No._____

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD CHRISTOPHER GILBERT, 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 presented in *Holguin-Hernandez v. United States,* 18-7739, in which certiorari was granted on June 3, 2019.

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Reginald Gilbert 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 June 13, 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The unpublished opinion of the court of appeals is appended to this petition.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 June 13, 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 Reginald Gilbert was convicted in 2011 of conspiratorial and substantive offenses involving more than 28 grams of cocaine base, in violation of 21 U.S.C. § 841 and § 846. Fifth Circuit Electronic Record on Appeal at 48, 51. He was sentenced to concurrent 60-month terms of imprisonment and concurrent 5-year terms of supervised release. EROA.52-53. After his release from prison, Gilbert had his supervised release modified and revoked for incidents involving intoxicants and for not being at home and at court when he was supposed to. *See* EROA.60-61; EROA.77-82; EROA.84-85; EROA.95-96; EROA.100-01; EROA.116-20; EROA.134-35. For these violations, he served imprisonment terms ranging from three to nine months, and was, each time, placed back on supervised release. *Id.*

In June 2018, Gilbert had a disagreement with a counselor at the Lifetime Recovery center, where he was receiving substance-abuse counseling as a condition of his supervised release. EROA.138. The counselor was pressing Gilbert to address publicly trauma he had suffered as a child. Gilbert demurred. EROA.274-75; EROA.277. The counselor felt Gilbert was uncooperative, and that feeling led to Gilbert's discharge from Lifetime Recovery. EROA.138.

A U.S. probation officer petitioned to revoke Gilbert's supervised-release term. EROA.138-39. The petition alleged Gilbert had violated the supervised-release

requirement that he "participate in an inpatient substance abuse treatment program and follow the rules and regulations of that program." EROA.138; *see also* EROA.147-48.

At a hearing on the revocation petition, the district court Gilbert for his plea. EROA.272-73. Gilbert answered "True." EROA.273. The prosecutor read a factual basis– taken from the revocation petition–into the record. EROA.273-74; *see* EROA.138. The factual basis stated that the staff at Lifetime Recovery had come to question "Gilbert's commitment to treatment." EROA.274 During a phone call with the probation officer on June 15, 2018 the Lifetime staff told the probation officer that they had "numerous issues" with Gilbert, and Gilbert "advised he wanted to leave the facility and no longer participate" in the treatment it offered. Gilbert was therefore discharged from Lifetime Recovery. EROA.274.

The district court accepted this factual basis. EROA.274. It determined that Gilbert had committed a Grade C violation, the least serious type of violation under the sentencing guidelines. EROA.274; s*ee* U.S.S.G. §7B1.3.[2] The court found the suggested sentencing range under Chapter 7 of the *Guidelines Manual* to be 5 to 11 months' imprisonment. EROA.274; U.S.S.G. §7B1.3.

Defense counsel explained during allocution that, in a "group setting" Gilbert's counselor "was wanting to bring up sensitive past issues not directly related to current

[2] The guidelines advise that a court "shall" revoke a term of supervise release for a Grade A or B violation, but that for a Grade C violation a court "may" either revoke or modify the term of supervised release. U.S.S.G. §7B1.3(a)(1)-(2).

substance abuse[.]" EROA.275. The topic, counsel said, was "not something that I believe most people would want to bring up in front of a group of strangers." EROA.275. When the counselor insisted that Gilbert talk, Gilbert reacted with anger, and then withdrawal: he "stopped talking to them, which they took as his unwillingness to participate in any kind of treatment." EROA.275

Counsel stressed that the problem at Lifetime did not mean that Gilbert had quit on his recovery efforts, and that Gilbert had been looking for another treatment facility, "but was told to hold off on that, and then these proceedings started." EROA.275. Gilbert made the problem explicit: he had been molested as a child, and the counselor's insistence that he discuss the molestation publicly had created problems, because, "I just don't want to keep reliving being molested as a kid, especially in front of a whole bunch of people I don't know. And, I mean, that's where my problem started down there." EROA.277.

