No. _____

In the

Supreme Court of the United States

_____

Travon Nikeith Johnson,

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

Whether the court below overlooked or disregarded *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), meriting remand or reversal?

PARTIES TO THE PROCEEDING

Petitioner is Travon Nikeith Johnson, 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 Travon Nikeith Johnson 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. Johnson*, 795 Fed. Appx. 278 (5th Cir. Feb. 26, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B. The district court's judgement and sentence revoking his supervised release is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on February 26, 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 District Court

Petitioner Travon Nikeith Johnson pleaded guilty to a conspiracy to commit bank fraud. *See* (Record in the Court of Appeals, at 41). He received just over a year's imprisonment, but a five-year term of release. *See* (Record in the Court of Appeals, at 41). Upon commencement of his term of release, he violated the terms of release by committing an assault and falling behind in his restitution. *See* (Record in the Court of Appeals, at 94-95).

Probation and the government sought revocation on these and other grounds. *See* (Record in the Court of Appeals, at 41, 45, 53-55, 59-62). Petitioner sought to plead true to some of the allegations, but for reasons the record does not reflect, the district court declined to take that plea. *See* (Record in the Court of Appeals, at 92-93, 96). The government produced a judgment of conviction for a misdemeanor crime of domestic assault, and it elicited testimony showing the defendant's outstanding financial obligations. *See* (Record in the Court of Appeals, at 94-95, 97-99).

During argument about the appropriate sentence, defense counsel began to tell the court about the defendant's work history. *See* (Record in the Court of Appeals, at 102). The court, however, said that mere representations by counsel don't "help me much," and invited counsel to place the defendant on the witness stand. *See* (Record in the Court of Appeals, at 102). Defense counsel did so and elicited testimony in question and answer form regarding the defendant's work history and his family obligations. *See* (Record in the Court of Appeals, at 103-106).

The court imposed a sentence of 24 months, which exceeded the policy statement range of 12-18 months deemed applicable by the district court. *See* (Record in the Court of Appeals, at 107, 110). As the court began to remand the defendant to custody, however, defense counsel interrupted to point out that Petitioner had not been offered an opportunity to allocute. *See* (Record in the Court of Appeals, at 111). The court then stated its belief that he had been given the chance to allocute by testifying, but both the defense and the government agreed that it had not "invite[d] him to make whatever statement or presentation he would like to make on the subject of mitigation." (Record in the Court of Appeals, at 111).

The court then set the sentence aside and offered another chance "to make whatever statement you would like to make that possibly could change my mind." (Record in the Court of Appeals, at 111). Petitioner accepted the offer, took responsibility for his conduct, and asked for the chance to return to his parenting obligations. *See* (Record in the Court of Appeals, at 112).

At that point, the government noted that the court had made an error in the calculation of the policy statements. *See* (Record in the Court of Appeals, at 113). The prosecutor explained that the true range was only 6-12 months, not 12-18 months, because there was now no evidence before the court that the defendant had committed a felony while on supervised release. *See* (Record in the Court of Appeals, at 113). The district court then said:

> Okay. Well, I didn't think 12 to 18 months was adequate, so that follows that I don't think 6 to 12 months would be adequate.

(Record in the Court of Appeals, at 113).

It then thanked counsel for calling these oversights to its attention but imposed the same sentence of 24 months and 30 months of supervised release. *See* (Record in the Court of Appeals, at 113).

B. Appellate Proceedings

Petitioner appealed, contending[1] that the district court erred in pronouncing sentence prior to allocution, which deprived Petitioner of a meaningful opportunity to allocate. *See* Appellant's Initial Brief in *United States v. Johnson*, No. 19-10517, 2019 WL 4744445, at **5-6, 8-16 (5th Cir. Filed Sept. 24, 2019)("Initial Brief"). Acknowledging the district court's efforts to cure the error, he argued that they did not render it harmless. *See* Initial Brief, at **11-16. He stressed that the language used by the court -- "change my mind" – would tend to impress the uphill battle facing an allocuting defendant. *See* Initial Brief, at **12-13. Pointing to *United States v. George*, 872 F.3d 1197 (11th Cir. 2017), and *United States v. Luepke*, 495 F.3d 443,

[1] Petitioner also argued that the district court plainly failed to consider the extent of deviation from the advisory policy statement range before passing sentence. *See* Initial Brief, at **4-5, 20-25. The district court declined to alter the sentence imposed when it learned that it had miscalculated the Guideline range, commenting "I didn't think 12 to 18 months was adequate, so that follows that I don't think 6 to 12 months would be adequate." (Record in the Court of Appeals, at 113). Petitioner contended that this commentary showed that the court considered only the propriety of a variance from the correct range, but did not consider whether the lengthy sentence imposed would constitute too large a variance, given its new information about the true range. *See* Initial Brief, at **4-5, 20-25.

The Fifth Circuit held that Petitioner failed to show an effect on his substantial rights because "Johnson has not pointed to anything in the record that tends to show that the outcome would have been different had the district court explicitly considered the extent of the deviation." [Appendix A, at 3]; *United States v. Johnson*, 795 F. App'x 278, 279 (5th Cir. 2020)(unpublished). It is doubtful that this complies with *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2019), which holds that the Guidelines are presumed to exert some influence over the sentence imposed.

(7th Cir. 2007), he argued that pronouncing sentence before allocution would likely be dispiriting to the defendant, and deprive the ritual of much of its force. *See* Initial Brief, at **13-16.

The Fifth Circuit concluded that Petitioner failed to preserve this claim, and rejected it for want of clear or obvious error. It held that:

> Johnson … first contends that the district court deprived him of a meaningful opportunity to allocute by making its statements to him that tended to indicate that he had an "uphill battle" in trying to change the court's mind.
>
> **Plain error review applies because Johnson did nothing to indicate that he "took exception" to how the district court handled his initial allocution objection.** *See United States v. Salinas*, 480 F.3d 750, 755-56 (5th Cir. 2007). There was no "clear or obvious" error. *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). The district court was permitted to state its intentions to impose a particular sentence before giving Johnson the opportunity to speak. *United States v. Pittsinger*, 874 F.3d 446, 452 (5th Cir. 2017). It is not clear or obvious that the district court's language constituted "a definitive and conclusive statement regarding the sentence to be imposed." *Id*. at 453.

[Appendix A, at 2][emphasis added]; *United States v. Johnson*, 795 F. App'x 278 (5th Cir. 2020)(emphasis added)

REASONS FOR GRANTING THE PETITION

The court below overlooked or disregarded the clear guidance of *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), as to the abolition of exceptions, meriting either remand or reversal.

Prior to the adoption of Federal Rule of Civil Procedure 46 and Federal Rule of Criminal Procedure 51, "counsel were obliged not only to object to such matters as rulings of the court on the admissibility, or non-admissibility of evidence, but it was also required to except to the rulings of the court during the trial, in order to save the question for review." *Sucher Packing Co. v. Manufacturers Cas. Ins. Co.,* 245 F.2d 513, 519 (6th Cir. 1957). In accord with the general trend of American jurisdictions, the federal system abolished the exception requirement upon adoption of Rules 46 and 51. *See* Fed. R. Civ. P. 46; Fed. R. Crim. P. 51(a). It is thus unnecessary to object after a district court has heard and responded to a party's request, provided the request is accompanied by sufficient explanation of grounds. *See* Fed. R. Crim. P. 51.

Vestiges of the exception requirement, however, have persisted in the Fifth Circuit. Thus, a party claiming an unreasonable sentence under 18 U.S.C. §3553(a) could not preserve error by requesting a different sentence – the party had also to object to the sentence actually imposed as unreasonable. *See United States v. Peltier*, 505 U.S. 389 (5th Cir. 2007). And a defendant who objected to the admission of evidence had also to "raise[] … concerns with how the district court chose to handle his objection," even if the objection were not sustained, and the jury were permitted

to consider it for some purposes. *See United States v. Potts*, 644 F.3d 233 (5th Cir. 2011).

