No. 19-

IN THE

Supreme Court of the United States

ERBEY ALANIS BOTELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Consolidated With

ERBEY BOTELLO-ALANIS, ALSO KNOWN AS JAVIER GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit–which refused to unequivocally recognize the constitutional right to due process on a plea at a revocation hearing–conflicts with the decision of other Circuits such that a compelling reason is presented in support of discretionary review by this Honorable Court.

Furthermore, whether the decision of the United States Court of Appeals for the Fifth Circuit on the reasonableness of the federal sentence imposed in this case conflicts with the decisions of this Court on an important matter and the decision calls for an exercise of this Court's supervisory powers.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Erbey Alanis Botello:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, ERBEY ALANIS BOTELLO, respectfully requests this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), which refused to recognize the constitutional right to due process on a plea at a revocation hearing, conflicts with the decisions of other Circuits such that a compelling reason is presented in support of discretionary review by this Honorable Court.

Furthermore, the Fifth Circuit's decision affirmed a sentence which is constitutionally unreasonable and therefore the sentence calls for the exercise of this Court's discretionary review.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

> The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Erbey Alanis Botello*, Nos. 18-20225 & 18-20226, (5th Cir. May 1, 2019), appears at Appendix A to this Petition and is unreported.
>
> The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, Houston Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

> None.

GROUNDS FOR JURISDICTION

On May 1, 2019, the United States Court of Appeals for the Fifth Circuit affirmed the revocation sentence imposed on Mr. Botello-Alanis. A copy of this Order appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. A copy of the Judgment issued by the United States District Court for the Southern District of Texas, Houston Division, is attached at Appendix B.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In 2013, Mr. Botello was sentenced to serve 51 months in the custody of the Bureau of Prisons ("BOP"), followed by a 4-year-term of supervised release, based on his plea of guilty to a charge of possession with intent to distribute marijuana. ROA.26-30. His

sentence of 51 months was subsequently reduced to 40 months in the custody of the BOP. ROA.32.

Mr. Botello was subsequently released from custody. In 2018, while Mr. Botello was still on supervised release, the probation officer submitted a motion to revoke his supervised release. An arrest warrant issued, Mr. Botello was again taken into custody, and a hearing on the revocation matter was held on April 11, 2018. ROA.7.

Mr. Botello appeared at that hearing with Court-appointed counsel. ROA.57-59. At the same time, Mr. Botello was sentenced on a separate felony under case number CR-H-17-719-1. ROA.57-69.

With respect to the revocation, Mr. Botello's attorney stated:

> I think he's [referring to Mr. Botello] remorseful. He's aware that he also has a violation report that's been filed against him for violating his supervised release. He's prepared to plead true to that. I'm asking the Court to take into consideration his situation. I know he guidelines out at 37 to 46 months, Your Honor. I'm asking for a 27-month sentence, and I'm also asking for the Court to consider running his time on the violation report of 8 to 14 months, either running it concurrent or alternatively, Judge, allowing my client to get partial credit on whatever sentence the Court feels is proper in the violation of his supervised release.

ROA.62-63.

Subsequently, the Judge asked Mr. Botello if he was aware of the allegations on the revocation matter alleged against him. The Court inquired: "Sir, it has been alleged that you violated apparently your supervised release; it that true?." ROA.65. When Mr. Botello answered "Yes," the Judge stopped and said "Give me a second." ROA.65. The Judge then

stated: "Let me get my papers" and "we have a lot of papers in this case, with the reduction and all that." ROA.65.

Critically, the Court never specifically asked Mr. Botello if he was knowingly and voluntarily waiving his right to a hearing on the petition to revoke his supervised release. The Court never specifically asked Mr. Botello if he had in fact violated the terms of his supervised release. The Court never asked Mr. Botello how he violated the terms of his supervised release. ROA.65.