Gilbert acknowledged he had struggled after his release from prison in 2014. EROA.276. But, he told the court, he had not taken drugs for years and "I haven't used alcohol since the date of June 3rd of last year [2017]. I mean, I am just ready to go home and take care of my family." EROA.277. He asked that he not be sentenced above the Chapter 7 range, stating "I mean, I don't want to do another year or two away from my wife and son just to kill [the supervised-release term]." EROA.164.

The district court expressed its unhappiness with Gilbert, stating "I don't think your problem began with this last time because this last time is just the final thing." EROA.278. Although the only evidence in the record suggested that the counselor had sprung the

molestation issue on Gilbert, the court concluded that Gilbert should "have told counselor that they could discuss it later." EROA.279. The court revoked Gilbert's supervised-release term, and sentenced him to 36 months' imprisonment with no further supervised release. EROA.281. It spoke to Gilbert about what it had done, acknowledging that its sentence was harsh: "So, again, I've killed your paper. It cost you a little bit more on the front-end, but let's get this behind you so that you can get out from under the Court's supervision." EROA.281.

The court explained it imposed the 36-month sentence because "What am I going to do? Put him back in counseling? He won't stay. There will be some other reason, I guarantee. I've been around Mr. Gilbert too long. There will be another reason he won't be able to stay." EROA.283. The court indicated that it was interested solely in punishing Gilbert for his violation and moving on. The court stated that, after trying supervision, "If at some point we've done that, repeatedly, let's don't throw good money after bad. We've got other people. And we know what we can do. We can give him time to serve and then move on to other folks where we can spend the money more efficiently, more effectively for that sort of thing." EROA.284.

Gilbert appealed. He argued that, in imposing the revocation sentence, the district court improperly considered retributive sentencing goals. He also argued that the court imposed a sentence greater than needed and thus the sentence was substantively unreasonable. The Fifth Circuit ruled that, because Gilbert had failed to object to his sentence after the district court pronounced it, his claim could be reviewed only for plain

error. Appendix at 2 (citing *United States v. Whitelaw,* 580 F.3d 256 (5th Cir. 2009)). The court ruled that Gilbert had failed to satisfy the plain-error standard and affirmed the 36-month sentence. Appendix at 2-3.

REASONS FOR GRANTING THE WRIT

THE COURT IS POISED 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.

Reginald Gilbert had his supervised release revoked. Both defense counsel and Gilbert discussed with the district court circumstances that implicated the sentencing factors set out by Congress in 18 U.S.C. § 3553 and incorporated into revocation sentencing by 18 U.S.C. § 3583(e). Gilbert specifically asked not to sentenced above the 11-month guideline maximum he faced. The district court imposed the maximum sentence of 36 months' imprisonment.

Gilbert'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, and the Court recently granted certiorari in *Holguin-Hernandez v. United States,* No. 18-7739, to address that division. Gilbert's case should be held pending a decision in *Holguin-Hernandez.* If *Holguin-Hernandez* is resolved favorably to the petitioner in that case, then this Court should grant Gilbert's petition for a

writ of certiorari, vacate the judgment of the Fifth Circuit in this case, and remand for appropriate proceedings.

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. *Holguin-Hernandez* Will Likely Resolve the Circuit Split and Explain the Interaction of Substantive Reasonableness Review with the Language of Rule 51 and 52.

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. 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 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 does not seem that 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 that the sentence is unreasonable be lodged exalts 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.

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 does the requirement serve any purpose of error preservation.

C. Application of Reasonableness Review Will Affect This Case.

The Fifth Circuit reviewed Gilbert's arguments that his sentence was greater than necessary only for plain error. It declined to engage in reasonableness review because of the lack of a post-sentence objection. If *Holguin-Hernandez* determines that the law does not require such an objection, Gilbert's petition should be granted and the case remanded for review under the substantive-reasonableness standard.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court hold this petition pending a decision in *Holguin-Hernandez*, and then, if appropriate, grant a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals.

Respectfully submitted.

/s/ Philip J. Lynch
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DATED: July 12, 2019.