No. 19-5125

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO GALLEGOS-LOPEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES FIFE
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5030
(619) 234-8467/Fax: (619) 687-2666

Attorneys for Petitioner

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Argument in Reply

Mr. Gallegos's Petition urged the Court finally to address a circuit split—festering for a decade and half—over the requirements to preserve procedural, sentencing error for plenary review on appeal. That split implicates not only the uniform scope for standards of review in the Courts of Appeals, but also the nationwide application of Fed. R. Crim. P. 51, which several circuits have found governs the question at the heart of this division. Mr. Gallegos pressed the Court to address this intractable split and clarify the scope of Rule 51. His case provided a suitable vehicle for that task.

The Solicitor General opposes the Petition. First, he jumps the gun to assert a merits argument: that the plain-error side of the split applies here. Opp. at 7-9. Second, he claims the split in circuit approaches is only a "minimal circuit division" not needing resolution. Opp. at 7, 9-13. Third, even if resolution of the split deserves attention from the Court, Mr. Gallegos's case is a "poor vehicle for addressing the question presented." Opp. at 7, 13-14. And finally, the Question Presented here is not "the same question pending before the Court" in *Holguin-Hernandez v. United States*, No. 18-7739. Opp. at 7, 14-16.

The Solicitor General's arguments lack merit, and the Court should issue the writ to resolve the long-standing circuit split for the reasons given in the Petition. The Opposition fails to address the cogent reasons why Rule 51's procedure is fully applicable in the sentencing context. The state of the law on this point in the circuits is far more divided and confused than the Solicitor General portrays. The record here

provides concrete ways the district court's inattentiveness to the Guideline calculations affected the outcome, especially given the dispositive effect of applying plain error versus plenary review. And it is precisely because this Petition presents the complementary issue to the *Holguin-Hernandez* question that avoidance of piecemeal and incomplete decisions counsels this Court accept review of both cases.

I

The Applicability *vel non* of Plain Error Is the Merits Issue at Stake Here, Not a Reason to Deny Review

Mr. Gallegos's Petition is predicated on a division in circuit authority. *See* Sup. Ct. R. 10(a). Where some circuits require an exception to an unreasonable sentence, other circuits accord plenary review of procedural, sentencing errors when a party proffered and argued for a sentence that is different from the sentence ultimately imposed by the district court. Pet. at 11-16. Mr. Gallegos argued that these circuits—including the Fourth, Seventh, and Eighth Circuits—maintain that this set of circumstances preserves sentencing errors in accordance with Fed. R. Crim. P. 51. Those circuits reason that to require a post-denial listing of claimed errors would not be an "objection" to the ruling, but an "exception," which Rule 51 states is unnecessary to preserve a claim for plenary, appellate review. Pet. at 12-15. Under this reasoning, circuits that require a so-called "objection" to particular flaws in the court's reasoning are actually requiring a bill of exceptions contrary to the Rule.

From the start, the Opposition fails to grasp the basic premise of certiorari and, in essence, prejudges the answer to the Question Presented by adopting reasoning on one side of the split, namely of those courts that require a so-called "objection" to avoid

review on plain error. Opp. at 7-9.

The Solicitor General's jumping the gun and choosing sides on the merits does not properly respond to Mr. Gallegos's arguments in the Petition why the writ should issue. In fact, in a backhanded way, the Solicitor General affirmatively *confirms* the need for the Court's consideration, because he adopts one side of the split without addressing the other circuits' reliance on Rule 51 to take this matter out of the realm of plain error under Rule 52. Thus, he cites a decision relating to a non-sentencing context (viz. *United States v. Vonn*, 535 U.S. 55 (2002)) without acknowledging that three circuit courts have held Rule 51 *does apply* to sentencing cases like Mr. Gallegos's. Opp. at 8.

The merits, of course, are a separate matter from whether review is warranted to resolve circuit confusion over a question of nationwide importance. Whatever the value of the Solicitor General's merits arguments, none of what he says denies the fact that a genuine, long-standing line in circuit authority applies Rule 51 in the sentencing context, such that exceptions are deemed unnecessary to preserve procedural errors.

