No. _____

In the Supreme Court of the United States

October Term, 2018

GEOVANNY ANTONIO LOYOLA-VILLEGAS, *PETITIONER*,
also known as Loyola Geovanny Anto Villegas, also known as Giovanny Loyola, also known as Geovanny Antonioloyo Villegas, also known as Geovanny Antoni Villegasloyola, also known as Geovanny Anton Loyola-Villegas, also known as Geovanny Loyolavillegas, also known as Geovanny Loyola, also known as Geovanny A. Loyola-Villegas,

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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QUESTIONS PRESENTED FOR REVIEW

1. Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.
2. Whether a sentence produced by a guideline that is not empirically-based, illegal-reentry guideline §2L1.2, is entitled to a presumption of reasonableness on appeal.

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V.

UNITED STATES OF AMERICA

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

Petitioner Geovanny Antonio Loyola-Villegas 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 12, 2019.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

United States Sentencing Guidelines

Other Authorities

OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Loyola-Villegas*, No. 18-50513, unpub. op. (5th Cir. Apr. 12, 2019), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on April 12, 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 STATUTE INVOLVED

The text of 18 U.S.C. § 3553(a) is reproduced in Appendix B.

FEDERAL RULES INVOLVED

The text of Federal Rules of Criminal Procedure 51 and 52 is reproduced in Appendix C.

UNITED STATES SENTENCING GUIDELINE INVOLVED

The 2016 version of Sentencing Guideline §2L1.2 is attached to this petition as Appendix D.

STATEMENT

Geovanny Loyola-Villegas is a 30-year-old Mexican citizen whose immediate family lives in Mexico. His father died in an automobile accident when Loyola was six years old, and he was raised by his mother and stepfather. Loyola first came to the United States in 2007, after graduating from high school in Mexico and attending one year of university.

Loyola worked for a contractor in San Antonio, Texas, for several years. He also was convicted of driving while intoxicated and evading arrest, for which he was sentenced to six months in jail in 2009. Years later, he was convicted of possessing a controlled substance. According to the police report, he was stopped for driving without a seatbelt and the officer found a folded dollar bill containing a few grams of cocaine. Loyola served seven months of his two-year sentence before being paroled and then removed to Mexico in 2015.

Loyola came back to the United States to try to help his mother financially. He found work as a quality control supervisor earning $18 per hour. But he was convicted of DWI a second time and was sentenced to four months and 16 days in jail. That conviction led to his discovery by immigration officials.

In 2018, Loyola pleaded guilty to illegal reentry. *See* 8 U.S.C. § 1326. The presentence report, which the district court adopted

without change, calculated his total offense level as 13 using the 2016 version of the Guidelines Manual. That included a base offense level of eight, an eight-level enhancement for his prior drug conviction, and a three-level reduction for his acceptance of responsibility. *See* U.S.S.G. §2L1.2(a), (b)(2)(B); §3E1.1. Loyola's seven criminal history points placed him in criminal history category IV. *See* Ch.5 Pt.A (Sentencing Table). The resulting advisory Guidelines range was 24 to 30 months. *See* U.S.S.G. Ch.5 Pt.A (Sentencing Table).

At the sentencing hearing, Loyola asked for a downward variance because he had recently found out he would soon become a father. His girlfriend living in Mexico was eight months pregnant with a baby girl. This news changed his perspective and motivated him to be a father, caregiver, and financial provider to his girlfriend and child. Loyola explained that he will stay in Mexico going forward because he wants to be at his daughter's side. The government asked for a sentence within the advisory Guidelines range.

The district court explained that, while it is normally lenient under such circumstances, it could not overlook Loyola's history of a prior deportation, two felony convictions, and two misdemeanor convictions. The court sentenced Loyola to 24 months' imprisonment and three years' nonreporting supervised release.

On appeal, Loyola argued that the sentence was substantively unreasonable. The court of appeals affirmed Loyola's sentence. App. A. It held that, because Loyola had not objected after imposition of his sentence, the claim was subject to plain-error review. And it held that the sentence was not unreasonable. In so doing, it applied the circuit's rule that within-Guidelines sentences are presumptively reasonable.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari to Clarify That a Formal Objection After Pronouncement of Sentence Is Not Necessary to Invoke Appellate Reasonableness Review.

