

No. _____

In the
Supreme Court of the United States

Garian King,

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 Garian King, 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 Garian King seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. King*, 790 Fed. Appx. 639 (5th Cir. Jan. 21, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B. The Transcript of Sentencing is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 21, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULE

Federal Rule of Criminal Procedure 51 reads as follows:

Preserving Claimed Error

(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.

STATEMENT OF THE CASE

A. Facts and Proceedings in the Trial Court

1. The offense

On April 5, 2018, Fort Worth Police officers received a call complaining of a threat made at gunpoint. *See* (Record in the Court of Appeals at 174). Acting on this call, they stopped a car driven by Petitioner Garian King. *See* (Record in the Court of Appeals at 177). Inside, the police found a short-barrel shotgun and arrested Mr. King. *See* (Record in the Court of Appeals at 177).

That night, the police took a *Rashomonic*¹ morass of conflicting statements. Not counting the initial call, the record in fact appears to contain ten different statements from five different people, all taken the same night. This includes one statement from Mr. King (oral), three from his girlfriend Ms. Raven Smith (two oral and one written), one from Ms. Smith's mother Ms. Cheryl Phillips (oral), three from Mr. Ebak Wakilongo (two oral and one written), and two from Mr. Lulenda Bakari (both oral).

It is difficult to make sense of these statements, as the following summary of them reflects:

¹ *See Rashomon*, Wikipedia.com (“Rashomon (羅生門 *Rashōmon*) is a 1950 Japanese period psychological thriller film directed by Akira Kurosawa, working in close collaboration with cinematographer Kazuo Miyagawa....The film is known for a plot device that involves various characters providing subjective, alternative, self-serving, and contradictory versions of the same incident.”), available at <https://en.wikipedia.org/wiki/Rashomon>, last visited June 2, 2020.

- ***Mr. Wakilongo's oral statement.*** Mr. Wakilongo first told an officer orally that he was sitting in the apartment of his friend Mr. Bakari when Mr. King knocked on the door. *See* (Record in the Court of Appeals at 188). Mr. Wakilongo opened the door and told Mr. King to go away, but Mr. King “kept telling them that they needed to ‘chill out’ or else because he was just looking for someone.” (Record in the Court of Appeals at 188). According to this statement, Mr. King walked out of the doorway, reached for a putative gun in his waistband, and then briefly departed before returning with a long gun. *See* (Record in the Court of Appeals at 188). Then, in this account, Mr. King “pointed the gun at Ebak (Wakilongo) and Lulenda (Bakari), yelling that he would ‘[expletive] shoot them if they didn't back off’.” (Record in the Court of Appeals at 188). Mr. Wakilongo first told the police that he was scared, but then said that he was not scared. *See* (Record in the Court of Appeals at 188).
- ***Mr. Wakilongo's body camera statement.*** Mr. Wakilongo also made statements on police body camera. *See* (Record in the Court of Appeals at 191). According to police reports in the record, Mr. Wakilongo appears on body camera *claiming to be married to Ms. Smith*, an assertion that no one else joined. (Record in the Court of Appeals at 191). In this statement, Mr. King simply knocked on the door, pulled out a gun, and threatened to kill Mr. Wakilongo. *See* (Record in the Court of Appeals at 191).

- **Mr. Wakilongo's written statement.** Mr. Wakilongo also gave a written statement to the police, apparently without leaving his apartment complex. *See* (Record in the Court of Appeals at 194). This statement said that Mr. Wakilongo was at his friend's house, when a man knocked on the door and pulled a gun. *See* (Record in the Court of Appeals at 194). The written statement denied being scared, but said that the man at the door threatened to kill him. *See* (Record in the Court of Appeals at 194).
- **Mr. Bakari's oral statement.** At close to the same time that the police spoke to Mr. Wakilongo -- perhaps at the same time (*see* Record in the Court of Appeals at 188) – they spoke to Mr. Bakari. *See* (Record in the Court of Appeals at 188). His statement was captured on body camera. *See* (Record in the Court of Appeals at 190-191). In this statement, Mr. Bakari answered the door, and Mr. King immediately pulled a gun and demanded that he (Mr. Bakari) come out. *See* (Record in the Court of Appeals at 190). Mr. King threatened to kill Mr. Bakari, which Mr. Bakari first said caused him to fear for his life, but then said didn't frighten him because he was not afraid to die. *See* (Record in the Court of Appeals at 188, 190). Mr. Bakari said that he followed Mr. King outside as Mr. King was walking away. *See* (Record in the Court of Appeals at 190).

- **Mr. Bakari's written statement.** Mr. Bakari also provided a written statement to the responding officers, which said that he was at a friend's house when a man knocked on the door and immediately pulled a gun. *See* (Record in the Court of Appeals at 191).
- **Ms. Smith's first oral statement (at the apartment complex).** Ms. Smith also seems to have been in Mr. Bakari's apartment or apartment complex when the police arrived, so the police took an oral statement from her as well. *See* (Record in the Court of Appeals at 188-189). She told the police that she dated Mr. King, but that she had missed several phone calls from him. *See* (Record in the Court of Appeals at 188). Mr. King called her and said that he was going to go by her ex-boyfriend's (Mr. Bakari's) apartment in an effort to find her and touch base. *See* (Record in the Court of Appeals at 188). But according to this statement, when Mr. King arrived, Mr. Wakilongo opened the door and the two became irritated with each other. *See* (Record in the Court of Appeals at 188). At that point "Garian felt that Ebak (Mr. Wakilongo) was going to try to start something with him, so he went back to his car to retrieve his gun *just in case*." (Record in the Court of Appeals at 188)(emphasis added). And, according to the police report "Raven (Ms. Smith) confirmed that Garian did indeed threaten both Ebak (Mr. Wakilongo) and Lulenda (Mr. Bakari) with a gun." (Record in the Court of Appeals at 188).

- **Mr. King's statement.** The police questioned Mr. King in an interrogation room at the Gang Unit, where he first denied possessing or brandishing the gun in his car. *See* (Record in the Court of Appeals at 190). When police did not accept this answer, he said that he had the shotgun on him, but never brandished it. *See* (Record in the Court of Appeals at 190). He denied that anyone followed him that night. *See* (Record in the Court of Appeals at 190).
- **Ms. Smith's second oral statement (in the interrogation room).** At the same time that they interrogated Mr. King, the police brought Ms. Smith to the Gang Unit and questioned her again. *See* (Record in the Court of Appeals at 190). In this second oral statement, she said that Mr. King came to *her* apartment and asked to see her. *See* (Record in the Court of Appeals at 188). Although she went outside to speak to him, Mr. Bakari (her ex-boyfriend) came outside "yelling" at them. (Record in the Court of Appeals at 190). It is not clear whether Mr. Bakari was in her apartment or his own. *See* (Record in the Court of Appeals at 190). At that point, Mr. King retrieved a gun from his car. *See* (Record in the Court of Appeals at 190). "She advised that he kept the gun to his side and didn't point it at anyone but did openly display it." (Record in the Court of Appeals at 190). According to this statement, Mr. Bakari was drunk. *See* (Record in the Court of Appeals at 190).

- **Ms. Phillips's statement.** After receiving this statement, the police called Ms. Smith's mother, who also seems to have been present.² See (Record in the Court of Appeals at 190). Like Mr. Bakari, she said that Mr. King knocked on the door with the gun in hand. See (Record in the Court of Appeals at 190). But she said that he summoned not her daughter but Mr. Wakilongo to go outside. See (Record in the Court of Appeals at 190). She is also alone in asserting that only Ms. Smith went outside with Mr. King. See (Record in the Court of Appeals at 190).
- **Ms. Smith's written statement.** Finally, the police obtained a written statement from Ms. Smith. That statement is copied below in its entirety:

Gary came over my house and asked for me, my ex-boyfriend and his friend was there. His friend confronted Gary and Gary walked off. He pursued Gary and chased him and Gary warned him to back up, but he didn't. He showed him a gun and told him to back up so my ex-boyfriend friend left and so did Gary.

(Record in the Court of Appeals at 193).³

² Ms. Smith's oral statements say that she was doing her mother's hair at her own apartment when she received a call from Mr. King advising that he was going to Mr. Bakari's apartment. See (Record in the Court of Appeals at 188, 190). Both she and her mother seem to have witnessed or participated in the events of the evening, though neither describes any travel to Mr. Bakari's apartment. See (Record in the Court of Appeals at 188, 190). The apartments have different addresses, but seem to be close together. See (Record in the Court of Appeals at 183, 188, 190). Nonetheless, the statements do not seem to agree about the door upon which Mr. King knocked.

³ Counsel reads the statement as follows:

The police could not locate surveillance footage to sort any of this out. *See* (Record in the Court of Appeals at 191).

2. Procedural History

a. Charges and Plea

Mr. King was arrested on multiple state charges, including aggravated assault with a deadly weapon. *See* (Record in the Court of Appeals at 139). Perhaps unsurprisingly, given the above, that state charge would ultimately be dismissed. The federal government charged Mr. King with one count of possessing a firearm after a felony conviction, *see* (Record in the Court of Appeals at 18), and he pleaded guilty, *see* (Record in the Court of Appeals at 26-27).

b. The Presentence Report

A Presentence Report (PSR) valiantly attempted to set forth most of the witness statements. *See* (Record in the Court of Appeals at 137-140). After applying a four level enhancement for using the firearm in connection with an aggravated assault, (Record in the Court of Appeals at 141); USSG §2K2.1(b)(6), it determined that the Guidelines should be 110-120 months imprisonment, where 120 months was the statutory maximum. *See* (Record in the Court of Appeals at 155). In the absence of this four level adjustment, the Guideline range would have been 77-96 months

Gary came over my house and asked for me. My ex boyfriend and his friend was there. His friend confronted gary and gary walked off he pursued and chased him and gary warned him to back up but he didn't he showed him a gun and told him to back up so my ex-boyfriend friend left and so did gary.

imprisonment, the product of a final offense level of 21 and a criminal history category of VI. *See* USSG Ch. 5A.

c. Objection

The defense objected to the four level enhancement for using the firearm in connection with the alleged aggravated assault. *See* (Record in the Court of Appeals at 159-162). The objection conceded the presence of a gun, but denied that Mr. King pointed a gun at anyone or that he told anyone he would kill them. *See* (Record in the Court of Appeals at 159). Appending Ms. Smith's written statement, the defense pointed out that in this statement Mr. King was "pursued and chased" by Mr. Bakari. *See* (Record in the Court of Appeals at 160, 166). Threatened in this way, Mr. King "merely 'showed him a gun' and instructed ex-boyfriend [sic] to 'back up.'" (Record in the Court of Appeals at 160). The objection also noted the bias of the accusing witnesses (the ex-boyfriend of a love interest, and a compatriot), and the difficulty of arriving at the truth when critical statements contradicted each other on essential details. On this point, the objection argued:

logically one cannot view two statements (i.e. Raven' s statement and ex-boyfriend's statement), determine the statements to exclude the other as truth, and then decide to accept as truth a select (but contradicting) part of each statement. Reliable evidence supports the presence of a gun, but there is insufficient evidence to support the allegations that the gun was displayed or a threat was made.

(Record in the Court of Appeals at 161).