Despite this lack of such inquiries, the Court nonetheless found the allegation of a violation on supervised release was "true" and Mr. Botello was sentenced to 8 months confinement. ROA.67. The Court also sentenced Mr. Botello to a sentence of 37 months on the criminal matter, to run consecutive to the 8-month sentence on the supervised release violation. ROA.67.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
Legal Background

This case involves two due process arguments. The first concerns the District Court's failure to verify Mr. Botello's waiver of a revocation hearing was knowing and voluntary. The second addresses the District Court's failure to clearly determine that Mr. Botello was actually pleading true to the alleged revocation violations. However, there was no such due process objections made to the District Court. Hence, review is for plain error. *United States v. Olano,* 507 U.S. 725, 732-33 (1993); *United States v. Martinez-Rodriguez,* 821

F.3d 659, 662 (5th Cir. 2016); *United States v. Neuman,* 176 F. App'x 480, 481 (5th Cir. 2006). As the Supreme Court has explained, plain error requires a showing of error which is "clear or, equivalently, obvious," which "affects [a defendant's] substantial rights," and which "seriously affects the fairness, integrity, or public perception of judicial proceedings." *Olano,* 507 U.S. at 732-34 (internal quotations omitted).

II.

Due Process Requirements on Revocation Waivers and Pleas

Although revocation of supervised release in not part of a criminal prosecution, it nonetheless results in a deprivation of liberty and loss of freedom. *Gagnon v. Scarpelli,* 411 U.S. 778, 782 (1973); *Morrissey v. Brewer,* 408 U.S. 471, 484 n.12 (1972). Thus, fundamental fairness "requires that defendants facing such revocations should be afforded notice of the charges against them, an opportunity to confront their accusers, and a chance to present evidence" on their behalf. *United States v. Correa-Torres,* 326 F.3d 18, 22 (1st Cir. 2003) (citing *Bearden v. Georgia,* 461 U.S. 660, 669 & n.10 (1972)). Hence, Mr. Botello submits that an accused has due process rights at a revocation hearing.

In *Correa-Torres,* 326 F.3d at 22, the First Circuit addressed this concern in light of Rule 32.1(a)(2) of the Federal Rules of Criminal Procedure. The Court explained:

> When the revocation of a term of . . . supervised release hangs in the balance, the target is entitled to a panoply of procedural rights. These include:
>
> > (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear and present evidence in the person's own behalf; (D) the opportunity to question adverse witnesses; and (E) notice of the person's right to be represented by counsel.

> Fed. R. Crim. P. 32.1(a)(2)(2000). These protections serve a variety of interests. Among other things, they safeguard the defendant's obvious stake in preserving his liberty. *See e.g., United States v. Stocks,* 104 F.3d 308, 312 (9th Cir. 1997). They also serve the sovereign's more nuanced interest in ensuring that important legal determinations re informed by an accurate account of verified facts. *See e.g., Black v. Romano,* 471 U.S. 606, 612 (1985); *Morrissey,* 408 U.S. at 484.

Id.

Certain rights are waived. *Id.* However, "the waiver of virtually any right closely affecting individual liberty must be knowingly and voluntarily made." *Id.* at 22 (citing *Brady v. United States,* 397 U.S. 742, 748 (1970); *Adams v. United States,* 317 U.S. 269, 275 (1942); *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). "Because adherence to the processes prescribed by Rule 32.1 is instrumental to the fair and efficient operation of revocation proceedings, [federal appellate courts have held that] a waiver of the rights conferred thereunder cannot be effective unless that waiver is made both knowingly and voluntarily." *Id.* (citing *United States v. LeBlanc,* 175 F.3d 511, 515 (7th Cir. 1999); *United States v. Pelensky,* 129 F.3d 63, 68 n.9 (2d Cir. 1997); *Stocks,* 104 F.3d at 312). The First Circuit continued to explain:

