No. _____

In the

Supreme Court of the United States

JOHN CHRISTOPHER BADGETT,
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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QUESTION PRESENTED

I. Whether this Court should grant certiorari, vacate the sentence and remand to the Fifth Circuit for reconsideration in light of *United States v. Haymond*, 139 S. Ct. 2369 (2019)?

II. Whether substantive reasonableness review necessarily encompasses some degree of reweighing the sentencing factors?

PARTIES

John Christopher Badgett is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, and was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Christopher Badgett seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is published in the Federal Reporter and is reprinted in the appendix. *See United States v. John Christopher Badgett*, 957 F.3d 536 (5th Cir. 2020)

JURISDICTION

The Fifth Circuit issued its written judgment on April 28, 2020. (Appendix A). The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on March 19, 2020. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves 18 U.S.C. § 3583(g) which provides the following:

> **(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.**--If the defendant--
>
> > **(1)** possesses a controlled substance in violation of the condition set forth in subsection (d);
> >
> > **(2)** possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;
> >
> > **(3)** refuses to comply with drug testing imposed as a condition of supervised release; or
> >
> > **(4)** as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

This petition also involves 18 U.S.C. § 3553(a), which provides:

(a) **Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . .
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
> >
> > > (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines

> by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
>
> (5) any pertinent policy statement –
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

The Fifth Amendment to the United States Constitution provides the following:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

> offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

LIST OF PROCEEDINGS BELOW

1. *United States v. John Christopher Badgett*, CR 07-0296-1-S, CR 08-279-1-S, CR 09-020-1-S, United States District Court for the District of Idaho. Consolidated for one judgment and sentence entered on June 4, 2009.

2. *United States v. John Christopher Badgett*, 4:16-100-A, 4:16-101-A, 4:16-102-A, United States District Court for the Northern District of Texas, Fort Worth Division. Consolidated for one judgement and sentence entered on January 31, 2019.

2. *United States v. John Christopher Badgett*, 957 F.3d 536 (5th Cir. 2020). CA No.19-10146, Court of Appeals for the Fifth Circuit. Judgment affirmed on April 28, 2020.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

This case involves the consolidated revocation of six concurrent terms of supervised release and then the consolidated imposition of six eight-month terms of imprisonment ordered to run consecutively for a total combined sentence of 48 months, in district court numbers 4:16-CR-100-A, 4:16-CR-101-A, 4:16-CR-102-A. *See* (ROA.75-78,280-283,472-475).[1]

On December 11, 2007, John Christopher Badgett was indicted in the District of Idaho with four counts of bank robbery in cause number CR-07-0296- S. (ROA.7-9). That indictment was superseded on January 8, 2009, by an information charging six counts of bank robbery. (ROA.11-14). Badgett was also charged with a bank robbery in the Central District of California, which was transferred to the District of Idaho for a guilty plea pursuant to Rule 20. *See* (ROA.409,421). He was also charged with a bank robbery out of the District of Wyoming, which was also transferred for a guilty plea to the District of Idaho. *See* (ROA.224,231).

On June 4, 2009, Badgett was sentenced in a single judgment, consolidating Idaho cause numbers CR07-296-001 (four counts); CR08-279-001 (one count); and CR09-20-001 (one count) to 108 months imprisonment on all six counts and five years supervised release on each of the six counts to run concurrently. *See* (ROA.16-19,232-239,424-431).

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[1] For the convenience of the Court and the parties, the Petitioner has cited to the page number of the record on appeal below.

On May 5 and 6, 2016, jurisdiction for all three cause numbers were transferred to the Northern District of Texas. (ROA.6,217,409)

On July 3, 2018, the probation office filed a petition for offender under supervision in all three cause numbers, 4:16-CR-100-A; 4:16-CR-101-A; 4:16-CR-102-A. (ROA.38,243,407). The probation officer alleged that Badgett violated his terms of supervised release on June 14, 2018, by consuming alcohol in a motor vehicle, in violation of Texas Penal Code, Section 49.031(B); by leaving the district without the permission of the probation officer on June 18, 2018; and by failing to report for a random drug test on June 18, 2018). *See* (ROA.38-40). The government filed an identical motion to revoke the term of supervised release in all three cases based upon the probation officer's allegations in the petition. (ROA.65,245,457)

The violation report, contained in the petition for offender under supervision, set forth that there was a three year statutory maximum term of imprisonment for each of the six terms of supervised release. (ROA.40). The report established a Chapter 7 advisory imprisonment range of 5-11 months on each of the six terms of supervised release. (ROA.41). The report advised that the district court had the authority to run the sentences on the six terms of supervised release consecutively. (ROA.41). The report also found that revocation of the six terms of supervised release was mandatory for Badgett's refusal to comply with drug testing, pursuant to 18 U.S.C. § 3583(g)(3). (ROA.40).

