No. _____

In the

Supreme Court of the United States

_____

Silvestre Lara-Cervantes,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether there is a reasonable probability of a different result in the event that the court below is instructed to reconsider the decision in light of *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020).?

PARTIES TO THE PROCEEDING

Petitioner is Silvestre Lara-Cervantes, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Silvestre Lara-Cervantes seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Lara-Cervantes*, 788 F. App'x 299, 300 (5th Cir. 2019)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on December 20, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3553(a) states:

> (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 purposes 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;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.1

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3742(a) provides:

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

STATEMENT OF THE CASE

A. Trial Proceedings

On December 24, 2017, Petitioner Silvestre Lara-Cervantes suffered arrest for Driving While Intoxicated. *See* (Record in the Court of Appeals, at 127). He ultimately pleaded guilty to this offense in state court, and received a three-year term of imprisonment, from which he was paroled on July 19, 2018. *See* (Record in the Court of Appeals, at 132).

The day after this arrest, (December 25, 2017), ICE Agents encountered Mr. Lara-Cervantes in state custody. *See* (Record in the Court of Appeals, at 127). Indeed, ICE placed a detainer on him. *See* (Record in the Court of Appeals, at 127). For reasons the record does not reveal, however, federal prosecutors elected not to bring any charges against him for illegally re-entering the country until August 15, 2018, after he had already been paroled into the custody of the Bureau of Immigration and Customs Enforcement (ICE). *See* (Record in the Court of Appeals, at 8). As a consequence, Mr. Lara-Cervantes lost any opportunity to obtain a concurrent sentence, whether by federal court order, *see* 18 U.S.C. §3584(a), or by simple dismissal of the state charge. And the nearly eight months spent in state and ICE custody will certainly not be credited against his federal term. *See* 18 U.S.C. §3585(b).

Last year, Mr. Lara-Cervantes pleaded guilty to one count of illegally re-entering the country. *See* (Record in the Court of Appeals, at 67). A Presentence Report (PSR) calculated a Guideline range of 46-57 months imprisonment, the product of an offense level of 17 and a criminal history category of V. *See* (Record in

the Court of Appeals, at 137). The defense filed a Sentencing Memorandum, noting that Mr. Lara-Cervantes had lost an opportunity for a concurrent sentence due to the federal government's inexplicable delay in bringing charges.

The district court, however, imposed a sentence within the Guideline range: 46 months imprisonment. *See* (Record in the Court of Appeals, at 88). In doing so, it said that it had considered the arguments in the memorandum and in the defense's presentation. *See* (Record in the Court of Appeals, at 117). But it also said that it had intended to vary above the Guidelines, and that it was persuaded to sentence at the bottom of the range by counsel and the defendant's oral presentation. *See* (Record in the Court of Appeals, at 118-119). The defense objected to the sentence as unreasonable, which objection the court overruled. *See* (Record in the Court of Appeals, at 118-119).

B. Appellate Proceedings

Petitioner appealed, contending that the district court imposed a substantively unreasonable sentence, due to the district court's failure to account for the delay in bringing federal charges. Specifically, he argued that failure to account for the delay in prosecution created a profound risk of arbitrary disparity between Mr. Lara-Cervantes and other re-entry defendants, increased the aggregate term of imprisonment beyond the needs expressed in 18 U.S.C. §3553(a)(2), and allowed federal prosecutors to compromise the state's legitimate interests in helping to decide the aggregate term.

The Fifth Circuit rejected these arguments with the following commentary:

> Lara-Cervantes's arguments are nothing more than a disagreement with the district court's weighing of the § 3553(a) factors, which is insufficient to show an abuse of discretion. *See United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010).
>
> Because Lara-Cervantes has not rebutted the presumption of reasonableness applicable to his within-guidelines sentence, the judgment of the district court is AFFIRMED. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009).

United States v. Lara-Cervantes, 788 F. App'x 299, 300 (5th Cir. 2019).

REASONS FOR GRANTING THE PETITION

There is a reasonable probability of a different result in the event that the court below is instructed to reconsider the decision in light of *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020).

Section 3553(a) of Title requires federal district courts to impose a sentence sufficient but not greater than necessary to comply with certain sentencing goals enumerated in 3553(a)(2). This Court instructed courts of appeals to review district court's compliance with that principle for "reasonableness" *See United States v. Booker*, 543 U.S. 220 (2005). Yet the court below has repeatedly held that its review for reasonableness does not embrace a "reweighing" of the sentencing factors, nor a "substantive second guessing" of their application by the district court. *See United States v. Hernandez*, 876 F.3d 161, 167 (5th Cir. 2017); *United States v. Cotten*, 650 Fed. Appx. 175, 178 (5th Cir. 2016)(unpublished); *United States v. Vasquez-Tovar*, 2012 U.S. App. LEXIS 21249, at *4 (5th Cir. 2012)(unpublished); *United States v. Mosqueda*, 437 Fed. Appx. 312, 312 (5th Cir. 2011)(unpublished); *United States v. Turcios-Rivera*, 583 Fed. Appx. 375, 376-377 (5th Cir. 2014); *United States v. Douglas*, 667 Fed. Appx. 508, 509 (5th Cir. 2016)(unpublished); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008).The opinion below reflects this view. *See United States v. Lara-Cervantes*, 788 F. App'x 299, 300 (5th Cir. 2019)(unpublished)("Lara-Cervantes's arguments are nothing more than a disagreement with the district court's weighing of the § 3553(a) factors, which is insufficient to show an abuse of discretion.")(citing *United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010)).