Mr. Gallegos contends that logic and the wording of Rule 51 support those courts applying its principles to sentence requests. Rule 51, as one circuit stated, "represent[s] the considered view after extensive study of skilled judges and lawyers. We see good reason to adopt the approach to preservation set forth in those Rules, and no reason to reject it. This is particularly so given that we have followed precisely this approach [applying Rule 51] in other sentencing cases." *United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010). Rule 51 avoids a "formulaic approach," *id.* at 577, with rote recitations

and procedural pitfalls: "As Judge Easterbrook has explained, Rule 51 does 'not require a litigant to complain about a judicial choice after it has been made.' *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009)." *Id.* at 578. Against this practical approach, the Solicitor General's argument touts a "hobgoblin"[1] of mere consistency, providing little fairness and few institutional benefits for the price.

But that is all for the Court to decide, following full briefing, once it grants review.

II

The Long-Standing Split in Circuit Authority on How a Litigant Preserves Procedural, Sentencing Error for Plenary, Appellate Consideration Warrants Review

The Solicitor General concedes that the circuits are *not* in accord on the standard for reviewing procedural, sentencing error, admitting "some disagreement" exists. Opp. at 10. But his description does not do justice to the state of confused division among the circuit courts on this matter. Plus, what he fails to acknowledge is that a split is a split, even if only a single circuit takes a divergent course.

The Solicitor General disputes the disparity is acute. He points to there being a "clear majority" in the circuit split that applies plain-error review to one type of procedural error: failure to explain the sentence adequately. Opp. at 10. Thus, he contends, neither the Seventh nor the Eighth Circuit has consistently adopted an analysis relying on Rule 51 to preserve attendant *procedural* errors once a particular sentence has been proffered and denied. Opp. at 10-11.

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[1] Ralph Waldo Emerson, ESSAYS: FIRST SERIES *Self-Reliance* (1841).

That claim is not accurate. Instead, what the Solicitor General's discussion proves is that confusion and inconsistency has occurred repeatedly over the decade since *United States v. Booker,* 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007). *See also* Pet. at 15-16 (noting this circuit backtracking).

That confusion stems from the circuits' inconsistent treatment of the Court's post-*Booker* precedents. *Gall* clearly catalogued the types of judicial missteps that would constitute "procedural," sentencing error, which a reviewing court should address first.

> [The reviewing court] must first ensure that the district court committed no significant procedural error, such as [1] failing to calculate (or [2] improperly calculating) the Guidelines range, [3] treating the Guidelines as mandatory, [4] failing to consider the [18 U.S.C.] § 3553(a) factors, [5] selecting a sentence based on clearly erroneous facts, or [6] failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.

552 U.S. at 51. Contrary to the Solicitor General's reasoning, *Gall* did not distinguish one species of procedural error from another: all six types mentioned address errors of *process* unrelated to the reasonableness of the resulting sentence, or what is termed "substantive reasonableness." In that light, if some circuits treat one sort of procedural error (explanation) differently from others (failing to consider statutory factors), that does not show circuit uniformity and compliance with this Court's precedents, as the Opposition argues—it shows the opposite. *Gall*'s cohesive catalogue of "procedural errors" has been fragmented and assigned varying review standards, but with little justification in light of Rule 51.

Thus, in the larger view, the Solicitor General's attempt to balkanize the *Gall* list

of procedural errors makes little sense and fails to distinguish Mr. Gallegos's case as pertaining to some different error from the cited cases. After all, there is not much analytical daylight between an inadequate explanation (error [6]) and some version of slighting the proper Guideline calculation (which relates to errors [1] through [4], to some extent). If a party, such as Mr. Gallegos, proposes to a judge a sentence based on a proffered calculation of the Guideline range, but the sentencing judge fails to address that calculation—or any other calculation—in a meaningful fashion, the judge is, in essence, wholly ignoring "nonfrivolous reasons for imposing a different sentence." *Rita v. United States*, 551 U.S. 338, 357 (2007). That is one of the most concrete signs of an inadequate explanation. Consequently, the conceptual gap between non-calculation and non-explanation is slim; it does not support the radically different treatment the Solicitor General claims. Ultimately, then, the distinction the Opp. at 10-11 makes is chimerical. A judge who fails to calculate the applicable Guidelines fails to respond to nonfrivolous arguments based on § 3553(a) factors (including *two* Guidelines-anchored factors in (a)(4) & (5)). The error in the instant case is properly just a sub-type of a non-explanation/non-consideration error of *Gall*'s [4] and [6] types.