The court of appeals held that Loyola's challenge to his sentence was subject to plain-error review. App. A. This was so even though Loyola requested a sentence below the bottom of the Guidelines range and gave reasons for his request. The court's ruling was based on its opinions in *United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007), and *United States v. Heard*, 709 F.3d 413 (5th Cir. 2013), in which the court held that, even if a defendant has asked for a variance from the Guidelines range, he waives any substantive-reasonableness claim on appeal by not objecting to the reasonableness of the sentence after it is imposed. This practice conflicts with the Court's precedent governing appellate review of sentences, Federal Rule of Criminal Procedure 51, the purpose of the plain-error standard of review, and an overwhelming majority of the other circuits.[1]

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[1] *See generally* Benjamin K. Raybin, *Note, "Objection: Your Honor Is Being Unreasonable!"—Law and Policy Opposing the Federal Sentencing Order Objection Requirement*, 63 VAND. L. REV. 235 (2010) [hereinafter Raybin, *Objection*].

This Court granted certiorari in another case raising the same question, *Holguin-Hernandez v. United States*, No. 18-7739. The Solicitor General agreed that the Fifth Circuit's practice "incorrectly extents Federal Rule of Criminal Procedure 51's contemporaneous-objection requirement," but argued the petitioner could not rebut the presumptively reasonable revocation sentence. United States' Brief in Opposition 7, 9–11, *Holguin-Hernandez v. United States*, No. 18-7739 (Apr. 26, 2019).

A. Plain-Error Review Conflicts With This Court's Precedent That Appellate Courts Apply Reasonableness Review to the Length of a Sentence.

Under the sentencing scheme established by this Court in *Booker*,[2] *Gall*,[3] and *Kimbrough*,[4] the reasonableness of a criminal sentence is to be decided by an appellate court. *See Gall*, 552 U.S. at 51. District courts are directed by statute to impose sentences that are no greater than necessary to achieve Congress's sentencing goals. 18 U.S.C. § 3553(a); *Kimbrough*, 552 U.S. at 101. The

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[2] *United States v. Booker*, 543 U.S. 220 (2005).

[3] *Gall v. United States*, 552 U.S. 38 (2007).

[4] *Kimbrough v. United States*, 552 U.S. 85 (2007).

appellate courts then review the sentences to determine substantive reasonableness under an abuse-of-discretion standard. *Gall*, 552 U.S. at 51.

Consequently, no reasonableness objection is needed in the district court because it is the unique duty of the appellate courts to determine whether a sentence is reasonable. *See United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008); *United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007). "A litigant has no duty to object to the 'reasonableness' of the length of a sentence … *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 (emphasis in original; citing *Rita v. United States*, 551 U.S. 338, 351 (2007)). This reasonableness review "merely asks whether the trial court abused its discretion[.]" *Rita*, 551 U.S. at 351.

Although the district court is not charged with making a reasonableness determination, the Fifth Circuit has held that a defendant must object to the reasonableness of his sentence—in the district court, after the sentence is imposed—to preserve a substantive reasonableness challenge for appeal, even if the defendant

requested a lower sentence and gave reasons supporting that request. *Peltier*, 505 F.3d at 391–92. The Fifth Circuit's rule requiring such an objection conflicts with the sentencing scheme established by this Court.

B. Requiring a Post-Sentence Objection Conflicts with Federal Rule of Criminal Procedure 51.

Peltier is also contrary to Federal Rule of Criminal Procedure 51. Rule 51 provides that "[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[.]" FED. R. CRIM. P. 51(b) (emphasis added). "[T]he rules do 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. 2012). That is because "[e]xceptions to rulings or orders of the court are unnecessary." FED. R. CRIM. P. 51(a). Requiring an objection after the district court imposes a sentence greater than the one requested effectively requires defendants to make an exception to the court's ruling. Raybin, *Objection* 255; *see Bartlett*, 567 F.3d at 910 ("when an issue is argued before the judicial ruling, counsel need not take exception once the court's decision has been announced"). Such a rule conflicts with Rule 51. *See United States v. Curry*, 461 F.3d 452, 459 (4th Cir. 2006) (finding plain-error review inapplicable

where the government argued for a different sentence, even though it did not object after the sentence was imposed).