> Ideally, the district court, when confronted with an attempted waiver, will advise the . . . person on supervised release of both the rights afforded him by Rule 32.1 and the consequences of a relinquishment of those rights. Because we are mindful that revocation proceedings are more informal than criminal prosecutions, *see Morrissey,* 408 U.S. at 480; *United States v. Jones,* 299 F.3d 103, 110 (2d Cir. 2002); *United States v. Miller,* 797 F.2d 336, 340 (6th Cir. 1986), we do not prescribe any particular mantra. Instead, we emulate several of our sister circuits and hold that, notwithstanding the requirement that waivers of procedural rights with respect to revocation hearings must be knowing and voluntary, such waivers need not be accompanied either by any magic words or by a formal colloquy of the depth and intensity required under Federal Rule of Criminal Procedure 11 (governing guilty pleas in criminal

cases). *See LeBlanc,* 175 F.3d at 515-16; *Pelensky,* 129 F.3d at 67-68 (collecting cases); *United States v. Rapert,* 813 F.2d 182, 184-85 (8th Cir. 1987); *cf. United States v. Proctor,* 166 F.3d 396, 401 & n.5 (1st Cir. 1999) (noting that waivers of some rights must be scrutinized more closely than others).

> This protocol has real significance for purposes of appellate review. Where, as here, a . . . person on supervised release mounts a retrospective challenge to the validity of a waiver of Rule 32.1 rights, a reviewing court should look not only to the punctilio of the sentencing court's colloquy with the . . . person on supervised release, but also to the totality of the attendant circumstances. *See LeBlanc,* 175 F.3d at 517; *United States v. Green,* 168 F.Supp.2d 383, 385 (E.D. Pa. 2001); *cf. United States v. Woodard,* 291 F.3d 95, 109 (1st Cir. 1995) (applying this mode of examination to waivers of the right to counsel); *Smart v. Gillette Co. Long-Term Disab. Plan,* 70 F.3d 173, 181 (1st Cir. 1995) (applying this mode of examination to waivers of employment rights).
>
> The totality of the circumstances means exactly that–all the circumstances should be considered. Still, some circumstances are likely to have particular relevance in the revocation hearing context. These include evidence that sheds light upon the target's comprehension of the charges against him and evidence as to his appreciation of the nature of the rights afforded him by Rule 32.1. In the final analysis, however, courts should beware of assigning talismanic significance to any single fact or circumstance.

Id. at 22-23. The Court in *Correa-Torres* thus concluded that "[t]he question of waiver entails endless permutations, and each case is likely to be sui generis." *Id.* at 23.

Admittedly, two Circuits have disagreed. *United States v. Farrell,* 393 F.3d 498, 500 (4th Cir. 2005); *United States v. Rapert,* 813 F.2d 182, 184 (8th Cir. 1987). However, at least three other Appellate Courts have concurred with the First Circuit. For example, in *United States v. LeBlanc*, 175 F.3d 511, 516-17 (7th Cir. 1999), the Seventh Circuit explained that, "while a revocation hearing need not contain all of the procedural protections of a Rule 11 hearing," the Rule 32.1 waiver of rights must be knowing and voluntary. Prior to this ruling, the Second Circuit Court of Appeals in *United States v. Penensky,* 129 F.3d 63, 68 n.9 (2d

Cir. 1997), determined that a Rule 32.1 waiver must be knowing and voluntary. That same year, the Ninth Circuit Court of Appeals concurred. *United States v. Stocks,* 104 F.3d 308, 312 (1997).

At this juncture, a review of *Boykin v. Alabama,* 395 U.S. 238, 239 (1969), is in order. *Boykin* involved a plea of guilty where "the [trial] judge asked no questions of petitioner concerning his plea." The Supreme Court of the United States ruled it was plain error "for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242. Hence, the defendant's waiver was not valid. *Id.* More specifically, the Court explained:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

Id. The Court then determined:

> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.

Id. (internal citations omitted). Ultimately, the Supreme Court in *Boykin* set aside the defendant's guilty plea as a violation of due process. 395 U.S. at 243-44 (internal citations omitted). To this end, the Court explained:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea

> connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought.

Id. at 244.