On January 31, 2019, the district court held a consolidated revocation hearing for all three cause numbers – and all six terms of supervised release. (ROA.82-85).

The district court advised that if Badgett admitted the allegations in the three petitions were true, the court would conclude that the three terms of supervised release should be revoked. (ROA.88-89).- After being advised of the potential punishment he faced, Mr. Badgett pleaded true to all of the allegations in the three motions to revoke supervised release. (ROA.91). The evidence presented at the revocation hearing, as well as the allocution of Mr. Badgett, revealed that Mr. Badgett had left the Northern District of Texas to live in Alaska, where he worked hard building log cabins and other structures in the wilderness for a living. He eventually turned himself in to authorities in Alaska to face the court for his absconding supervision. (ROA.92-102).

At the conclusion of the revocation hearing, the district court entered its consolidated judgement revoking supervised release and imposing a term of imprisonment of 8 months on each of the six terms of supervised release to run consecutively, for a total combined sentence of 48 months on January 31, 2019, in cause numbers 4:16-CR-100-A; 4:16-CR-101-A; and 4:16-CR-102A. (ROA.104,75,280,472). The district court did not order any additional term of supervised release. (ROA.104).

In the time between the notice of appeal and the filing of the appeal brief, this Court issued its decision in *United States v. Haymond*, 139 S. Ct. 2369 (June 26, 2019). There, the Court held that the mandatory supervised release revocation statute of 18 U.S.C. § 3583(k) unconstitutionally required a revocation and sentence

of imprisonment without affording the accused the right to a have a jury determine the truth of the allegations beyond a reasonable doubt. *Id.* at 2380.

II. On Appeal

On appeal, Badgett raised two issues: 1) that the district court committed plain, constitutional error by treating the revocation of Badgett's six terms of supervised release as mandatory; and 2) that the total combined sentence of 48 months was substantively unreasonable. The court of appeals affirmed the sentence in a published opinion. The court disposed of the first issue by holding "'[b]ecause there is currently no case law from either the Supreme Court or this court extending *Haymond* to § 3583(g) revocations,' the district court could not have committed any 'clear or obvious' error in applying the statute." *United States v. Badgett*, 957 F.3d 540, 542 (5th Cir. 2020), quoting *United States v. Rendon*, 797 Fed. Appx. 190, 191 (5th Cir. 2020).

The court disposed of the second issue by re-stating its common mantra, "A defendant's mere disagreement with the district court's presumptively reasonable sentence 'is not sufficient ground for reversal.'" *United States v. Badgett*, 957 F.3d at 541, quoting *United States v. Lopez-Velasquez*, 526 F.3d 804, 809 (5th Cir. 2008).

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari, vacate the sentence and remand to the Fifth Circuit for reconsideration in light of *United States v. Haymond*, 139 S.Ct. 2369 (2019).

This Court's plurality decision in *Haymond* makes clear that, even in the context of supervised release, "a jury must find any facts that trigger a *new* mandatory prison term." *Haymond*, 139 S. Ct. 2369, 2380 (2019) (emphasis in original). Here, Badgett was sentenced under a statute that required mandatory imprisonment after failing to afford him the right to a jury trial to determine the truth of the allegations against him.

This issue was not raised in the trial court. The Petitioner's claim of error must be reviewed by the plain error standard of review. *See United States v. Olano*, 507 U.S. 725, 732 (1993). However, in determining whether error is plain, "it is enough that the error be plain at the time of appellate consideration." *Henderson v. United States*, 568 U.S. 266, 274 (2013) quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997) ("We agree with petitioner on this point, and hold that in a case such as this – where the law at the time of trial was settled and clearly contrary to the law at the time of the appeal – it is enough that an error be 'plain' at the time of appellate consideration.").

From the opening paragraph of *Haymond*, the plurality made clear that the mandatory revocation statute of 18 U.S.C. § 3583(k) violated the Constitution by failing provide the accused with the right to a jury and the reasonable doubt standard:

> Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most

> vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison . . . without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.

Haymond, 139 S.Ct. at 2373.

In his initial trial, Mr. Haymond was convicted of possessing child pornography, in violation of 18 U.S.C. § 2252(b)(2). *Id.* Mr. Haymond was sentenced to 38 months' imprisonment and 10 years of supervised release. *Id.* After completing his prison sentence and beginning his term of supervised release, Mr. Haymond was found with several "images that appeared to be child pornography" on his phone. *Id.* at 2374. The government moved to revoke Mr. Haymond's supervised release and imposed a new, additional prison sentence. *Id.*

After a hearing, the district judge found by a preponderance of the evidence that Mr. Haymond possessed some of the images. *Id.* The district judge felt "bound by [18 U.S.C. § 3583(k)] to impose an additional term of prison." *Id.* at 2375.