C. The Post-Sentence Objection Rule Conflicts with the Policy Reasons Underlying the Plain-Error Standard.

Additionally, the Fifth Circuit's ruling in *Peltier* is inconsistent with the policy behind the plain-error standard, which is to "encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). When a party's position "has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance." 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, CRIMINAL § 842 (3d ed. 2004).

In the sentencing context, "the district court will already have heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence[.]" *United States v. Castro-Juarez*, 425 F.3d 430, 434 (7th Cir. 2005). "[R]equiring the defendant to then protest the term handed down as unreasonable will [not] further the sentencing process in any meaningful way." *Id.* Indeed, "remonstration with the judge" after

he or she has imposed sentence "is not an objection as usually understood." *Bartlett*, 567 F.3d at 910. The Fifth Circuit's rule requires a redundant objection that does not serve the purpose of plain-error review.

D. The Fifth Circuit's Rule Conflicts with the Majority of Circuits.

The Fifth Circuit's rule in *Peltier* conflicts with all of the other circuits to have examined the issue. The overwhelming majority of the other circuits do not require a party to object to the reasonableness of the sentence after it is imposed to preserve a claim of substantive unreasonableness for appeal. *See United States v. Grier*, 475 F.3d 556, 571 n.11 (3d Cir. 2007) (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. Rodriguez-Duenas*, 461 F.3d 1178, 1182–83 (10th Cir. 2006); *United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007).

These circuits have held that a post-sentence objection to the reasonableness of the sentence is unnecessary because reasonableness is the *appellate* standard of review. *See Vonner*, 516 F.3d at 389; *Bras*, 483 F.3d at 113. They also note that the purpose of

plain-error review is not served by requiring a post-sentence reasonableness objection. *See Curry*, 461 F.3d at 459; *Castro-Juarez*, 425 F.3d at 433–34; *Wiley*, 509 F.3d at 477; *Autery*, 555 F.3d at 871; *Bras*, 483 F.3d at 113. And they dismiss a post-sentence objection requirement as contrary to Rule 51. *See Curry*, 461 F.3d at 459; *Wiley*, 509 F.3d at 477. Instead, the majority of circuits have held that "[a]n objection to the reasonableness of the final sentence will be preserved if, during sentencing proceedings, the defendant properly raised a meritorious factual or legal issue relating to one or more of the factors enumerated in 18 U.S.C. § 3553(a)." *Grier*, 475 F.3d at 571 n.11.

These circuits have the better argument. Under their precedent, Loyola preserved his claim of substantive unreasonableness by asking for a sentence below the Guidelines range and explaining the circumstances that he believed warranted such a sentence. The district court rejected those arguments and imposed a sentence greater than that Loyola requested. Loyola brought his arguments to the court's attention, and the court addressed them. An additional objection asserting that the court's decision did not comply with the appellate standard of review would not have served any further purpose. And, pursuant to Rule 51, Loyola was not required to complain about the judge's choice after it was made.

Yet, under the Fifth Circuit's stringent and redundant preservation rule, his compliance with Rule 51 was not enough to preserve his appellate claim of unreasonableness. In such circumstances, it is wrong to require an additional objection.

Certiorari should be granted given that this Court is addressing this important federal question in *Holguin-Hernandez*. Loyola's 24-month sentence was unreasonable, and the Fifth Circuit merely held, applying a presumption of reasonableness challenged *infra*, that Loyola had not established *plain* error. *See* App. A.

II. The Court Should Grant Certiorari to Determine Whether the Illegal Reentry Guideline Is Entitled to an Appellate Presumption of Reasonableness.

Loyola asks this Court to grant certiorari to determine whether, in light of the Court's opinions in *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007), the illegal-reentry guideline is entitled to a presumption of reasonableness on appeal.

Contrary to the Fifth Circuit's position, a guideline that is not empirically based is not entitled to an appellate presumption of reasonableness. The former version of the illegal reentry guideline, U.S.S.G. §2L1.2, under which Loyola was sentenced, was not based on empirical data or experience and does not satisfy the sentencing goals set forth by Congress in 18 U.S.C. § 3553(a).