Prior to adjudicating this case, the Fifth Circuit had explained that "we have not yet addressed whether *Boykin* applies to revocation hearings" and noted "other circuits have held *Boykin* inapplicable to revocation proceedings." *United States v. Cardenas-Ramirez,* 537 F. App'x 587, 589 (5th Cir. 2013) (citing *United States v. Johns,* 625 F.2d 1175, 1176 (5th Cir. 1980)). However, the Fifth Circuit had also cited *Correa-Torres* without indicating any disagreement with the approach taken by the First Circuit. For instance, in *United States v. Hodges,* 460 F.3d 646, 651 (5th Cir. 2006), the Fifth Circuit cited *Correa-Torres* and pointed out that in *Correa-Torres* the First Circuit:

> not[ed] that the protections of Rule 32.1 "serve a variety of interests" including "safeguard[ing] the defendant's obvious stake in preserving his liberty," and "the sovereign's more nuanced interest in ensuring that important legal determinations are informed by an accurate account of verified facts."

(quoting *Correa-Torres,* 326 F.3d 18, 22-23 (1st Cir. 2003) (omitting internal citations)).

Despite the Fifth Circuit's legal history on this issue, the Fifth Circuit concluded in this case it had not "addressed the issue whether *Boykin* is applicable to supervised release revocation hearings. (Appendix A at page 3). This led the Court to conclude:

> Given the lack of controlling authority in support of Botello-Alanis's argument and the contrary jurisprudence from other circuits, any error by the district court with regard to failing to ascertain the knowing and voluntary nature of the plea was not clear or obvious and, thus, does not meet the plain error standard.

Id. (citing *United States v. Salinas,* 480 F.3d 750, 759 (5th Cir. 2007)).

III.
Error is Clear and Obvious

Mr. Botello respectfully submits error is clear and obvious. The District Court failed to determine that the plea was knowing and voluntary. Indeed, the District Court never clearly elicited a plea of true from Mr. Botello.

On the issue of whether the District Court elicited a plea of true, the Government exclaimed to the Fifth Circuit that Mr. Botello had actually "plead true to the violations." (Government's Brief at page 7). However, the Government failed to cite where Mr. Botello pleaded true. Instead, the Government declared that "the district court did not repeat to Botello each of his rights [because] there appeared to be no need." (Government's Brief at page 13) (emphasis added). Rather, the Government concludes Mr. Botello:

* "admitted to violating conditions of his supervised release,"
* made "admissions to the allegations against him," and
* "stipulated to the allegations against him."

(Government's Brief at page 14). Nonetheless, the Fifth Circuit concluded "the record belies Botello-Alanis's claim that the district court did not elicit a plea of true at the revocation hearing." (Appendix A at page 3).

Yet, the record before the Fifth Circuit establishes there was no indication the plea was knowing and voluntary. Indeed, the colloquy on the discussion regarding the plea and the waiver provide in its entirety:

The Court: Do you want to speak first or do you want your client to speak first?

Mr. Sillas: I'll let my client speak first, Your Honor.

The Court: This is your opportunity, Mr. Botello, to say anything you want to about the issue of sentencing. Is there anything you'd like to say?

The Defendant: Yes. Well, I came over–I came back over to this side so that I could take care of my children. I have two families. In the Rio Grand, I have two daughters, and I have two kids here in La Porte. And the reason why I came here from Mexico is because, well, the crime is real bad over there.

The Court: Yeah, I saw in Paragraph 42, you think the drug cartel tried to kill you.

The Defendant: Yes.

The Court: Why did they want you dead?

The Defendant: Because those drugs were the cartel's. It was–part of it was those people's.

The Court: Were you dealing in drugs?

The Defendant: No, no. I mean, I came back here, but since I said stuff about them, they–so they talked about me. They said stuff about me, and so then I defended myself. And those people are over in Mexico and they tried to find me so they could talk to me and that day I was out on the highway with a friend of mine and we ended up getting rear-ended by the–

The Court: Yeah, I saw that.

The Defendant: Yes.

The Court: The real tragedy of all this is that once upon a time you had legal status to be in this country.

The Defendant: I did have my residency.

