

No. 18-_____

In the

Supreme Court of the United States

JODY LANARDO WHITE,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

Kevin Joel Page
Counsel of Record
Federal Public Defender's Office
Northern District of Texas
525 Griffin Street, Suite 629
Dallas, Texas 75202
(214) 767-2746

QUESTIONS PRESENTED

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Whether challenges to the reasonableness of a sentence must be preserved by specific objection?

PARTIES TO THE PROCEEDING

Jody Lanardo White is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jody Lanardo White, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of conviction and sentence was entered June 8, 2018, and is provided in the Appendix to the Petition. [Appendix A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. White*, 757 Fed. Appx. 405 (5th Cir. March 15, 2019)(unpublished), and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTION

The opinion and order of the United States Court of Appeals for the Fifth Circuit affirming the sentence as modified were issued on March 15, 2019. [Appendix B]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 51 provides:

Rule 51. Preserving Claimed Error

(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.

STATEMENT OF THE CASE

A. District Court Proceedings

The life history of Petitioner Jody Lanardo White reads like a punch to the gut. During his shockingly traumatic childhood, Mr. White's father was murdered, and his mother was raped. (Record in the Court of Appeals, at 55). The latter event caused his mother to enter a psychiatric facility and him to live with his impoverished grandmother. (Record in the Court of Appeals, at 55). He bounced through countless homes and relatives until attempting to reunite with his mother at age 11. (Record in the Court of Appeals, at 55, 60). When this proved unsuccessful due to a possessive stepfather, he ran away to his grandmother, and continued pin-balling through relatives and juvenile facilities (Record in the Court of Appeals, at 55-56, 60).

Unsurprisingly, Mr. White began to exhibit the emotional and intellectual consequences of this extended trauma. He was placed in stigmatizing special education classes, and dropped out. (Record in the Court of Appeals, at 56). His intellectual functioning is currently classified as Borderline, and he has repeatedly sought treatment for emotional disorders like depression. (Record in the Court of Appeals, at 57-60). At age nine, Mr. White suffered his first arrest for stealing less than five dollars worth of property, though little else is known about the incident. See (Record in the Court of Appeals, at 144). An extensive criminal history – juvenile and

adult – has followed, until the instant offense of possessing a firearm after felony convictions. (Record in the Court of Appeals, at 142-152).

In 2017, Mr. White was arrested for parole violations, and caught with drugs and a gun. (Record in the Court of Appeals, at 137). He pleaded guilty to possessing a firearm after having sustained a felony conviction in violation of 18 U.S.C. §922(g). (Record in the Court of Appeals, at 38-39).

Probation ultimately concluded that his Guideline range should be 70-87 months imprisonment. (Record in the Court of Appeals, at 220). The Presentence Report (PSR) included the following narrative of Mr. White's first arrest at age nine, for "Theft Under \$5:

The FWPD incident report revealed on August 15, 1983, the defendant was transported to FWPD by his grandmother, Nettie White. The incident report revealed there was insufficient evidence to file a case; however, no details were provided. The defendant was in the company of several juveniles.

(Record in the Court of Appeals, at 144).

The court imposed sentence at the statutory maximum of ten years imprisonment. (Record in the Court of Appeals, at 120-122). Explaining the sentence, the court showed grave concern with the defendant's criminal history. (Record in the Court of Appeals, at 120-122). And at the outset of its explanation, the court noted the defendant's first arrest at age nine:

THE COURT: Okay. Well, as your attorney acknowledged, you have a terrible criminal record. You're now, I think, 43, and it started at age 11 with a theft. Actually, according to the Presentence Report, it started earlier than that.

You started at age 9 with a theft, and then at age 10 went from age -- from there to age 10 with a theft, and then to age 11 with a theft, and it's almost been at least once a year or more frequently than that since then.

(Record in the Court of Appeals, at 120).

The defendant objected to the sentence as procedurally and substantively unreasonable, upon which objection the court did not rule. (Record in the Court of Appeals, at 125).

B. Proceedings in the Court of Appeals

On appeal, Petitioner argued, inter alia, that the district court plainly erred in considering his arrest at age nine, because neither due process nor the Sentencing Guidelines authorized the Court to consider an arrest record so devoid of factual elaboration. *See Townsend v. Burke*, 334 U.S. 736 (1948); USSG §4A1.3.

The court of appeals applied a standard of plain error for want of an objection to the arrest record below. [Appendix B, at 2]. The court of appeals agreed that the theft arrest was not an appropriate basis for sentencing. [Appendix B, at 2][“The record at issue here, White’s 1983 arrest for theft under \$5, constitutes a bare arrest record that the district court arguably considered during sentencing.”]. But it affirmed because the error did not meet the demanding standards of “plain error.” Specifically, it noted – as reflected above – that the arrest was only “arguably” considered,” and it found that the defendant had failed to “demonstrate that, but for the court’s [error], he would have received a lesser sentence.” [Appendix B, at 3].

REASONS FOR GRANTING THE PETITION

THERE IS A REASONABLE PROBABILITY OF A DIFFERENT RESULT IF THE PETITIONER PREVAILS IN *HOLGUIN-HERNANDEZ V. UNITED STATES*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (JUNE 3, 2019)(GRANTING CERTIORARI), AND THE COURT BELOW IS INSTRUCTED TO CONSIDER THE OUTCOME OF THAT DECISION.

The length of a federal sentence is determined by the district court's application of 18 U.S.C. §3553(a). *See United States v. Booker*, 543 U.S. 220, 261 (2005). A district court must impose a sentence that is adequate, but no greater than necessary, to achieve the goals set forth in 18 U.S.C. §3553(a)(2). *See* 18 U.S.C. §3553(a)(2). The district court's compliance with this dictate is reviewed for reasonableness. *See Rita v. United States*, 551 U.S. 338, 359 (2007). In *Gall v. United States*, 552 U.S. 38 (2007), this Court emphasized that all federal sentences, "whether inside, just outside, or significantly outside the Guidelines range" are reviewed on appeal "under a deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 51.

The court of appeals treats as a species of "substantive reasonableness" whether "it gives significant weight to an irrelevant or improper factor..." *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009); *accord United States v. Broussard*, 669 F.3d 537, 551 (5th Cir. 2012). Accordingly, the district court's consideration of a bare arrest record exposed the sentence to attack as substantively unreasonable. Indeed, the court below held that the arrest was not a proper basis for sentencing. [Appendix B, at 2].

Yet the court below has also held that a defendant must make specific objection to preserve a substantive reasonableness claim. *See United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007); *United States v. Duhon*, 541 F.3d 391, 397 (5th Cir. 2008). And that proved to be dispositive here; applying plain error, the court below affirmed for want of clear error or, primarily, an adequate showing of an effect on substantial rights. [Appendix B, at 2].

This Court, however, will decide whether substantive reasonableness challenges require specific objection in *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting certiorari). In the even that this Court holds that such objections are not necessary, there is a reasonable probability of a different result, if the court below were to consider that forthcoming authority. The court below, after all, conceded that the arrest record is an improper basis for sentencing. Under these circumstances, it is appropriate to hold the instant petition, and if the petitioner prevails in *Holguin-Hernandez*, grant the instant petition, vacate the judgment below and remand for reconsideration. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

CONCLUSION

This Court should hold the instant Petition pending the outcome of *Holguin-Hernandez*, and then grant certiorari, vacate the judgment below and remand for reconsideration.

Respectfully submitted this 13th day of June, 2019,

Kevin Joel Page
Kevin J. Page
Counsel of Record
Assistant Federal Public Defender
Federal Public Defender's Office
Northern District of Texas
525 Griffin Street, Suite 629
Dallas, Texas 75202
(214) 767-2746