A. A Guideline's Empirical Basis Legitimizes the Presumption of Reasonableness for Within-Guideline Sentences.

This Court has held that an appellate presumption of reasonableness may be applied to a within-guideline sentence. *Rita v. United States*, 551 U.S. 338 (2007). The approval of an appellate presumption, however, is derived from the "empirical data and national experience" upon which the Sentencing Commission typically promulgates guidelines. *Kimbrough*, 552 U.S. at 109.

The Commission's "empirical" approach was a result of a compromise intended to ensure that the Guidelines effectuated Congress's sentencing goals. Congress had directed the Commission to base its sentencing ranges on the purposes identified in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. § 991(b). When the members of the Commission could not agree on which of those purposes should predominate, they agreed to use past practice and experience as a proxy for the purposes, and this Court has since accepted that proxy. *See Rita*, 551 U.S. at 349–50; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17–18 (1988); U.S.S.G. §1A1.1, comment. (n.3), p.s.

Particular guidelines, however, do not take account of data and experience, and the Court has suggested that no presumption should apply to these guidelines. *Kimbrough*, 552 U.S. at 109–10.

This is so because, if the Commission did not rely on empirical data—its proxy for § 3553(a)(2) purposes—there is no basis for concluding that a guideline represents a "rough approximation" of sentences that would achieve Congress's sentencing goals. *Rita*, 551 U.S. at 349–50. The Fifth Circuit has reiterated that, in reviewing the substantive reasonableness of within-guideline sentences, it will apply the presumption of reasonableness whether the guidelines are "[e]mpirically based or not." *United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011) (noting disagreement with Second Circuit in approach regarding consideration of empirical basis of child pornography guideline).

The Fifth Circuit's rationale, however, appears to overlook this Court's reason for allowing a presumption in the first place. In *Rita*, the Court concluded that the alignment of the trial court's decision with the Sentencing Commission's assessment of the proper sentencing range supported a presumption. *Rita*, 551 U.S. at 347. But this conclusion was based on the "the manner in which" the Commission made its assessment—an empirical approach that involved examining court practices and refining those practices based on information, gathered from a variety of sources, confirming their efficacy. *Id.* at 347–50. This reasoning suggests that, if

the Commission has not fulfilled its institutional role, then its assessment of a proper sentence is not entitled to a presumption of reasonableness.

B. Because the Illegal Reentry Guideline Is Not Empirically Based, a Presumption of Reasonableness Is Inapplicable.

The Sentencing Commission has acknowledged that, for "immigration" offenses, it has "established guideline ranges that were significantly more severe than past practice." FIFTEEN-YEAR REPORT 47. The Commission recently amended §2L1.2, but it did not base the new §2L1.2 specific offense characteristics on empirical research that indicates such enhancements better reflect sentencing practices or achieve § 3553(a) sentencing goals. *See* U.S.S.G. App. C. amend. 802 (noting the percentage of defendants with prior illegal reentry convictions and determining, without reasoning, that such convictions are "appropriately accounted for in a separate enhancement" simply because they entered illegally more than once).

Nor did the Sentencing Commission fix the problematic way guideline §2L1.2 treats a defendant's criminal history. A defendant's prior record is ordinarily accounted for by his criminal history score, calculated under Chapter 4 of the Guidelines Manual. *See United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 961 (E.D.

Wis. 2005) (reviewing history and operation of guideline §2L1.2). Chapter 2 typically establishes offense levels based on a defendant's offense conduct, not his prior criminal record. *See id.* The guideline for unlawful reentry, however, gives heavy weight to a defendant's prior convictions in setting the offense level, effectively double-counting the defendant's criminal record in establishing his guideline range.[5] *Id.* at 960 (imposing below-guideline sentence when §2L1.2 double-counted prior offense); *see also United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321, 1324, 1326–28 (D.N.M. 2005) (same); *United States v. Santos*, 406 F. Supp. 2d 320, 327–28 (S.D.N.Y. 2005) (same).