Likewise, despite the Solicitor General's attempt to characterize the case law as homogenously addressing procedural error, in cases like the Seventh Circuit's *Bartlett*, 567 F.3d at 909-10, the error to which Rule 51 was applied was plainly procedural error different from the non-explanation type in *Gall*'s list: the judge apparently misread the Guidelines Sentencing Table, which is a *calculation* error, not an explanation error. Similarly, in *United States v. Boling*, 648 F.3d 474, 483 (7th Cir. 2011), plenary review

was accorded to a claim "the district court failed to properly consider the sentencing factors listed in § 3553(a)," item [4] in *Gall*'s catalogue of procedural errors. Also, in *United States v. Williams*, 616 F.3d 685, 694 (7th Cir.), *cert. denied*, 562 U.S. 1092 (2010), the same procedural error of slighting the statutory factors was reviewed under the abuse of discretion standard, not plain error. As a result, all the Solicitor General demonstrates is that circuits have inconsistently and confusedly divided up the *Gall* catalogue of procedural errors, giving some plenary review and requiring an exception for others.

In his Petition, Mr. Gallegos pointed to how some circuits have wavered in their applying a consistent, plain-error regime. Pet. at 15-16. Thus, the Tenth Circuit, often cited as applying the plain-error rule, has retreated from its original position in *United States v. Romero,* 491 F.3d 1172 (10th Cir.), *cert. denied* 552 U.S. 930 (2007), to adopt a more mixed standard. Now, plain-error review applies "only to alleged procedural errors at sentencing that were not properly raised in the district court," not to sentencing requests made prior to the hearing; the latter situation—consistent with Rule 51—accords the denial plenary review. *United States v. Lopez-Avila*, 665 F.3d 1216, 1217-19 (10th Cir. 2011).

Mr. Gallegos also cited the case of the D.C. Circuit. Pet. at 16. Although the Solicitor General places it without comment in the plain-error camp on procedural error (Opp. at 10), that Circuit treats the procedural error of failure to explain as "prejudicial in itself," which comes close to making it reversible per se. *United States v. Akhigbe*, 642 F.3d 1078, 1087-88 (D.C. Cir. 2011).

Likewise, the Solicitor General dismisses the Sixth Circuit as applying some version of a local rule in its supervisory capacity. Opp. at 11-12. That claim of parochialism is inconsistent with the views of the dissent in *United States v. Vonner*, 516 F.3d 382, 406, 409 (6th Cir. 2008) (en banc) (Moore, J., dissenting)—that the Sixth Circuit's approach creates a substantive split in legal authority with other circuits worthy of this Court's attention. Moreover, the Solicitor General again merely demonstrates that the Sixth Circuit nonetheless applies a rule *different* from the alleged "clear majority." Opp. at 10. *See also United States v. Vanderwerfhorst*, 576 F.3d 929, 934 (9th Cir. 2009) (recognizing the Sixth Circuit approach differs from the Ninth's and expressly rejecting it).

Finally, the Opposition concedes that at least the Fourth Circuit has reasoned in the manner Mr. Gallegos points out. Opp. at 12. *See also United States v. Jones*, 438 F. App'x 515, 518 (7th Cir. 2011) (acknowledging the Fourth Circuit approach accords with the Seventh's while rejecting the contrary circuits' reasoning). Although the Solicitor General cannot deny that *Lynn*, 592 F.3d at 578 applies the rule the Petition attributes to it, he falls back on the claim that the Court has "repeatedly declined to review" the divergence represented by the Fourth Circuit's approach. Opp. 12-13. But the " 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.' " *Teague v. Lane*, 489 U.S. 288, 296 (1989) (citations omitted). Thus, "[t]he 'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value." *Id.* (*quoting Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.)). The denial of review to

decisions on *both* sides of the split at most suggests the Court had not yet deemed the split fully developed. But now, after 14 years of experiment, the lines are drawn and the matter ripe for resolution.

As a consequence, the national, legal landscape regarding the standard of review for sentencing error is far from uniform or even consistent. At most, the Solicitor General shows there is at least a three-way split, with multiple instances of intra-circuit divisions, and courts dividing up *Gall*'s unitary list of "procedural errors," assigning varying standards of review with little justification for why one type of error gets one standard and another gets a different one. All this in the face of what would seem to have been a *fusion* of the sentencing standard of review following *Booker*. Pet. at 9-10.

