No. _____

In the

Supreme Court of the United States

_____

Rosalio Ramos Tapia,

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 Rosalio Ramos Tapia, 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 Rosalio Ramos Tapia seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is reported at *United States v. Tapia*, 946 F.3d 729 (5th Cir. Jan. 6, 2020)(unpublished).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 January 6, 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

In 2015, FBI Agents caught a drug dealer named Villa Del Rio talking to Petitioner Rosalio Ramos Tapia about two kilograms of methamphetamine. *See* (Record in the Court of Appeals, at 77). Those Agents then talked to an unknown defendant, who implicated Appellant in more illegal activity. *See* (Record in the Court of Appeals, at 77). Specifically, this person said that Appellant gave him five kilos of methamphetamine a week for 13 weeks. *See* (Record in the Court of Appeals, at 78). The FBI executed a search warrant at Petitioner's home, but didn't find any drugs. *See* (Record in the Court of Appeals, at 78). They did find some firearms. *See* (Record in the Court of Appeals, at 78).

B. Trial Proceedings

1. The course of negotiations between the parties

The government issued a one count Information, charging Petitioner with conspiracy to traffic in more than 50 grams of methamphetamine. *See* (Record in the Court of Appeals, at 19). Before these charges were resolved, the parties entered into a proffer agreement. *See* (Record in the Court of Appeals, at 121-122). By the terms of this agreement, Petitioner agreed to provide information to the government, in exchange for the application of USSG §1B1.8. *See* (Record in the Court of Appeals, at 121-122). That Guideline forbids the use of proffered information to increase the sentence. But the proffer also contained an important exception, which permitted the use of proffered information:

> [i]f at any stage of any trial or other proceeding, [Petitioner] or anyone on his behalf offers or elicits evidence, assertions, representations, or arguments that are inconsistent with information supplied by [the defense] during the proffer meeting...

(Record in the Court of Appeals, at 122).

The proffer agreement would ultimately be supplanted by the terms of a new agreement: a plea agreement signed a month later. *See* (Record in the Court of Appeals, at 59-69). Under the terms of this new agreement, Petitioner pleaded guilty, (Record in the Court of Appeals, at 59-60), waived appeal, (Record in the Court of Appeals, at 63), and (in a supplement) agreed again to cooperate with the government, (Record in the Court of Appeals, at 67). In return for this new consideration, the government agreed to forego any further charges. *See* (Record in the Court of Appeals, at 62). In a supplement, it agreed to consider a reduction under USSG §5K1.1. *See* (Record in the Court of Appeals, at 67). Most significantly for our purposes, it agreed to the application of USSG §1B1.8 (Record in the Court of Appeals, at 68).

Unlike the proffer agreement, the plea agreement contained *no* exception permitting the government to rebut "inconsistent" "assertions, representations, or arguments." *See* (Record in the Court of Appeals, at 68). Moreover, the plea agreement explicitly displaced any earlier agreement, stating in a merger clause that it was "a complete statement of the parties' agreement and may not be modified unless the modification is in writing and signed by all parties." (Record in the Court of Appeals, at 65).

2. Sentencing litigation

A Presentence Report (PSR) calculated the Guidelines using a drug quantity of 67 kilograms, crediting the anonymous estimate of five kilos a week. *See* (Record in the Court of Appeals, at 78, 80). Petitioner's counsel objected, noting that the anonymous source was the "sole authority to attribute 65 kilograms of methamphetamine to Defendant." (Record in the Court of Appeals, at 90).

Probation rejected this objection because the anonymous estimate seemed to match Petitioner's proffer. *See* (Record in the Court of Appeals, at 94). As the Addendum to the PSR put it, the estimate "corroborated information that codefendants provided during their own proffers." (Record in the Court of Appeals, at 94). Thus, Probation expressly utilized the proffered information in support of its Guideline calculation.

The government also urged the court to reject the objection. *See* (Record in the Court of Appeals, at 100-104). Defending the PSR's quantity estimate, the government detailed the anonymous source's alleged interactions with Petitioner, and noted two more anonymous buyers who also attributed drug transactions to him. *See* (Record in the Court of Appeals, at 100-102).

But the government also relied on Petitioner's own statements during the proffer sessions, apparently believing that their use was permitted by the proffer agreement's rebuttal exception. *See* (Record in the Court of Appeals, at 102-103). In particular, the government used Petitioner's admission that he sold drugs to a person named Chavez. *See* (Record in the Court of Appeals, at 102-103). It conceded that

Chavez was not the anonymous person discussed in the PSR, and was not either of the other two buyers referenced in its own response. *See* (Record in the Court of Appeals, at 103).

The government's response also used another admission: that Petitioner received drugs from a Mexican source of supply other than Villa Del Rio. *See* (Record in the Court of Appeals, at 102-103). All of this came from the proffer; indeed the government submitted the FBI report on Petitioner's proffer as an exhibit. *See* (Record in the Court of Appeals, at 124-125). Notably, the defendant's objection had not denied any transactions with Chavez, nor with the second Mexican source of supply.

At sentencing, the defense contended that none of the government's informants were credible. *See* (Record in the Court of Appeals, at 225). And when arguing the objection, counsel complained that the government had relied on information derived from the proffer agreement:

> However, the Government then goes on and -- and they understand, and **they made it real clear that they're not to use any debriefing information against the Defendant**, but in this case they contend it's done to rebut any evidence that the Defendant would bring.
>
> So I'm contending, Judge, here that they're saying that my client made reference to now about deals that he did with another individual in Tulsa to the tune of about 10 kilos, **and that's during debriefing.** We're not saying that didn't happen, Judge. He also makes reference to another source that my client was utilizing that allowed him to transact and broker some activity in California.

