No. _____

In the

Supreme Court of the United States

_____

Jorge Madrid-Uriarte,

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

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

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 Jorge Madrid-Uriarte, 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 Jorge Madrid-Uriarte 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. Madrid-Uriarte*, 795 Fed. Appx. 287 (5th Cir. Feb. 27, 2020)(unpublished).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 February 27, 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

On August 10, 2017, local police arrested Appellant Jorge Madrid-Uriarte for evading arrest with a vehicle and possession of less than a gram of a controlled substance. *See* (Record in the Court of Appeals, at 129-130). He was in the country despite a prior removal, a fact ICE Agents learned no later than September 16, 2017, when they encountered him in a county jail. *See* (Record in the Court of Appeals, at 129-130). Yet federal prosecutors waited almost a year to obtain an indictment for illegal re-entry, commencing federal criminal proceedings only on August 15, 2018. *See* (Record in the Court of Appeals, at 7).

B. Presentence litigation

Mr. Madrid-Uriarte pleaded guilty without a plea agreement. A Presentence Report (PSR) noted a Guideline range of 33-41 months imprisonment. *See* (Record in the Court of Appeals, at 143). Yet it also found that an upward departure might be authorized under USSG § 4A1.3 for under-representation of criminal history, and noted the possibility of an upward variance. *See* (Record in the Court of Appeals, at 144-145).

The PSR listed 11 prior convictions, the most serious of which was denominated "Force/Assault Deadly Weapon Not Firearm: Gross Bodily Injury Likely." *See* (Record in the Court of Appeals, at 132-136). Mr. Madrid-Uriarte had also sustained one conviction for selling or furnishing marijuana or hashish, and two for evading arrest. *See* (Record in the Court of Appeals, at 133, 135).

Probation also noted a lengthy collection of unadjudicated arrests, including one for driving under the influence, (PSR, ¶44), (Record in the Court of Appeals, at 137), one for domestic violence, (PSR, ¶46), (Record in the Court of Appeals, at 137), one for possessing marijuana for sale, (PSR, ¶50), (Record in the Court of Appeals, at 138), three for an offense called "Force/Assault Deadly Weapon Not Firearm: Gross Bodily Injury Likely," (PSR, ¶¶61, 63, 64), (Record in the Court of Appeals, at 139-140), and two more for "Assault with Deadly Weapon: Not Firearm" without specification as to the likelihood of injury, (PSR, ¶¶66-67), (Record in the Court of Appeals, at 140). The PSR contained no information about any of these incidents aside from the name of the alleged offense, the arresting jurisdiction, and the date. *See* (Record in the Court of Appeals, at 136-140).

The defense objected to the PSR's suggestion of an above-range sentence in a detailed written filing. *See* (Record in the Court of Appeals, at 147-154). It first contended that the proper standard for departure was incorrectly set forth in the PSR. *See* (Record in the Court of Appeals, at 148). But it also contended that neither USSG §4A1.3 nor 18 U.S.C. §3553 would support an out-of-range sentence in the defendant's case. *See* (Record in the Court of Appeals, at 148-154). Arguing against a departure, the filing said:

> the application note focuses on convictions as opposed to the accusations that may have occurred in conjunction with an offense. This reflects the fact that circumstances that result in convictions better reflect the actual seriousness of the offense than the underlying accusations.

(Record in the Court of Appeals, at 150).

The government filed a document entitled "Government's Response to Defendant's Objections to the Presentence Investigation Report." (Record in the Court of Appeals, at 156). This filing defended the suggestion of an out-of-range sentence, though it stopped short of actively requesting one. *See* (Record in the Court of Appeals, at 156-160). Defending the proposed departure, the government argued that:

> [t]he PSR also contains credible information that Madrid has engaged in other criminal activity which does not count toward his guidelines calculation for one reason or the other.

(Record in the Court of Appeals, at 158). And it cited Paragraphs 26-27 and 42-68 of the PSR in support of this contention. *See* (Record in the Court of Appeals, at 158). Paragraphs 42-68 of the PSR detailed Mr. Madrid-Uriarte's unadjudicated arrests. *See* (Record in the Court of Appeals, at 136-140).

C. The sentencing hearing

At sentencing, the district court overruled the defense objection and expressly adopted the reasoning of the government's response to the PSR objections. The following exchange occurred:

> THE COURT: Then I'll now notify the parties of my tentative findings as to the defendant's objections to the presentence report. The defendant's objections are overruled for the reasons argued by the government in its response to the defendant's objections. Does the government have any objection or evidence relating to those tentative findings?
> MR. THOMAS: No, Your Honor.
> THE COURT: Does the defendant?
> MR. HERMESMEYER: No, Your Honor. We do persist in our objections.
> THE COURT: Objections are overruled.

(Record in the Court of Appeals, at 114-115)(emphasis added).

The defense asked for a sentence within the Guidelines or only modestly above them, noting the defendant's time in state custody for offenses it argued to be related to the instant case. *See* (Record in the Court of Appeals, at 115-116). This relationship, defense counsel argued, justified concurrent sentencing as to the undischarged state offenses. *See* (Record in the Court of Appeals, at 115-117). Further, he asked that the court reduce the federal sentence to take into account the time already spent in state custody. *See* (Record in the Court of Appeals, at 115-117). Defense counsel also noted that this was the first immigration prosecution, and that Mr. Madrid-Uriarte had plans to relocate to a family farm in Mexico. *See* (Record in the Court of Appeals, at 117-118).