The government responded in defense of the enhancement. *See* (Record in the Court of Appeals at 167-171). To the government's credit, its filing included Ms. Smith's written statement, Mr. Wakilongo's written statement, and police reports

that described all of the oral statements. *See* (Record in the Court of Appeals at 173-193).

d. The Sentencing Hearing

Sentencing did not produce a clear finding about what happened that night.⁴ The court first stated its tentative intention to overrule the objection to the four level increase (which it erroneously described as a two-level increase). *See* [Appx. C at 5]. In response, the defense attempted to argue the contradictions between Ms. Smith’s accounts and those of the putative victims. *See* [Appx. C at 5]. The court cut the argument off and asked whether the defense was “going to have some evidence to back up what you’re telling me.” [Appx. C at 6]. The defense said that it would only have argument, and the court proceeded to recite the PSR’s descriptions of the police reports. *See* [Appx. C 5-6].

The defense then urged the court to consider the handwritten statement of Ms. Smith, which the court asked the defense to mark as an exhibit. *See* [Appx. C at 7]. The court chastised the defense for failing to offer it earlier, and read it on the bench. *See* [Appx. C at 7]. It did not seem to be familiar with the statement, which had been appended to both parties’ filings and discussed at length therein. *See* [Appx. C at 7].

⁴ The judge let a number of things slip through the cracks at sentencing. Sometimes these oversights were caught, as when the court was reminded of the need to rule on the defendant’s second PSR objection, [Appx. C at 8], and to hear allocution before ruling on the consecutive or concurrent nature of the sentence, [Appx. C at 12], and when it righted itself in its Guideline calculations, [Appx. C at 12]. But other matters were not fully resolved, such as the defendant’s reasonableness objections. *See* [Appx. C at 19].

After reading the statement, the court said that it did not believe the statement changed “anything as far as the recitations in the Presentence Report’s [sic] concerned.” [Appx. C at 8]. After some discussion of whether the sentence should be run concurrently or consecutively to the pending (now dismissed) aggravated assault charge, counsel and the court returned to the matter of Ms. Smith’s statement. *See* [Appx. C at 9]. The defense again argued that, according to the statement, Mr. King merely turned with the gun “and said, back off, after he (Mr. Bakari) had followed him from the apartment.” [Appx. C at 10]. The district court again said that the statement “has no effect on the ruling I’ve made” and did not “change[] the descriptions of activity in the Presentence Report...” [Appx. C at 10].

The district court imposed the statutory maximum, 120 months, which was also the high end of the Guideline range. *See* (Record in the Court of Appeals at 126).

B. Appellate Proceedings

On appeal, Petitioner argued that the wildly conflicting accounts of the evening could not support any reliable conclusion about what happened that night. Alternatively, he argued that the district court erred in failing to decide whether Ms. Smith’s written statement was true or false. The failure to decide as much, he argued, suggested that the court regarded her account as consistent with a violation of Tex. Penal Code §22.02. Because her account did not show a violation of that statute, he contended that the case should be remanded.⁵

⁵ Petitioner also claimed that the plea was invalid because he never admitted that he knew he’d been previously convicted of a felony. He later attempted to waive that claim, but the court of appeals reached it anyway and resolved it against him

The court of appeals found that the first argument – insufficiently reliable evidence to support a factual finding – had been preserved. [Appendix B, at 2]. It rejected the claim on the merits, concluding that the court could choose which of the conflicting evidence to believe. [Appendix B, at 2].

The court found that the second claim – failure to decide whether the veracity Ms. Smith’s statement – was not preserved. [Appendix B, at 2]. Specifically, it found plain error necessary “[b]ecause King failed to object on this ground in the district court.” [Appendix B, at 2]. It cited *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009), which case holds that an objection, and not mere argument, is necessary to preserve claims of procedural unreasonableness. [Appendix B, at 2]. It affirmed on this standard of review. *See* [Appendix B, at 3].

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).

Federal Rule of Criminal Procedure 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, or the party's objection to the court's action and the grounds for that objection.” In spite of the Rule’s use of the disjunctive, the court below has held that only an objection – explicitly described as such – could preserve error. *See United States v. Peltier*, 505 F.3d 389, 391 (5th Cir. 2007); *United States v. Whitelaw*, 580 F.3d 256, 260 (5th Cir. 2009); *United States v. Mondragon-Santiago*, 564 F.3d 357, 360-361 (5th Cir. 2009). This is so even in contexts where other circuits held that counsel’s advocacy inherently requested a response from the court. *United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010). And below, it held explicitly that an **objection** – not a mere request to credit it -- was necessary to a district court’s inadequate fact-finding as regards the Smith statement. See [Appx. B at 2].