The Court:	That's such a pity.
The Defendant:	Yes, I know.
The Court:	Anything else you would like [to] say, Mr. Botello?
The Defendant:	Well, just that I apologize to this country and to all those present and to this Honorable Judge as well. I'm sorry.
The Court:	Mr. Sillas, do you have anything to say?
Mr. Sillas:	Yes, Your Honor. The Court has before it a young man who is 44 years of age, who was gainfully employed on the day that he was arrested, which was November 17, 2017. He was on his way to work at a place called E-Z Line. At that time he was a pipefitter. He not only has been a pipefitter in times past, but he's also been a forklift operator. He came to the United States when he was 14 years of age. He became a legal permanent resident in 1997. And, so, he was here for a long period of time. He made some poor choices and got involved in these two drug cases. The end result, he was deported both times, and he came back to be [reunited with his four kids. As he stated, two kids are down in the Rio Grande Valley and two kids are here in La Porte, Texas.]

ROA.18-20226.60-62 (transcript on page 62 indicated in brackets). Respectfully, there is no plea of true in this discussion. Because there was never a plea of true, the Fifth Circuit opinion is in error and Mr. Botello requests that this Court grant this Petition and allow this case to proceed to further review.

Perhaps it is worth noting that the District Court was attempting to proceed toward obtaining a plea of true or not true, but never reached its final destination. Mr. Botello's attorney said that Mr. Botello was going to "plead true to that" and the Court accepted it was

true that it was alleged that Mr. Botello had violated his supervised release. ROA.18-20225.63, 65. However, the Court never asked Mr. Botello if it was true that he actually violated supervised release (as opposed to understanding that he was being accused of violating supervised release) and/or if the specific allegations of how he violated supervised release were true. Therefore, any attempt to dispute this claim is simply a misunderstanding or misinterpretation of the record. Respectfully, for these reasons, Mr. Botello has shown he is entitled to proceed with further review.

On the other issue involving the revocation proceeding, the Government asserts Mr. Botello "had not shown that the judge plainly erred by failing to verify Botello wanted to waive a further hearing to contest the violation." (Government's Brief, page 8). Relying on portions of its arguments made above and *United States v. Holland,* 850 F.2d 1048, 1050-51 (5th Cir. 1988), the Government claims that, because the District Court determined that Mr. Botello "has admitted the alleged violations of supervised release," a valid waiver was legally unnecessary. (Government's Brief, page 12). All indications are that the Fifth Circuit accepted this argument.

However, the evidence establishes Mr. Botello's argument is sound. First, the Fifth Circuit's conclusion is flawed because, as established above, it is based on the incorrect presumption that Mr. Botello entered a plea of true. Even so, the facts in *Holland* establish a waiver was still necessary. 850 F.2d at 1051. In *Holland,* it was undisputed there was no waiver-of-a-hearing-issue because "testimony was heard." *Id.* The issue in this case, however, is whether a waiver of a hearing was necessary because there was no testimony

heard. In other words, because no testimony was had in this case, there must be a valid waiver of a hearing and there was no such waiver. Therefore, irrespective of the analysis in *Holland*, this case merits further consideration by this Court.

IV.
Legal Issues

Mr. Botello submits the above discussion establishes there was no plea of true in this case and any waiver of right was not voluntary and knowing. Therefore, he respectfully submits that this Court should grant this Petition.

Mr. Botello further submits this Court should resolve the split in the Circuits on the issue of due process at a revocation hearing. As noted above, the majority of Circuits have held that the Due Process Clause applies to pleas in revocation proceedings. *United States v. Correa-Torres,* 326 F.3d 18, 22 (1st Cir. 2003); *United States v. LeBlanc,* 175 F3 511, 516-17 (7th Cir. 1999); *United States v. Pelensky,* 129 F.3d 63, 68 n.9 (2d Cir. 1997); *United States v. Stocks,* 104 F.3d 308, 312 (9th Cir. 1997). At least two Circuits have determined the Due Process Clause does not apply to revocation proceedings. *United States v. Farrell,* 393 F.3d 498, 500 (4th Cir. 2005); *United States v. Rapert,* 813 F.3d 182, 184 (8th Cir. 1987). Respectfully, Mr. Botello requests that this Court grant this Petition to resolve this difference of opinion on this critical issue.

