**No. 18-9692**

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**

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## ARGUMENT

**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.**

This Court will shortly decide in *Holguin-Hernandez v. United States*, No. 18-7739, 139 S.Ct. 2666 (June 3, 2019)(granting certiorari), whether an objection is necessary to preserve substantive reasonableness claims. Appellant's claim of error fits within substantive reasonableness claims as they are defined by the court below. *See United States v. Cooks*, 589 F.3d 173 (5th Cir. 2009)(sentence may be substantively unreasonable if the sentencing court than "giv[es] significant weight to an irrelevant or improper factor."). As such, the decision may change the standard of review. And as it appears that the standard of review was dispositive – a point the government does not contest – this Court should at least hold the instant case pending *Holguin-Hernandez*.

The government resists this conclusion. It contends that *Holguin-Hernandez* will not alter the standard of review because "the petitioner in *Holguin-Hernandez* has acknowledged that "procedural reasonableness is different from substantive reasonableness" and that '[w]hen a defendant has not asked the district court to take a certain procedural step, it might be necessary to object after the district court engages in a purported procedural irregularity to preserve such a claim for appeal.'" (Brief in Opposition, at pp.11-12). But it does not follow from the concession that

"procedural reasonableness is different from substantive reasonableness" that no claim may sound in both categories. To the contrary, many circuits have recognized that the line between the two kinds of claims is not a bright one, and that the categories overlap. *See United States v. Reyes-Santiago*, 804 F.3d 453, 468 (1st Cir. 2015) ("The line between procedural and substantive sentencing issues is often blurred."); *United States v. Liou*, 491 F.3d 334, 337 (6th Cir. 2007)("Although we have noted that the border between factors properly considered "substantive" and those properly considered "procedural" is blurry if not porous, our post-*Booker* jurisprudence requires us to consider each of these factors in determining whether a sentence is reasonable.")(citing *United States v. Jones*, 489 F.3d 243, 250 (6th Cir.2007)); *United States v. Cookson*, 922 F.3d 1079, 1090 (10th Cir. 2019)("...we have recently acknowledged a blurring of the line between procedural and substantive reasonableness when it comes to the district court's explanation for a given sentence.").

Most significantly, the claim falls comfortably within the definition of a substantive reasonableness claim employed by the court below. The government does not even contest the appropriate characterization of the claim under the Fifth Circuit definition. Rather, it points out only that Petitioner himself pressed the issue as one of procedural reasonableness in the court below. *See* (Brief in Opposition, at p.12). But at the time of the briefing below, there would be little point in arguing the characterization, since the court below required detailed objections for either kind of claim. *See United States v. Hernandez-Martinez*, 485 F.3d 270, 272 (5th Cir.

2007)("generalized request for a sentence within the Guidelines" does not preserve "an argument of specific legal error."). Further, the rule in the court below is that parties' concessions as to the standard of review are irrelevant – the court itself must decide the appropriate standard, ignoring the parties' characterizations and concessions. *See United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992)(*en banc*)("The parties' failure to brief and argue properly the appropriate standard may lead the court to choose the wrong standard. But no party has the power to *control* our standard of review.")(emphasis in original); *United States v. Fisher*, 624 F.3d 713, 719 (5th Cir. 2010)( "the court, not the parties, determines the correct standard of review.")(citing *Vontsteen*, *supra*). Accordingly, if this Court holds that substantive reasonableness claims need not be preserved by specific objection, and if the instant claim falls within the definition of a substantive reasonableness claim as the court below understands it, plain error will not be applied, the defendant's concessions notwithstanding.

Finally, the government argues at length that the claim ought not be characterized as a substantive reasonableness claim, and should not be excused from objection. *See* (Brief in Opposition, at pp.12-14). The standard for issuance of GVR (granting certiorari, vacating judgment, remanding in light of new authority) is predictive, whether the court below will likely change its mind. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996)("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the

lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate."). As such, the controlling question is how the court below will treat the claim, not how the government (or even this Court) thinks it ought to be treated. The government offers no reason to think that adding time to the sentence on the basis of a bare arrest record constitutes anything other than "giv[ing] significant weight to an irrelevant or improper factor." *Cooks*, 589 F.3d at 186.

## 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 28th day of October, 2019,

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