Holguin-Hernandez v. United States, __U.S.__, 140 S.Ct. 762 (2020), clearly undermines the Fifth Circuit position. In that case, the defense requested that a district court impose no further prison time for a violation of supervised release. *See Holguin-Hernandez*, 140 S.Ct. at 764-5. When the court instead imposed twelve months imprisonment, the defendant appealed the sentence as substantively unreasonable. *See id.* The Fifth Circuit held the claim unpreserved for want of an explicit objection labelling the sentence substantively unreasonable. *See id.*

This Court held that the defendant's advocacy in the trial court preserved error. *See id.* at 765-7. Interpreting the Rule as written, it found no formal objection necessary. *See id.* at 766. Rather, the mere request for a lesser sentence provided adequate notice of "the action the party wish[ed] the court to take," namely to resolve the factors enumerated at 18 U.S.C. §3553(a) in favor of no additional prison time. *See id.* *Holguin-Hernandez* accordingly dispenses with the need for formal objection when a party requests a specific action.

In this case, the court below enforced a strict objection requirement. Decided before *Holguin-Hernandez*, it did not consider whether defense counsel's extensive advocacy asking the court to credit Ms. Smith's statement might have satisfied Rule 51(b). Under extant Fifth Circuit law, this was a defensible view. But after *Holguin-Hernandez*, this ground for decision is probably incorrect. *Holguin-Hernandez* holds that "[b]y 'informing the court' of the 'action' he 'wishes the court to take,' a party ordinarily brings to the court's attention his objection to a contrary decision." *Holguin-Hernandez*, 140 S. Ct. at 766 (quoting Fed. R. Crim. P. 51(b)).

That rule would likely change the decision below. Defense counsel's advocacy repeatedly provided notice to a reasonable court that it expected a ruling on the veracity of the statement. The defense twice presented the written statement to the court. *See* [Record in the Court of Appeals at 166, 193]. And it urged the court to find that the statement showed no use of the gun in a threatening way, and hence did not constitute aggravated assault with a firearm. *See* [Appx. C 5, 7, 9-10]; (Record in the Court of Appeals at 160-161). Defense counsel thus necessarily urged the court to

credit the statement. Indeed, he continued to press the matter after the court cut him off, [Appx. C at 6], and provided ambiguous rulings, which merely expressed the court's ultimate commitment to the e guideline enhancement, [Appx. C at 8, 10]. Considering the entire course of the sentencing hearing, a reasonable court might have thought that counsel effectively asked for a ruling on the veracity of Ms. Smith's statement, at least to the extent that the district court permitted. Under *Holguin-Hernandez*, this preserves error.

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). Here, the adequacy of the district court's fact-finding was expressly reviewed under the plain error standard. See [Appx. B at 2]. *Holguin-Hernandez* shows that this basis for decision would be rejected given another opportunity.

And it is reasonably probable that the defense might prevail under plenary review. The district court repeatedly dodged any ruling about the veracity of Ms. Smith's written statement. See [Appx. C at 8, 10]. And it is doubtful that this statement actually describes a violation of the Texas Aggravated Assault statute, Tex. Penal Code §22.02. According to Ms. Smith, the defendant was chased by her boyfriend, and showed his weapon only after telling him to back off and leave him

alone. *See* (Record of the Court of Appeals at 193). The statement does not say that he pointed the gun. *See* (Record of the Court of Appeals at 193). Absent pointing, a display of this kind does not violate the statute. *See Clark v. State*, 99 Tex.Crim. 73, 268 S.W. 731 (1925).

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 5th day of June, 2020.

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