDEZ, PETITIONER

V.

UNITED STATES OF AMERICA

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. RESOLVING THE CIRCUIT SPLIT IS IMPORTANT TO THE UNIFORMITY, FAIRNESS AND INTEGRITY OF THE FEDERAL CRIMINAL JUSTICE SYSTEM AND TO INDIVIDUAL DEFENDANTS.

Holguin asks the Court to take his case to resolve a split among the courts of appeal. The Fifth Circuit requires that a post-sentence objection be made in the district court to trigger appellate review of a sentence under the abuse-of-discretion, reasonableness standard this Court set out in *Gall v. United States,* 552 U.S. 38 (2007). *See, e.g., United States v. Peltier,* 505 F.3d 389, 391-92 (5th Cir. 2007). No other circuit has such a requirement. The requirement imposed by the Fifth Circuit means that a significant number of criminal sentences are reviewed differently in that court than in the other courts of appeals. The Fifth Circuit relegates defendants who do not make a post-sentence objection to plain-error review of their sentences, a review less comprehensive and with a different allocation of proof on harmful error than the review this Court has repeatedly held applicable. *See, e.g., United States v. Booker,* 543 U.S.220, 260 (2005); *Gall,* 552 U.S. at 49-50. That relegation runs contrary to this Court's teaching on appellate review of federal sentences, contrary to the principal animating directive of federal sentencing, and contrary to the Court's teachings concerning the wrong caused by unnecessary imprisonment. *Cf. Kimbrough v. United States,* 552 U.S. 85, 101 (2007) (18 U.S.C. § 3553(a)(1) sets out overarching command shaping sentencing); *Rita v. United States,* 551 U.S. 338, 350-51 (reasonableness is an appellate-review standard); *Gall v. United States,* 552 U.S. at 49-50 (appellate review of a sentence is abuse-of-discretion inquiry into reasonableness); *Glover v. United States,* 531 U.S. 198, 203 (2001) (any additional prison time prejudicial to individual).

The government acknowledges the circuit split. BIO 6. It admits that the Fifth Circuit applies the wrong approach, one that improperly extends the reach of the contemporaneous-objection requirement of Federal Rule of Criminal Procedure 51. BIO 6-7; *see* Holguin Pet. 9-11; *see also 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). It nonetheless argues that review is not warranted.

The first ground the government offers for opposing certiorari is that the circuit split is long established and so the Fifth Circuit's mistaken view has become routinized in its provinces. BIO. 7-8. Practitioners, the government argues, have become used to the additional burden the Fifth Circuit imposes, and this Court has denied review in many cases in which the Fifth Circuit applied plain-error review to evaluate the length of the sentence imposed. BIO 8 (citing denials of certiorari in cases raising the issue).

Several flaws appear in this argument. First, routinization of error does not cure or excuse the error. The Fifth Circuit's post-sentence objection requirement is contrary to this Court's sentence-review jurisprudence. The Fifth Circuit requires a post-sentence reasonableness objection to allow a district court to reconsider the reasonableness of its sentence, but the reasonableness of the sentence is an appellate question, not a question for the district court. *See, e.g., Rita,* 551 U.S. at 350-51; *Gall,* 552 U.S. at 49-50. The Fifth Circuit's requirement of a post-sentence objection is also in conflict with the standard applied in other circuits. *See, e.g., United States v. Autrey*, 555 F.3d 864 (9th Cir. 2009) (discussing split). And the Fifth Circuit's requirement of a post-sentence objection, as the government admits, runs contrary to federal law—it is a misapplication of

a Federal Rule of Criminal Procedure. BIO 6-7. Each of these grounds is reason for review. *Cf.* Supreme Court Rule 10(a), (c). That all three grounds have been present for years and the court of appeals has persisted in its error is not reason to deny review, it is reason to grant review.

Second, the government cites 15 cases between 2012 and the end of March 2019 in which this Court has denied certiorari on the issue. BIO 7-8.[1] This recurrence of the issue supports review. Litigants have challenged and continue to challenge the Fifth Circuit on its post-sentence objection rule. No reason exists to think that the challenges will stop, and no way exists for the issue to be resolved other than a decision by this Court.[2]

Third, the government's routinization argument implies that on-the-ground practice reflects the post-sentence objection rule and thus that review of sentences for plain-error is rare in the Fifth Circuit. This is not the case. A Westlaw search reveals at least 200 cases in the last decade in which the Fifth Circuit has applied plain-error review to challenges to the substantive reasonableness of a sentence, rather than reasonableness review. *See, e.g., United States v. Acevedo,* 754 Fed. Appx. 234 (5th Cir. 2018); *United States v. Velardo-Benitez,* 672 Fed. Appx. 484 (5th Cir. 2017); *United States v. Chavez-Delgado,* 694 Fed Appx. 271 (5th Cir. 2017); *United States v. Young,* 693 Fed. Appx. 361

[1] Those 15 cases cited by the government are illustrative, not exhaustive. Other cases have also raised the issue, though falling short of certiorari. *See, e.g., United States v. Callaway,* 585 Fed. Appx. 867 (5th Cir. 2014), *cert. denied,* 135 S. Ct. 1521 (2015).