To be sure, reasonableness review is deferential. *See Gall v. United States*, 52 U.S. 38, 51 (2007). Nonetheless, this Court's recent decision in *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), makes clear that the task of reasonableness review is precisely to reweigh the sentencing factors, though under a deferential standard of review. In *Holguin-Hernandez*, the defense requested a sentence of fewer than 12 months for violating the terms of his release. *See Holguin-Hernandez*, 140 S.Ct. at 764. When he did not object to a greater term as unreasonable, the Fifth Circuit applied plain error review to his substantive reasonableness claim on appeal. *See id*. at 765.

This Court, however, found that no such objection was necessary. *See id*. at 764. Federal Rule of Criminal Procedure 51 states that "[a] party may preserve a claim of error by informing the court ... of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action and the grounds for that objection." Fed. Rule Crim. Proc. 51(b). Applying this standard, this Court held that a request for a lesser sentence presented the same claim to the district court that a defendant might assert in an appellate reasonableness claim. Both forms of advocacy claimed that the sentence exceeded what is necessary to satisfy the §3553(a) factors. *See Holguin-Hernandez*, 140 S. Ct. at 766–767. As this Court explained, "[a] defendant who, by advocating for a particular sentence, communicates to the trial judge his view that a longer sentence is 'greater than necessary' has thereby informed the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence." *Id*. at 766-767.

The core of the *Holguin-Hernandez* holding is thus that the defendant asserting a reasonableness claim is doing the same thing in the court of appeals that he or she does when requesting leniency in the district court– arguing the weight of the 3553(a) factors. If the courts of appeals faithfully undertake reasonableness review, then, they must to some extent "reweigh the sentencing factors", "substantively second guess" the district court, and entertain mere "disagreement with the district court's weighing of the § 3553(a) factors." As noted, this overturns the view of substantive reasonableness review applied below.

This Court may grant certiorari, vacate the judgment below, and remand for reconsideration (GVR) in light of developments following an opinion below when those developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation..." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). In the absence of its misguided view of reasonableness review, it is reasonably probable that the court of appeals would have reversed the sentence.

The Sentencing Commission has recognized that time spent in state custody prior to the commencement of re-entry charges may justify a downward departure in an appropriate case. *See* USSG §2L1.2, comment. (n. 7). And the Fifth Circuit has agreed "that a downward departure may be granted based on a defendant's lost opportunity to serve his federal sentence concurrently with his state sentence due to the delay in commencing federal proceedings after the defendant is discovered by

immigration authorities in state custody." *United States v. Barrera-Saucedo*, 385 F.3d 533, 536 (5th Cir. 2004)(citing *United States v. Los Santos,* 283 F.3d 422, 428-29 (2d Cir.2002); *United States v. Sanchez-Rodriguez*, 161 F.3d 556, 564 (9th Cir.1998) (*en banc*); *United States v. Saldana*, 109 F.3d 100, 104-05 (1st Cir.1997)).

To be sure, nothing obligates the district court to sentence below the Guidelines every time there is a delay in federal prosecution. *See United States v. Perez-Sanchez*, 579 Fed. Appx. 253 (5th Cir. 2014)(unpublished). Here, however, the evidence suggests that the court afforded the delay little or no mitigating value. Although the court said that it considered the sentencing memorandum, it also said that it planned on giving an above-range sentence before the sentencing hearing. *See* (Record in the Court of Appeals, at 117). It said that it was only counsel's presentation at sentencing, not the memorandum citing the delay, that drove the sentence down to the bottom of the Guidelines. *See* (Record in the Court of Appeals, at 118-119). Most significantly, the sentence reflects no particular adjustment for pre-sentence custody, as we might expect if the sentence were eight and a half months below the high end, low end, or mid-point of the Guidelines. *See* (Record in the Court of Appeals, at 118-119). This apparent refusal to afford significant mitigating value to time in state and administrative custody was not reasonable, for several reasons.

First, the date that federal proceedings begin is simply arbitrary. As explained above, Mr. Lara-Cervantes will likely receive a higher sentence than many or most defendants who receive their federal sentences before the expiration of their state sentences. At a minimum, he has lost a chance to argue for dismissal in state court

due to the pendency of a lengthy federal sentence. Yet the date of his federal sentencing does not make him more culpable, more dangerous, or a better example for general deterrence. As such, the refusal to accord mitigating value to the delay in prosecution creates unwarranted sentencing disparity under 18 U.S.C. §3553(a)(6).

Second, the time spent in state custody after his federal offense creates a reduced need for deterrence and incapacitation, required considerations under 18 U.S.C. §3553(a). Simply put, the total amount of time spent in prison after the defendant's offense is directly relevant to the goals of punishment. *See e.g. Dean v. United States*, __U.S.__, 137 S.Ct. 1170, 1176 (2017)("That [defendant] will not be released from prison until well after his fiftieth birthday ... surely bears on whether ... still more incarceration is necessary to protect the public."). But here the court seems to have given it little weight.

Third, unless it is given some weight in the sentencing process, the executive's decision to delay prosecution destroys the chief means for the state to exert control over the aggregate term of imprisonment: dismissal of charges, or moderation of the state sentence in light of the known federal sentence. *See Setser v. United States*, 566 U.S. 231, 241 (2012)("... it is always more respectful of the State's sovereignty for the district court to make its decision up front rather than for the Bureau of Prisons to make the decision after the state court has acted. That way, the state court has all of the information before it when it acts."). The potential for gamesmanship by the federal executive poses danger to public respect for the law, a required consideration under 18 U.S.C. §3553(a)(2)(A).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 19th day of March, 2020.

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