V.
Reasonableness

As a general rule, federal courts have developed a straightforward formula to prevent constitutionally infirm and inconsistent sentencing outcomes. To this end, the Guideline

range must first be determined. *Kimbrough v. United States,* 552 U.S. 85, 108-10 (2007); *Gall v. United States,* 552 U.S. 38, 51 (2007); *Rita v. United States,* 551 U.S. 338, 364 (2007). The various rules for determining the Guideline range to be applied by the District Court and how this Appellate Court reviews those findings and conclusions have been discussed by this Circuit on numerous occasions. *See e.g., United States v. Acosta,* 619 F. App'x 403, 404 (5th Cir. 2015); *United States v. Alaniz,* 726 F.3d 586, 618-19 (5th Cir. 2013); *United States v. Longstreet,* 603 F.3d 273, 275-76 (5th Cir. 2010). This process is important because the Fifth Circuit presumes sentences within the Guideline range are reasonable. Thus, after consulting and considering the Guidelines, the sentencing Judge must impose a "reasonable" sentence. *Gall,* 552 U.S. at 51.

Mr. Botello argued to the Fifth Circuit that the District Court imposed an unreasonable sentence contrary to these cases by rejecting defense counsel's request for a sentence below the Guidelines range. Specifically, Mr. Botello asserted error was established by the District Court's scant reasoning for the decision to stay within the Guidelines range pursuant to the Government's arguments to the District Court. The Fifth Circuit rejected this argument and affirmed the sentence. (Appendix A at pages 3-4). However, for the reasons set forth below, Mr. Botello respectfully submits the sentence imposed in this case was unreasonable and the Fifth Circuit's ruling is without merit.

Title 18 U.S.C. § 3553(a)(1)-(3) provides:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.–The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purpose set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed–
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; [and]
>
> (3) the kinds of sentences available[.]

Importantly, this was not a drug case. It is an illegal reentry case for the purpose of caring for children. When Mr. Botello was arrested for being in this country illegally, he was only supporting his children. He was not dealing drugs or working for the drug cartels. Indeed, the evidence is undisputed that he was running from the dangerous drug cartels and working as a pipe-fitter to support his children. ROA.68, 71. Even the Judge acknowledged to Mr. Botello that his "personal affect is one of responsibility and good judgment." ROA.71. However, the Court used the particulars of the two marijuana convictions as the reasonable basis for denying a lower sentence. Indeed, the Court failed to consider whether the sentence was reasonable for an illegal reentry case in general, or in this specific case where

the defendant reentered this country to find steady employment to care for his family, which he accomplished, and went on to become a law abiding contributing member of society.

At the District Court, the Government argued Mr. Botello's previous marijuana convictions should garner him a severe sentence. From the start, the Government argued Mr. Botello waived any right to consideration of the facts currently before the Court because he "chose" to traffic in "very large amounts of marijuana" in his past life. ROA.71. The Government continued that "you don't get convicted twice [for those offenses] by accident." ROA.71.

The Government then urged a factor which is contrary to the concerns of 18 U.S.C. § 3553(a). Specifically, the prosecutor said that Mr. Botello should be given a stiff sentence on this illegal reentry because "it's not happenstance that he was convicted of those crimes and given significant sentences to confinement." ROA.72. Respectfully, while 18 U.S.C. § 3553(a)(1) requires the consideration of the history of the defendant, this section does not stand for the proposition that if the accused is punished significantly on that history by the courts, he or she should be punished again for that significant punishment. Indeed, because § 3553(a) requires "just punishment for the offense," it can only follow that any prior punishment was effectively rendered at that time. In other words, a significant sentence for illegal re-entry based on a significant prior drug conviction is contrary to all of the concerns of 18 U.S.C. § 3553(a).