The Solicitor General cannot deny these admitted splits are significant, in that Mr. Gallegos's appeal would have been accorded different treatment if heard in a court adhering to a different position in this debate: Mr. Gallegos would have had a plenary review in the Fourth or Seventh Circuit, but was saddled with the plain-error burden in the Ninth. Nor can the Solicitor General deny the persistence of the division: his own citations span the breadth of a decade, with no clear convergence at the end of the line, fourteen years after *Booker*.

The legal rift is real and unlikely to heal itself. Nor does it matter that the Solicitor General adopts the view of the greater numerical line-up. Constitutional law is not a popularity contest where the Court simply counts noses to decide. Even unanimity of lower court views is no proof against error. *See Rehaif v. United States,* 139 S. Ct. 2191, 2210 (2019) (Alito, J., dissenting) (noting majority adopts position

contrary to how all circuits had hitherto decided). The Opposition's assuming plain-error review applies to Mr. Gallegos does nothing to heal that rift in the law, but only underscores the need for the Court to finally address it.

III

This Case Provides a Suitable Vehicle for the Court's Review

Even if the question is one that the Court should address, the Solicitor General insists this is not the case to finally do that, stating "this case would be a poor vehicle." Opp. at 13. His sole reason is that the procedural errors were not prejudicial. *Id.* at 13-14. But he fails to address head on Mr. Gallegos's discussion, based on the specifics of the sentencing below, how the sentence could reasonably differ had the district court not committed procedural error. Pet. at 22-23.

The Solicitor General misses the point that "the standard of review chiefly determines the ultimate direction of the appeal." G. Ross Anderson, Jr., *Metamorphosis of the Sentencing Landscape: Changes in Procedure Affect Judges, Attorneys, and Defendants*, 57 OCT. FED. LAW. 62, 63 (2010). At a minimum, plain-error review shifts the burden on prejudice to the appellant, and that alone suffices to show that the Court's ruling on the Question Presented would significantly affect the determination of this appeal. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (plain error places burden of persuasion on defendant).

The Solicitor General argues as if a failure to calculate and consult the Guidelines is a mere oversight. He claims that not calculating and considering the Guidelines had minimal effect on the sentencing here. That view is rather inconsistent

with the Court's position in *Gall* or *Molina-Martinez v. United States,* 136 S. Ct. 1338 (2016), calling the Guidelines the "starting point and initial benchmark" for sentencing, *Gall*, 552 U.S. at 49, and the "lodestar," *Molina-Martinez,* 136 S. Ct. at 1346, for gauging reasonableness.

But more specifically, the Opposition does not address or refute Mr. Gallegos's citation of the particular ways how *in this case* the lack of an anchor in the proper Guideline calculation affected the decision-making. Pet. at 22-23.

Take one example. The parties agreed that Mr. Gallegos's base offense level was enhanced by a four-level increase for prior immigration convictions under U.S.S.G. § 2L1.1(b)(3). At sentencing, without first addressing the actual calculations, the district judge railed against the alleged insensitivity of § 2L1.1(b)(3), because it gave the same enhancement whether there were two prior convictions or ten, failing to increment the sentence sufficiently to reflect prior immigration offenses. He cited this as one reason he found the parties' recommendations too low.

However, if the court had conducted the calculation as the "initial benchmark" as *Gall* requires, confronting what facts *in this case* underlay the specific offense characteristic, the judge would have realized that his complaint about the insensitivity of § 2L1.1 simply did not materialize on this record, as Mr. Gallegos had only the minimum number of prior offenses to qualify for the increase. That could reasonably have led the judge to forego the need for a variance or ameliorate its extent. But the judge's inattentiveness to the actual Guideline calculation in this case masked the groundless nature of one of his reasons why the Guideline sentence was supposedly

insufficient. Similarly, non-attention to the calculation obscured that the recommended Guideline range could legitimately change due to the aging-out of prior convictions, reducing the criminal history score compared with prior sentencings.

The fact is that, because this appeal was decided in the Ninth Circuit, where the lack of an exception cast all procedural claims into the plain-error pot, Mr. Gallegos's arguments on procedural reasonableness were formally given shorter shrift than they would have gotten at least in the Fourth Circuit and arguably in others. If the effect of the court's belated calculation until after the sentence was decided and imposed were reviewed in plenary fashion, there is a reasonable likelihood of a different result. For this Court's determination of the Petition, the fact remains Mr. Gallegos would have faced a better standard of review had he been prosecuted in one of the Rule 51 circuits. That fact demonstrates prejudice and provides a basis for this Court's decision to provide genuine relief.