Section 3583(k) of United States Code Title 18 states in relevant part:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

18 U.S.C.A. § 3583(k).

On appeal, Mr. Haymond challenged the constitutionality of the punishment, and the Tenth Circuit concluded that § 3583(k) violated the Fifth and Sixth Amendment. *Id.* The Tenth Circuit concluded that the last two sentences of § 3583(k) were "unconstitutional and unenforceable." *Id.* (citing 869 F.3d 1153, 1168 (10th Cir. 2017)).

On review this Court explained:

> [T]he Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the Fifth Amendment, they added that no one may be deprived of liberty without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has "extend[ed] down centuries."

Id. at 2376 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)).

Despite these rights, the Court noted that Mr. Haymond's revocation involved "a judge—acting without a jury and based only on a preponderance of the evidence—[who] found that Mr. Haymond had engaged in additional conduct in violation of the terms of his supervised release." *Id.* at 2378. Then, "[u]nder § 3583(k), that judicial fact-finding triggered a new punishment in the form of a prison term of at least five years and up to life. [Thus,] the facts the judge found here increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments." *Id.* (citing *Alleyne v. United States*, 570 U.S. 99 (2013)).

> Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal

> prosecution a "sentencing enhancement." Calling part of a criminal prosecution a "sentence modification" imposed at a "postjudgment sentence-administration proceeding" can fare no better. As this Court has repeatedly explained, any "increase in a defendant's authorized punishment contingent on the finding of a fact" requires a jury and proof beyond a reasonable doubt "no matter" what the government chooses to call the exercise.

Id. at 2379.

In a concurrence, Justice Breyer did not go so far. In his view supervised release may be likened to parole, violations of which may be ordinarily found without the aid of a jury. *See Id.* at 2385 (Breyer, J., concurring). But he vacated Mr. Haymond's sentence because of three features of 3583(k):

> First, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. Second, § 3583(k) takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. Third, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of "not less than 5 years" upon a judge's finding that a defendant has "commit[ted] any" listed "criminal offense."

Id. at 2386.

Two of the three of these criteria are present in 3583(g). Subsection (g) names "a discrete set of federal criminal offenses," namely: unlawful possession of controlled substances, 3583(g)(1), possession of a firearm (necessarily a violation of 18 U.S.C. 922(g) when the underlying offense is a felony), 3583(g)(2), and repeated use of a controlled substance, as evidenced by positive drug tests, 3583(g)(4). The only other basis for mandatory revocation named in 3583(g)(3) – non-compliance with drug testing – is so closely associated with illegal drug use as to be essentially a means of

proving a discrete federal offense. The statute thus creates the appearance of a legislative effort to provide punishment for criminal offenses while circumventing cumbersome constitutional guarantees. *See Id.* at 2381 (Gorsuch, J., plurality op.) ("If the government were right, a jury's conviction on one crime would (again) permit perpetual supervised release and allow the government to evade the need for another jury trial on any other offense the defendant might commit, no matter how grave the punishment.")

Here, like Mr. Haymond, Badgett also had his supervised release revoked and was subjected to mandatory imprisonment without being afforded the right to a jury trial and the beyond a reasonable doubt standard. In petitioning the court for action against Badgett, the probation officer reported that Badgett faced "Mandatory revocation for refusal to comply with drug testing. Sentence to a term of imprisonment. 18 U.S.C. § 3583(g)(3)." (ROA.40).

Section 3583(g) of Title 18 of the United States Code provides:

> **(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.**--If the defendant--
>
> **(1)** possesses a controlled substance in violation of the condition set forth in subsection (d);
> **(2)** possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;
> **(3)** refuses to comply with drug testing imposed as a condition of supervised release; or
> **(4)** as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

> the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

18 U.S.C. § 3583(g). This statute shares substantially similar language to the unconstitutional language of subsection (k): "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment." *Compare* 18 U.S.C. § 3583(g), *with* 18 U.S.C. § 3583(k).

The application of the mandatory revocation statute of § 3583(g) was illegal under the dictates of *Haymond.*

II. The court below and other federal courts of appeals have reached substantially different conclusions regarding the appropriate level of deference to be accorded the district court in substantive reasonableness review.

A. The circuits are in conflict.

The length of a federal sentence is determined by the district court's application of 18 U.S.C. §3553(a). *United States v. Booker*, 543 U.S. 220, 261 (2005). A district court must impose a sentence that is adequate, but no greater than necessary, to achieve the goals set forth in 18 U.S.C. §3553(a)(2). *See* 18 U.S.C. §3553(a)(2). The district court's compliance with this requirement is reviewed for reasonableness. *See Rita v. United States*, 551 U.S. 338, 359. (2007).