But this Court's recent decision in *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), clearly disapproves this approach. 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 764-765. 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 post-sentencing objection labelling the sentence substantively unreasonable. *See id.*

This Court reversed, and held that the defendant's advocacy in the trial court preserved error. *See id*. at 765-767. 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.

Most importantly for present purposes, however, *Holguin-Hernandez* is expressly premised on the abolition of exceptions. As this Court explained:

> [t]he rulemakers, in promulgating Rule 51, intended to dispense with the need for formal "exceptions" to a trial court's rulings. They chose not to require an objecting party to use any particular language or even to wait until the court issues its ruling. The question is simply whether the claimed error was "brought to the court's attention."

Id. at 766 (internal citations omitted). The decision below quite clearly overlooked this guidance.

Below, Petitioner argued that the district court erred in imposing sentence before offering allocution, which it in fact did. As to harm, Petitioner acknowledged that he received another chance to allocate, but argued that the announcement of a sentence before allocution diminished the force and significance of the defendant's statement. The court of appeals, however, found the error unpreserved because Petitioner did not object again to the district court's efforts to cure the error. Tellingly, it reasoned that "[a]lain error review applies because Johnson did nothing to indicate that he '***took exception***' to how the district court handled his initial allocution objection." [Appendix A, at 2][emphasis added]; *United States v. Johnso*n, 795 F. App'x 278 (5th Cir. 2020)(emphasis added).

Without question, Petitioner objected to the district court's imposition of sentence prior to allocution. Insisting that he "take exception" to the district court's curative effort is to insist on just that: an "exception." The Fifth Circuit demanded a second objection after the district court responded to the first.

To be sure, the district court's curative efforts – formally setting the sentence aside and inviting the defendant to "change my mind" – must be considered in evaluating whether the first error was harmless. But the mistaken imposition of sentence before allocution was "error" and it drew one objection – this is all the Rule and *Holguin-Hernandez* demand. *See* Fed. R. Crim. P. 51; *Holguin-Hernandez*, 140 S.Ct. at 764-766; *see also United States v. Olano*, 507 U.S. 725, 732-733

(1993)("Deviation from a legal rule is 'error' unless the rule has been waived."). And there is good reason to believe that the district court's efforts might not show harmlessness when considered under the correct standards of preserved error. *See United States v. George*, 872 F.3d 1197 (11th Cir. 2017)(remanding where district court took allocution after sentencing). As the Seventh Circuit observed:

> it is unpersuasive, considering the realities of the court room setting, to suggest that [the defendant] should have attempted to address the court after sentencing, to say, in effect, "now that you have imposed sentence, let me share some mitigating circumstances you may wish to consider in meting out my punishment."

United States v. Luepke, 495 F.3d 443, 449 (7th Cir. 2007). After all, preserved error requires the proponent of the sentence to show that it would have been the same – the appealing party bears no burden. *See Olano*, 507 U.S. at 733-734.

Under these circumstances, it is appropriate to grant certiorari, vacate the judgment below and remand for reconsideration in light of *Holguin-Hernandez*:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, 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, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996). That standard is met.

It is true that *Holguin-Hernandez* issued the same day as the decision below. But it is not cited on the preservation question. Given the timing, and the fact that it

deals with a superficially distinct issue – substantive reasonableness appeals -- there is every reason to believe that it was been overlooked.

Alternatively, if *Holguin-Hernandez* was not overlooked, it was disregarded, meriting summary reversal. *Holguin-Hernandez* cautions against preservation rules that effectively resuscitate the requirement of exceptions. *See Holguin-Hernandez*, 140 S.Ct. at 766. The court below nonetheless applied plain error review for want of an exception. It did so explicitly and in substance, as it required a second objection to the court's response to an appropriate objection. *See* [Appendix A, at 2]; *United States v. Johnso*n, 795 F. App'x 278 (5th Cir. 2020). The conflict with recent controlling precedent manifests with sufficient clarity to warrant summary reversal. *See Spears v. United States*, 555 U.S. 261 (2009).

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 27th day of July, 2020.

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