IV

The Question Presented Is the Flip-Side Issue to That Being Addressed by the Court in *Holguin-Hernandez*; Judicial Economy, Adequate Guidance to the Lower Courts, and Ample Scope for the Court's Analysis of Post-*Booker* Requirements Warrant Hearing This Case in Conjunction with *Holguin-Hernandez*

As a last point, the Solicitor General attributes to Mr. Gallegos a stance he does not in fact take. The straw-man he topples is to argue "the petition should not be held pending the Court's decision in *Holguin-Hernandez*." Opp. at 14. But the Petition does not request that. In fact, the very reason the Solicitor General says this case should not be held up for *Holguin-Hernandez* demonstrates the validity of the request

Mr. Gallegos *did* make in the Petition: to join this case as a companion to *Holguin-Hernandez*.

There may be some sense to the Solicitor General's argument on Opp. at 14-16 not to abey this case for a decision in *Holguin-Hernandez*, because the latter relates to review of substantive reasonableness and this Petition concerns review of procedural reasonableness. Because there is no legal point of tangency in their Questions Presented, the General argues, the outcome of one does not affect the other.

But what Mr. Gallegos actually suggested to the Court, Pet. at 17 n.3, is that this appeal is the obverse side of the Question Presented in *Holguin-Hernandez* and should be considered together with it. That is, it is exactly because the two cases represent the two fragmented approaches to post-*Booker* sentencing review that joinder would be beneficial to the Court and avoid piecemeal consideration of closely interconnected questions.

It is very likely that how the Court approaches the scope of review for one type of reasonableness will correspondingly affect the scope for the other, given the unitary review standard after *Booker. See* Pet. at 9-10. Judicial efficiency, securing the widest analytical scope for the Court's inquiry, and providing the lower courts with complete guidance on the subject all warrant this Court considering both sides of the reasonableness coin by taking up Mr. Gallegos's claim along with that in *Holguin-Hernandez.* For instance, the principal basis of the circuit split needing resolution in this case is the applicability of Rule 51 in the sentencing context. A cursory scan of the briefs filed in *Holguin-Hernandez* makes clear that the principles of Rule 51 play

a central role in the determination of that case as well. *See* Brief for Petitioner, Holguin-Hernandez v. United States (No. 18-7739), 2019 WL 3425113 (July 29, 2019); Brief for the United States Supporting Vacatur, Holguin-Hernandez v. United States (No. 18-7739), 2019 WL 3451574 (July 29, 2019); Brief of Amici Curiæ, Holguin-Hernandez v. United States (No. 18-7739), 2019 WL 3713690 (Aug. 5, 2019). *See also* Opp. at 14-15.

Thus, contrary to the Solicitor General's argument, precisely *because* this case does not present the identical, substantive-reasonableness question as *Holguin-Hernandez* makes it an ideal companion case regarding *procedural* reasonableness. Simultaneously, the scope and effect of Rule 51 at sentencing will play a key part in both cases. To avoid divergent or incomplete handling of the post-*Booker* standard of review, the Court should accept review of this case as well and render a comprehensive analysis of the union of the Questions Presented.[2]

[2] "Whether a criminal defendant who argues in the district court for a lower sentence must formally object after pronouncement of his sentence to preserve a claim for appeal that his sentence is substantively unreasonable." Brief for Petitioner at i, Holguin-Hernandez v. United States (No. 18-7739), 2019 WL 3425113, at *i (July 29, 2019). *Cf.* Pet. at prefix. Substituting "procedurally" for "substantively" in Mr. Holguin's Question Presented would fit Mr. Gallegos's Petition equally well.

Conclusion

For all the reasons given above and in the Petition, the Court should grant certiorari to clarify this important question of federal sentencing law. The Court is also respectfully requested to consider joining this appeal for consideration along with *Holguin-Hernandez v. United States,* No. 18-7739.

Date: October 18, 2019

Respectfully submitted,

s/ James Fife
JAMES FIFE
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101-5008
Telephone: (619) 234-8467
Attorneys for Petitioner