(Record in the Court of Appeals, at 226)(emphasis added). Taking all information together, counsel requested that the court impose sentence using a range of 5 to 15 kilos of methamphetamine. *See* (Record in the Court of Appeals, at 226).

The government acknowledged that the defendant's quantity objection might be plausible "if the Court looks at things in a vacuum." (Record in the Court of Appeals, at 230). But it urged the court to consider "the entire investigation," including the defendant's statements during the proffer. *See* (Record in the Court of Appeals, at 230, 232-234). Indeed, it relied heavily on the defendant's statements in its successful effort to overcome this objection:

> Then we talk about the Defendant's proffer, and it's interesting that when we come here to the courtroom we talk about and Defense counsel talks about only being held accountable for 5 to 15 kilograms of methamphetamine, but if we look at the Defendant's own proffer statement he admits, first off, to advising that he sold six or seven kilograms of ice to a person named Bufondo Chavez. That's six.
>
> Then we talk about the Defendant admitting he's got an alternate source of supply from Mexico, and he claims he received approximately 10 kilograms of methamphetamine from that alternate source of supply. That's 16.
>
> Then we talk about the Defendant telling the case agent that an alternate source of supply asked him to help distribute methamphetamine in California. The Defendant told case agents he helped broker a five kilogram methamphetamine transaction where two other people were arrested. That's another five kilos of methamphetamine, so that's 21 kilos of methamphetamine right there. That's six more kilograms than the Defendant is willing to admit to in court here today.

(Record in the Court of Appeals, at 232-233).

The district court overruled the quantity objection, noting the Guideline threshold of 45 kilograms for a base offense level of 38. *See* (Record in the Court of

Appeals, at 233). It also "adopted the government's position with respect to" "the other objections." (Record in the Court of Appeals, at 234). Ultimately, the court imposed sentence of 210 months imprisonment, the bottom of the Guideline range it believed applicable. *See* (Record in the Court of Appeals, at 234).

C. Appellate Proceedings

Petitioner appealed, contending that the government breached the plea agreement by asking the district court to consider the defendant's proffered information to reject his drug quantity objection.

The Fifth Circuit rejected this argument on the grounds: 1) that the defendant failed to object to the government's breach of the plea agreement, [Appendix A]; *United States v. Tapia*, 946 F.3d 729, 733-4 (5th Cir. Jan. 6, 2020), and 2) that the defendant could not carry his burden of persuasion, applicable only on plain error review, to show that the result would have been different but for the government's breach, [Appendix A]; *Tapia*, 946 F.3d at 733-4. It did not hold that the government complied with the plea agreement. [Appendix A]. Notably, the court's lack-of-preservation holding focused on the absence of a "clear objection":

> However, Tapia did not explicitly assert that the Government's disclosure of the proffer information constituted a violation or breach of the plea agreement. Tapia noted the Government's contention that the proffer information could be used as rebuttal evidence, but he did not clearly argue that the Government's contention was wrong. Because Tapia merely noted the prohibition without clearly stating that the Government was violating the plea agreement, his remarks fall short of those in [*United States v. Chavful*, 781 F.3d 758 (5th Cir. 2015),] which were sufficient to preserve a challenge to the breach of a plea agreement. *See Chavful*, 781 F.3d at 761 n.2.

> In the absence of a clear objection, our determination of the proper standard of review now turns on whether those same remarks were otherwise sufficiently specific to alert the district court to the alleged contravention. *See id.*; [*United States v. Hebron*, 684 F.3d 554, 558 (5th Cir. 2012)]. Here, Tapia's remarks did not put the district court on notice of the Government's alleged breach such that the court had the opportunity to cure or remedy the error. Accordingly, Tapia failed to preserve the issue and plain-error review applies.

[Appendix A]; *Tapia*, 946 F.3d at 733-4.

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 sometimes 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).

Holguin-Hernandez v. United States, __U.S.__, 140 S.Ct. 762 (2020), directly overrules this authority. 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 held that Petitioner failed to preserve his complaint regarding the breach of the plea agreement because his "remarks" fell short of a "clear objection." [Appendix A]; *Tapia*, 946 F.3d at 734. Under extant Fifth Circuit law, this was a defensible view. But after *Holguin-Hernandez*, this ground for decision is plainly incorrect.

Here, the defense asked for a drug quantity finding of 5-15 kilos. *See* (Record in the Court of Appeals, at 226). This adequately informed the court the defense objection to a drug quantity exceeding 45 kilos, just as the defendant's request for no further prison adequately informed the district court of his objection to a longer term in *Holguin-Hernandez*. *See Holguin-Hernandez*, 140 S.Ct. at 765-7. Further, the defense here informed the court that it did not wish to be held responsible for the information disclosed in the proffer. That is clear from defense counsel's requested drug quantity finding, which, the government noted, fell below the amount in the proffer. *See* (Record in the Court of Appeals, at 232-233). It is also reasonably clear from trial counsel's statement that "***they made it real clear that they're not to use any debriefing information against the Defendant***, but in this case they contend it's done to rebut any evidence that the Defendant would bring." [Appendix A]; Tapia, 946 F.3d at 733 (emphasis added).

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. As noted, the defense probably preserved error under the standards of *Holguin-Hernandez*. Certainly, the court below would need to reconsider its stated rationale – the absence of a "clear objection" -- in light of *Holguin-Hernandez*. And if the error were held preserved, the sole ground for decision – the defendant's failure to show an effect on substantial rights – would fall entirely apart. *See* [Appendix A]; *Tapia*, 946 F.3d at 733-4. The court below will never hold the government's breach of a plea agreement harmless if the defense preserves error. *See United States v. Purser*, 747 F.3d 284 (5th Cir. 2014).

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). That standard is met.

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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