[2] This day a petition for certiorari raising the issue was filed in *Muro v. United States.* The petition challenges the Fifth Circuit's application of its post-sentence objection rule and the consequent plain-error review of the sentence imposed following Muro's guilty plea. See also *United States v. Muro,* 2019 WL 1649308 (5th Cir. Apr. 15, 2019).

(5th Cir. 2017); *United States v. Irias-Murillo,* 628 Fed. Appx. 328 (5th Cir. 2016); *United States v. Siguil-Vasquez,* 574 Fed. Appx. 321 (5th Cir. 2014); *United States v. Bunch,* 550 Fed. Appx. 232 (5th Cir. 2013); *United States v. Trinidad,* 380 Fed. Appx. 449 (5th Cir. 2010). These cases arise from every area of the circuit. Whether the reason these cases arise is because the post-sentence objection requirement is both counterintuitive and counter to Rule 51, because lawyers familiar with *Rita* and *Gall* believe reasonableness is an appellate standard, not a question for the district court, or because of oversight by a lawyer, they occur in significant number. These cases would not occur at all if the Fifth Circuit had followed this Court's teachings and had not improperly extended Rule 51. The government's suggestion that routinization of the error has worked itself out by providing a workable, commonly understood system of sentence review in the Fifth Circuit is not well taken.

Fourth, the government's routinization argument overlooks the effect of the Fifth Circuit's post-sentence objection rule on other common appellate situations, such as pro se litigation and *Anders* briefs. The Fifth Circuit applies its post-sentence objection rule against pro se litigants. *See, e.g., United States v. Martinez,* 747 Fed. Appx. 236, 238 (5th Cir. 2019). Routinization may condition many counsel to making an unnecessary post-sentence objection, but a pro se litigant generally has but one opportunity—his own case—to learn about the rule and that opportunity comes too late to prevent the loss of reasonableness review. Practitioners in appointed-counsel cases may be influenced by the post-sentence objection rule to file *Anders* briefs even when they believe a sentence is greater than needed under the § 3553(a) factors. Thus the routinization of the Fifth

Circuit's anomalous requirement affects more cases negatively than the government suggests. The propriety of the Fifth Circuit's post-sentence objection requirement should be resolved.

II. HOLGUIN'S CASE WOULD BE ANALYZED DIFFERENTLY UNDER REASONABLENESS REVIEW.

The government's second argument is that Holguin does not offer "any reason to believe that the court of appeals would have arrived at a different conclusion in the absence of plain-error review." BIO 11. This is not so.

Reasonableness review looks to see whether the sentence imposed comported with the overarching command of § 3553(a) that a sentence not be greater than necessary. *See, e.g. Dean v. United States,* 137 S. Ct. 1170 (2017). Holguin's petition and the record show that the one-year revocation sentence imposed to run consecutively to the five-year mandatory-minimum sentence imposed on his underlying marijuana offense was greater than necessary. *See* Holguin Pet. 13; EROA.74-75. Holguin's counsel made clear to the district court that Holguin was seeking a below-guideline sentence. She explained why: the mandatory-minimum sentence on the marijuana offense was more than double the time Holguin had received for his other marijuana offense. The mandatory sentence also ignored the coercive, life-threatening tactics of cartel recruitment of young men on the border, and gave no weight to Holguin's youth. EROA.74-75[3]. These facts were relevant to the § 3553 factors. *See* 18 U.S.C. § 3553(a)(1) (history of defendant and circumstances

[3] The 60-month mandatory-minimum sentence for the underlying offense was 14 months above the otherwise applicable guidelines range for that offense. *See* EROA.124 in United States v. Holguin, Fifth Circuit No. 18-50387.

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.

On appeal, Holguin argued those points and pointed to absences in the record. For instance, no evidence suggested that Holguin posed a danger to the public. *See* 18 U.S.C. § 3553(a)(2)(C) (court should consider need to protect public). The government did not argue that Holguin posed a danger, and the facts showed that both of Holguin's arrests for marijuana offenses took place in remote areas of Texas, far from people. *See* EROA.73; EROA.99. Nor, Holguin showed, did the record support a conclusion that the 12-month consecutive sentence was necessary for deterrent purposes. *See* 18 U.S.C. § 3553(a)(2)(B) (court should consider need to deter). Because the recidivist sentence he received and the still greater sentence that loomed if he offended again provided a full measure of deterrence against possible recidivism, a court evaluating the sentence under reasonableness review would be likely to conclude that it was too long. *See* EROA.74-75.

The most compelling evidence that the result of the appeal would have been different had reasonableness review applied was the district court's comment agreeing with counsel that additional deterrence was not necessary. It stated: "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." EROA.76. A court applying reasonableness review would be likely to conclude that this comment

showed the one-year consecutive sentence was greater than necessary, and that a sentence of 12 months with a month or two run consecutively to the 60-month sentence would have been sufficient to send the message that Holguin had to take his supervised-release term seriously.

The result of Holguin's case would very likely have been different had the Fifth Circuit reviewed for reasonableness, not for plain error. His case therefore not only presents the issue on which the circuits have divided, but would be affected by a resolution of that circuit split that found the Fifth Circuit's approach incorrect. Certiorari should be granted.

CONCLUSION

FOR THESE REASONS, as well as those in his petition, Holguin asks that the Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

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April 30, 2019