Nonetheless, the prosecution went even further into the urging of matters profoundly beyond the concerns of § 3553(a). As noted above, the Government argued in response to Mr. Botello's assertion that his life is at risk in Mexico because of drug dealing:

> He wasted his chance here. And if he has a problem with cartels, that's because he chose to traffic in their product and he chose to involve himself with that. He could have steered clear of them. I don't have sympathy for somebody who has a problem with drug trafficking organizations because they've chosen to make themselves a part of it.

ROA.72.

Beyond the fact that this personal opinion of the Government is irrelevant and inflammatory, the Government's argument that Mr. Botello should rightfully suffer at the hands of the drug cartels and thus § 3553(a) mandates a higher sentence for illegal re-entry, was irrational and contrary to the Act. There is nothing in 18 U.S.C. § 3553(a) which would lend justification for a higher sentence based on a defendant's exposure to harm as a result of a prior offense. Stated another way, the fact that Mr. Botello's prior criminal activity could expose him to harm should not serve as a basis for a higher sentence on re-entry.

The District Court did not correct, modify or even discuss any of the Government's arguments. The Fifth Circuit likewise did not address these arguments of the Government. *See* (Appendix A at pages 3-4). Thus, because the District Judge granted the Government's sentencing request in its totality, the Government's arguments are included in any analysis of whether the sentence was reasonable. Indeed, the District Court and the Fifth Circuit gave legitimacy to the government's position because the District Judge also referred back to the federal marijuana case and noted that on that "serious" charge Mr. Botello "got 51

months and it was reduced to 40 months." ROA.71. Clearly, then, the Fifth Circuit concurred with the Government that this illegal re-entry case sentence should be treated like a serious drug conviction, and thus this Court should grant this Petition to assure compliance with 18 U.S.C. § 3553(a).

The District Court and the Probation Officer assigned to this case were against a lower sentence on re-entry because Mr. Botello's sentence on the federal marijuana conviction had been reduced by 11 months. ROA.71. Respectfully, this reduction was not a gift or favor, but rather a reduction made pursuant to the application of a legally mandated "retroactive amendment that reduced the drug amount." ROA.73. In other words, the reduced sentence of 40 months was the undisputable, correct legal sentence.

Counsel submitted to the Fifth Circuit that the application of the reduced-sentence to the term of punishment on illegal re-entry was clearly the use of an inappropriate sentencing factor. It is clear nothing in 18 U.S.C. § 3553(a) would call for increasing a prison term based on personal concerns about a sentence. Indeed, such action was an improper factor for consideration because § 3553(a) requires the sentence be just and promote respect for the law. In other words, it was reversible error for the District Court to add time to a sentence because the Judge believes a previous, legally mandated reduction in sentence should be unreduced in part by adding time on another case. Thus, the District Court had used an improper, inappropriate, or irrelevant factor for increasing a sentence. Respectfully, it therefore follows that the sentence imposed in this case was unreasonable and constituted clear error for purposes of balancing the sentencing factors. Because the

Fifth Circuit disagreed, (Appendix A at pages 3-4), Mr. Botello contends this case merits further review and that just grounds have been shown for granting this Petition.

According to the PSR before the District Court, Mr. Botello's two prior marijuana convictions increased his Guidelines range under both the offense level and criminal history categories. ROA.85-89. Mr. Botello asserted to the Fifth Circuit this was another factor which should decrease his criminal sentence below the Guidelines range. The PSR established that Mr. Botello received 4 levels and 8 levels respectively for the two prior offenses. ROA.85. In this end, this took his total offense level to 17, and thus his Guidelines range would have been 24 to 30 months, if his criminal history category had been 0. ROA.85.

However, these same two convictions were used to increase his criminal history score by 8 points. ROA.86-89. Specifically, Mr. Botello was given 3 points for each prior offense and then 2 more points because he committed the illegal reentry while on community supervision for the second prior offense. ROA.86-89.

Thus, Mr. Botello's assigned Guideline range came up to 37 to 46 months as a result of the use of these two priors to increase the offense levels as well as the criminal history. More specifically, if these priors had only been used in the criminal history category, and not in the offense level category, Mr. Botello's Guideline Range would have been 18 to 24 months, and if the priors had not been used to increase his criminal history, the Guidelines range would have been 24 to 30 months. These ranges are 12 to 18 months less than the calculated range of 37 to 46 months reflected in the PSR in this case as a result of the separate consideration of the prior convictions.