By deciding to double-count a defendant's criminal record—instead of tying the offense level for illegal reentry to empirical evidence—the Sentencing Commission has created guideline sentence ranges for immigration offenses that are at odds with Congress's goals of proportionality and uniformity. *See* 18 U.S.C. § 3553(a)(2)(A), (a)(6). Further, the "specific offense characteristics" prescribed at §2L1.2(b) contravene the statutory mandate for

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[5] This is true both for the former and current guideline §2L1.2. *See* U.S.S.G. §2L1.2(b) (Nov. 2016) (enhancing total offense level based on prior illegal entry and reentry convictions and the *length of sentences* imposed for prior criminal convictions); U.S.S.G. §2L1.2(b) (Nov. 2015) (enhancing total offense level based on the *type* of prior criminal convictions).

the Sentencing Commission to create *categories of offenses* and guidelines based on the grade, circumstances, and the harm of the offense and then *categories of defendants* taking into consideration criminal history. *Compare* 28 U.S.C. § 994(c) *with* § 994(d). By enhancing the offense level based on past criminal conduct, §2L1.2(b) conflates the two distinct categories, increasing the offense level based on the characteristic of a defendant, not the characteristic of the offense. *See Zapata-Trevino*, 378 F. Supp. 2d at 1328; *Santos*, 406 F. Supp. 2d at 327; *Galvez-Barrios*, 355 F. Supp. 2d at 963.

The illegal-reentry guideline produced a sentence range that overstated the seriousness of Loyola's unlawful reentry offense and failed to provide just punishment for that offense, thereby undermining respect for the law. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(A). Loyola's drug conviction increased his offense level by eight. (ROA.105.) This overstated the seriousness of Loyola's illegal reentry and his dangerousness. As a Texas third-degree felony, the

minimum sentence Loyola could receive was two years,[6] subjecting him to an eight-level increase even though the Commission believed that "less serious felony offenses, such as felony … drug possession, tended to receive much shorter sentences" than two years. U.S.S.G. App. C. amend. 802.

The district court should have accounted for this overrepresentation by imposing a sentence below the Guidelines range, as recommended by the commentary to the illegal reentry guideline. When a defendant receives an enhancement under §2L1.2 for a prior conviction, the commentary suggests that a downward departure may be appropriate if the "time actually served was substantially less than the length of the sentence imposed." U.S.S.G. §2L1.2, comment. (n.5(C)). That was true for Loyola; he served just over one-fourth of the two-year sentence for the drug conviction

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[6] *See* TEX. HEALTH & SAFETY CODE § 481.115(c) (cocaine possession of one gram or more, but less than four grams, is a third-degree felony); TEX. PENAL CODE § 12.34(a) (third-degree felony punishable by two to ten years' imprisonment); Written Statement of Marjorie Meyers, Federal Public Defender for the Southern District of Texas, on Behalf of the Federal Public and Community Defenders Before the U.S. Sentencing Commission Public Hearing on Immigration 23–25 (Mar. 16, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_Meyers.pdf (arguing the break points for sentence lengths are not supported by data and too low).

that triggered the eight-level enhancement. But rather than account for this overrepresentation, the district court exacerbated it by imposing a within-Guidelines sentence despite circumstances that made such a sentence unreasonable.

At sentencing, Loyola had just learned that he was going to become a father for the first time. He did not know that his girlfriend was pregnant when he decided to come to the United States. This news changed his perspective. It made him want to return to Mexico and build a life there so that he could raise and care for his child in a way that his father, who died when Loyola was six years old, could not. Because of this changed circumstance, Loyola is committed to staying in Mexico. A long sentence is therefore unnecessary to protect the American public from future crimes by him. *See* § 3553(a)(2)(C).

The Fifth Circuit's application of an appellate presumption of reasonableness in Loyola's case is at odds with this Court's opinions in *Rita* and *Kimbrough*. *See Mondragon-Santiago*, 564 F.3d at 366–67 (holding that *Rita*'s rationale for permitting presumption of reasonableness holds true even when guideline lacks empirical foundation, and that *Kimbrough* "does not require discarding the presumption for sentences based on non-empirically-grounded

Guidelines"). Certiorari should be granted to address this important federal question and correct the Fifth Circuit's flawed presumption of reasonableness standard.

Had the court of appeals reviewed Loyola's sentence for reasonableness, rather than under plain error with a presumption of reasonableness, the result would have been different.

CONCLUSION

FOR THESE REASONS, Loyola asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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