

No. _____

In the
Supreme Court of the United States

Jeremiah Lee Guerra,
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 Jeremiah Lee Guerra, 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 Jeremiah Lee Guerra 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The unpublished opinion of the Court of Appeals is reported at *United States v. Guerra*, 946 F.3d 729 (5th Cir. Jan. 6, 2020)(unpublished).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 and Proceedings in the Trial Court

Petitioner Jeremiah Lee Guerra pleaded guilty to one count of possessing 50 grams or more of methamphetamine (actual) with intent to distribute it. A plea agreement foreclosed any other charges. The Presentence Report (PSR) noted a Guideline range of 140--175 months imprisonment, a consequence of the elevated Guideline ranges for high purity methamphetamine.

At sentencing, defense counsel urged leniency in light of the higher proportion of methamphetamine produced at higher purity levels. This change in the illegal drug market, argued counsel, eroded the correlation between the purity of methamphetamine and the culpability of the offender.

The district court, however, imposed sentence at the Guideline maximum of 175 months. Its sole explanation for this nearly 15 year sentence was the following 14 words, which it recites verbatim as the exclusive explanation for nearly every sentence imposed:

I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.

B. Appellate Proceedings

On appeal, Petitioner maintained that it was reversible plain error to pass to pass over non-frivolous arguments for a lesser sentence without addressing them. Alternatively, however, he argued that a defendant's mere presentation of arguments for leniency notified the court of his request either to grant such leniency or to explain its contrary decision.

The court of appeals rejected the preservation argument as foreclosed by precedent, and expressly applied plain error. *See* [Appendix B]. It then held that Petitioner failed to meet two requirements for reversible plain error: clear error and an effect on substantial rights. *See* [Appendix B]. It did not hold that the sentence would have been affirmed on plenary review.

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). Indeed, it has held as much in the particular context of reasonableness review, both substantive, *Peltier*, 505 F.3d at 391, and procedural, *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). More particularly, it has held that an *objection* is necessary to preserve the claim that the district erred in passing over in silence arguments for leniency. *See Whitelaw*, 580 F.3d at 260 (5th Cir. 2009); *Mondragon-Santiago*, 564 F.3d at 360-361. This contradicted the views of the Fourth Circuit, which held that no objection is necessary because:

By drawing arguments from § 3553 for a sentence different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim.

United States v. Lynn, 592 F.3d 572, 578 (4th Cir. 2010).

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, without considering whether a defendant's request for leniency might constitute a request for the district court to explain a contrary decision. 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. The court of appeals relied exclusively on the requisites of reversible plain error – it did not hold that the

sentence would have been sustained on plenary review. Nor is it easy to see how the district court's explanation for the sentence could have been adequate response to the more particularized requests for a lesser sentence advanced: the gradual increase in drug purity that rendered that factor an inadequate proxy for an offender's relative culpability. Indeed, under Fifth Circuit precedent, a district court's failure to address an argument for leniency is error. *See Whitelaw*, 580 F.3d at 261; *Mondragon-Santiago*, 564 F.3d at 363-364

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 15th day of June, 2020.

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