The government opposed any effort to "take into account the sentence that the defendant served on his most recent arrest," because of his criminal history. *See* (Record in the Court of Appeals, at 119). The court imposed a sentence of 71 months, which it achieved by moving incrementally down the sentencing table by way of departure until reached a range of 57-71 months. *See* (Record in the Court of Appeals, at 122). It termed the sentence "an upward departure pursuant to Sentencing Guidelines Section 4A1.3(3)(A)(1), because reliable information indicates Mr. Madrid's criminal history substantially under-represents the seriousness of his criminal history and the likelihood that he will commit other crimes." (Record in the Court of Appeals, at 122). It explained the decision by reference to the defendant's criminal convictions, as well his history of prior removals. *See* (Record in the Court of Appeals, at 122). And it said alternatively that the sentence was a variance under 18

U.S.C. § 3553(a). *See* (Record in the Court of Appeals, at 123). The defense objected again to the sentence, including to the explanation therefor, which objection the court overruled. *See* (Record in the Court of Appeals, at 123-124).

D. Appellate Proceedings

Petitioner appealed, contending that the district court erred in considering his bare arrest record. He noted that the government expressly urged consideration of the arrest record as an answer to the defense's objection to an above-range sentence. And he noted that the court expressly adopted the government's reasoning. The Fifth Circuit imposes an absolute prohibition on the consideration of bare arrest records. *See United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013); *United States v. Harris*, 702 F.3d 226, 229 (5th Cir.2012).

As regards error preservation, Petitioner relied on his written objection to an above-range sentence. Specifically, this objection argued that USSG §4A1.3 requires the court to focus on convictions rather than underlying criminal conduct. *See* (Record in the Court of Appeals, at 150). As a court cannot focus on convictions rather than conduct while considering a bare arrest record, he contended that the written request preserved an objection to the use of a bare arrest record.

The Fifth Circuit concluded that plain error applied to this claim. It held that:

> Madrid-Uriarte's arguments in the district court did not alert the district court to consider the specific argument he is raising on appeal and did not provide the court the opportunity to clarify whether it had considered Madrid-Uriarte's arrest record in determining the appropriate sentence. Therefore, review is limited to plain error.

[Appendix A, at 2].

Because the court "did not expressly state that it had considered Madrid-Uriarte's arrest record," [Appendix A, at 3], the Fifth Circuit found no clear or obvious error. But it concluded with this statement, which recognized that a claim of error would at least be arguable:

> To the extent that the district court's statements could be construed as ambiguous because it adopted the Government's response, any error was not of the clear or obvious type required by the plain error standard.

[Appendix A, at 3]. This opinion issued February 27, 2020, the day after *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (February 26, 2020), which it did not cite.

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 764-765. 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 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.

Further, *Holguin-Hernandez* makes clear that a request need not be renewed after the district court has already acted. The requirement of a substantive reasonableness objection, on top of a request for a lesser sentence, this Court explained was effectively a resurrection of the outdated requirement of an "exception." *See id*. at 766. Federal Rule of Criminal Procedure 51(a) expressly abolishes exceptions. Fed. R. Crim. P. 51(a).

In this case, the Fifth Circuit held that the defendant's arguments "did not alert the district court to consider the specific argument he is raising on appeal and did not provide the court the opportunity to clarify whether it had considered Madrid-Uriarte's arrest record…" [Appendix A, at 2]. That is not consistent with *Holguin-Hernandez*. As this Court explained, the Rule's framers "chose not to require an objecting party to use any particular language or even to wait until the court issues its ruling." *Holguin-Hernandez*, 140 S. Ct. at 766. The lesson of *Holguin-Hernandez* is thus that a request for specific action by the district court preserves error in its inconsistent action. Here, the defense requested that the court premise an out-of-range sentence only on convictions rather than unadjudicated conduct. *See* (Record in the Court of Appeals, at 150). This preserves error in the district court's decision, instead, to rely in part on a bare arrest record. *See* (Record in the Court of Appeals, at 114-115, 136-140, 158).

If nothing else, the complaint of the court below that Petitioner "did not provide an opportunity to clarify" to the district court is clearly at odds with this Court's recognition that exceptions have been abolished. *See Holguin-Hernandez*, 140 S. Ct. at 766. A defendant who makes a request preserves error in the district court's contrary action. *See id.* Here, the defendant asked the court to consider convictions rather than unadjudicated conduct. The court acted in the opposite way, considering bare arrests. *See* (Record in the Court of Appeals, at 114-115, 136-140, 158). After *Holguin-Hernandez*, there is no need to give the court a second opportunity to clarify itself. The Fifth Circuit disregarded that principle, and hence failed to follow the law as set forth in *Holguin-Hernandez*.

Faithful application of the standards in *Holguin-Hernandez* would likely change the result below. As argued above, those standards suggest that the defendant's advocacy preserved an objection to the use of a bare arrest record. And there is at least a reasonable probability that the district court improperly considered a bare arrest record to some extent, which is improper in the Fifth Circuit in all sentencing contests as a matter of constitutional law. *See United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013); *United States v. Harris*, 702 F.3d 226, 229 (5th Cir.2012). In explaining the sentence, the district court expressly referenced a government pleading that relied on bare arrests. *See* (Record in the Court of Appeals, at 114-115, 136-140, 158). Indeed, the court below seemed to acknowledge that some consideration may have taken place, before concluding that any error might not be plain. *See* [Appendix A, at 3].

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 a day before 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 may have been overlooked.

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.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner