No._____

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO MURO JR., PETITIONER

V.

UNITED STATES OF AMERICA

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.[1]

[1] This issue is also raised in *Holguin-Hernandez v. United States*, 18-7739, which is currently before the Court and in which the Court requested a response from the Solicitor General.

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Antonio Muro Jr. 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 April 15, 2019.

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The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on April 15, 2019. 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 Antonio Muro Jr. pleaded guilty to aiding and abetting a possession of more than 100, but less than 1,000, kilograms of marijuana with the intent to distribute. Fifth Circuit Electronic Record on Appeal (EROA) 9-10. After Muro entered his guilty plea, a U.S. probation officer prepared a presentence report for the district court's use at sentencing. The officer found Muro's base offense level under sentencing guidelines §2D1.1(c)(8) to be 24, EROA.164, and recommended that Muro be placed in criminal history category II because he had three criminal history points from a 2005 marijuana-related conviction, ROA.165-66; *see* U.S.S.G. §4A1.1(a). A criminal history category of II and a total offense level of 24 yielded an advisory guideline sentence range of 57 to 71 months' imprisonment. EROA.170; U.S.S.G. Ch.5, Pt.A. (sentencing table). The statute of conviction, 21 U.S.C. § 841(b)(1)(B) required that Muro serve a mandatory-minimum sentence of 5 years' imprisonment. For that reason, the bottom of the advisory sentencing guideline range that Muro faced was 60 months, not the 57 months that would apply absent the mandatory sentence. EROA.170; U.S.S.G. §5G1.1(b).

At Muro's sentencing hearing, his counsel objected to the probation officer's failure to recommend an acceptance-of-responsibility adjustment under U.S.S.G. §3E1.1. EROA.113. The district court overruled the objection. It adopted the guideline calculations of the presentence report, and found that the advisory guideline range was 60 to 71 months' imprisonment. EROA.115-16. Muro asked the court to sentence him to the "lowest time possible so that I can go home and go back to work." EROA.117. The court did not do so.

Instead, it imposed a 66-month imprisonment term, to be followed by a 5-year term of supervised release. EROA.76-81; EROA.117-18. Muro appealed.

Muro appealed. He argued that the 66-month sentence was substantively unreasonable because it was greater than necessary to account for the factors set out by 18 U.S.C. § 3553(a). The Fifth Circuit ruled that, because Muro had failed to object to his sentence after the district court pronounced it, his claim could receive only plain-error review. Appendix at 2 (citing *United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007)). The court ruled that Muro had failed to satisfy the plain-error standard and affirmed the 66-month sentence. Appendix at 2-3.

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.

Antonio Muro asked the district court to impose the lowest sentence possible. EROA.117. That sentence was the 60-month mandatory-minimum imprisonment term required by 21 U.S.C. § 841(b)(1)(B). Defense counsel touched on circumstances of Muro's history and circumstances that implicated the sentencing factors set out by Congress in 18 U.S.C. § 3553(a)(1)-(2). The district court did not impose the minimum sentence. It imposed a sentence of 66 months' imprisonment, above the statutory minimum but within the advisory guidelines.

Muro's counsel did not make a formal 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 appellate 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 that 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 pronounced to obtain reasonableness review on appeal. Appendix at 2; *see also United States v. Peltier*, 505 F.3d 389, 391-92 (5th Cir. 2007); *United States Heard*, 709 F.3d 413, 425 (2013). Other circuits hold that no such objection is required. These circuits reason that the determination of the substantive reasonableness of the sentence imposed constitutes an appellate responsibility that exists whether or not the defendant objected to the sentence. *See, e.g., 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 the circuit split as to whether a post-sentence objection is necessary to obtain reasonableness review of a sentence. A single rule will help to bring consistency to appellate review of federal sentences.

A. This Court's Sentencing Opinions Establish 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 appellate courts reviewed sentences. 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 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 that it thought met those purposes in the particular case. *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 for reviewing sentences, not a standard for the district courts to use in imposing sentence. The sentencing court's task, *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 v. United States*, 137 S. Ct. 1170, 1175 (2017) (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 it has imposed is unreasonable. *See, e.g.*, Appendix at 2; *United States v. Peltier*, 505 F.3d 389, 391-92 (2007). When no post-sentence objection is 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; *see* Appendix at 2-3.

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 rationalizes 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 views 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) 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 following, *Booker*. When a defendant has made his sentencing request obvious to the district court, he has done what the contemporaneous-objection rule is designed to have him do. *Cf. Puckett*, 556 U.S. at 134 (explaining that requesting action or relief gives district court an opportunity to decide the issue). The Fifth Circuit's requirement, after sentence has been imposed, that a formal objection be lodged 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, relying on the principle that substantive reasonableness is an inapt concept at sentencing, have concluded that a requirement of a post-sentencing "reasonableness" objection can find no footing in this Court's precedent. These circuits base this conclusion 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, the courts conclude that reasonableness is not "an objection that must be raised upon the pronouncement of a sentence." *Bras*, 483 F.3d at 113. As the the Sixth Circuit has explained, 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 post-*Booker* § 3553 sentencing precedent. Nor is any purpose of error preservation 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 persisted, and neither side has indicated any inclination 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. Muro's Case Is a Good Vehicle.

Muro's case is an appropriate vehicle for resolving the circuit split. Muro specifically sought the lowest sentence possible, which was the mandatory-minimum 60-month sentence. Muro's counsel raised § 3553 considerations in connection with the

request. 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.

Muro'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. Muro informed the district court of his sentence request, and supplied reasons supporting that request. The facts Muro 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). Muro's allocution and his counsel's statements provided the district court with the information necessary to understand Muro's position on sentencing. The Fifth Circuit, however, held Muro'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 Muro'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 Muro 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_____
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DATED: April 30, 2019.