Respectfully, this analysis further established the unreasonable nature of the 37-month sentence imposed by the District Court. While it is not impermissible to "double count" in this case as the term is traditionally known, it is an additional circumstance which demonstrates that the prior marijuana offenses were given too much weight in determining the reasonableness of the sentence in this case. The Fifth Circuit disagreed, (Appendix A at pages 3-4), and Mr. Botello submits this disagreement constitutes additional grounds to grant this Petition.

Eleven days before the opening brief was filed with the Fifth Circuit, the Fifth Circuit reviewed a recent United States Supreme Court case and provided a straightforward assessment of the standard of review applicable to this case. The Fifth Circuit explained:

> The Supreme Court has recently found that, despite being both labeled "standards of review," the "plain error" inquiry is separate from the "substantive unreasonableness" inquiry. *Rosales-Mireles v. United States,* 138 S. Ct. 1897, 1910 (2018) ("A substantive reasonableness determination . . . is an entirely separate inquiry from whether an error warrants correction under plain-error review."). Thus, in examining Fuentes's sentence on appeal, we must first ask whether the sentence is "substantively unreasonable,"–that is, whether the district court engaged in an abuse of discretion under the "totality of the circumstances." *United States v. Warren,* 720 F.3d 321, 332 (5th Cir. 2013). Then, because we are reviewing for plain error, we must ask whether it was clear or obvious that the sentence imposed by the district court was an abuse of discretion. *Puckett v. United States,* 556 U.S. 129, 135 (2009).

United States v. Fuentes, No. 17-50407, 2018 WL 4927202, at *5 (5th Cir. Oct. 11, 2018) (full citations were added to cases cited for the first time herein).

Applying this totality of the circumstances analysis to the facts of this case, and based on the above review of the sentencing proceeding and the PSR, Mr. Botello asserted

to the Fifth Circuit that his sentence was substantively unreasonable because the District Court engaged in an abuse of discretion. The record demonstrated the District Court was urged to–and in fact did–seek to increase Mr. Botello's sentence because an earlier prison term had been mandatorily reduced. Based on the personal opinion of the prosecutor, as applied by the Judge in his observations, the Court's sentence was set based on this unjust, irrelevant and prohibited factor for sentencing considerations.

Significantly, it was the clear intent for the sentence to be based on the District Court's conclusion that the prior marijuana case was the reason for the length of prison term imposed and the circumstances surrounding the illegal re-entry were never considered as a basis for the sentence. Indeed, it appears the marijuana case–with its previous significant sentence–was the only reason for the sentence which was imposed on re-entry.

Finally, two considerations need to be additionally noted in the requisite analysis. First, it was the two prior marijuana convictions which added increases to Mr. Botello's total offense level and criminal history category. This only further establishes the prior marijuana cases constituted the only bases for a higher sentence. Further, because the sentence had to be run consecutively with the revocation on supervised release, the impact of the prior marijuana conviction only further established that the sentence was only relevant to a prior drug case.

Hence based on the totality of the circumstances, the sentence in this case was substantively unreasonable. However, the Fifth Circuit did not address these specific issues, but rather held it had not been shown "that the district court, when imposing

sentence, failed to consider a significant factor, considered an improper factor, or made a clear error of judgment in balancing the factors" and therefore the sentence comports with 18 U.S.C. § 3553(a). (Appendix A at page 4). However, based on the above analysis, Mr. Botello has shown he has established sentencing error which merits the granting of this Petition.

CONCLUSION

These circumstances establish Mr. Botello was deprived of due process at his revocation proceeding and that his sentence was constitutionally unreasonable. Mr. Botello therefore respectfully requests that this Court grant this Petition to assure conformity in the Circuit Courts and ensure the sentencing decision in this case does not conflict with the decisions of this Court.

WHEREFORE, Petitioner, ERBEY ALANIS BOTELLO, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit.

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