In *Gall v. United States*, 552 U.S. 38 (2007), this Court emphasized that all federal sentences, "whether inside, just outside, or significantly outside the Guidelines range" are reviewed on appeal "under a deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 41. It expanded further on this theme in *Kimbrough v.*

United States, 552 U.S. 85 (2007), holding that district courts enjoyed the power to disagree with policy decisions of the Guidelines where those decisions were not empirically founded. *See Kimbrough*, 552 U.S. at 109.

Nonetheless, the courts of appeals have taken divergent positions regarding the extent of deference owed district courts when federal sentences are reviewed for reasonableness. The Fifth Circuit flat-out prohibits "substantive second-guessing of the sentencing court." *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008).

This approach contrasts sharply with the position of several other courts of appeals. The Second Circuit has emphasized that it is not the case that "district courts have a blank check to impose whatever sentences suit their fancy." *See United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008). The Eleventh and Third Circuits have likewise read *Gall* to "leave no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished." *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008); *accord United States v. Levinson*, 543 F.3d 190, 195-196 (3d Cir. 2008). These cases conform to the consensus among the federal circuits that it remains appropriate to reverse at least some federal sentences after *Gall* as substantively unreasonable. *See United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008)*; United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008); *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008); *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008).

These approaches cannot be squared. The Fifth Circuit understands *Gall* to prohibit substantive second guessing; the majority of other circuits have issued opinions that understand their roles as to do precisely that, albeit deferentially.

B. The present case is an appropriate vehicle.

The present case is an appropriate vehicle to consider this conflict as Badgett's case involves a plausible claim of unreasonableness under §3553(a). Badgett's violations consisted of drinking alcohol in a motor vehicle and leaving the jurisdiction where he was being supervised and moving to Alaska where he built cabins in the wilderness. Although he was living a productive life, he eventually turned himself in and returned to face the consequences of absconding supervision. His advisory imprisonment range was a mere 5-11 months. However, the district court imposed a sentence of 8 months on each term of supervised release and ran the six terms consecutively for a total term of imprisonment of 48 months. Essentially, Mr. Badget was sentenced to four years imprisonment for absconding supervision. He received a four-year term of imprisonment for a violation that should have yielded a sentence of 5-11 months.

The real injustice in this case, however, is that when Mr. Badgett attempted to present this case on appeal for reasonableness review, the Fifth Circuit simply disposed of the argument with its usual convenient mantra, "A defendant's mere disagreement with the district court's presumptively reasonable sentence 'is not sufficient grounds for reversal.'" *United States v. Badgett*, 957 F.3d at 541, quoting *United States v. Malone*, 828 F.3d at 342.

Title 18 U.S.C. § 3553(a) requires that. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." This Court has instructed courts of appeals to review a district court's compliance with Section 3553 by the "reasonableness" standard. *See Gall v. United States*, 552 U.S. at 41

However, the Fifth Circuit has made it clear that it prohibits "substantive second-guessing of the sentencing court." *United States v. Cisneros-Gutierrez*, 517 F.3d at 767. The Fifth Circuit has simply refused to conduct any reasonableness review by re-visiting the weighing of sentencing factors. *See United States v. Malone*, 828 F.3d 331, 342 (5th Cir. 2016); *United States v. Hernandez*, 876 F.3d 161, 167 (5th Cir. 2017); *United States v. Cotten*, 650 Fed. Appx. 175, 178 (5th Cir. 2016) (unpublished); *United States v. Mosqueda*, 437 Fed. Appx. 312, 312 (5th Cir. 2011) (unpublished); *United States v. Turcios-Rivera*, 583 Fed. Appx. 375, 376-377 (5th Cir. 2014); *United States v. Douglas*, 667 Fed. Appx. 508, 509 (5th Cir. 2016) (unpublished).

The problem in this case, and the reason this Court should grant review, is that the Petitioner received no reasonableness review from the court of appeals. Badgett fully preserved the sentencing issue at the trial court and presented this issue for abuse of discretion – or reasonableness – review on appeal. The Fifth Circuit affirmed the sentence without conducting any kind of reasonableness analysis or weighing of the sentencing factors. Accordingly, the outcome of the case likely turns

on an appellate court's refusal to engage in meaningful review of the reasonableness of a criminal sentence. Review is warranted to address the practice of the Fifth Circuit to refuse to apply the reasonableness review required by this Court, and to resolve the division in the circuit courts in applying reasonableness review.

Moreover, this Court's recent decision in *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), makes clear that the task of reasonableness review is precisely to reweigh the sentencing factors, though under a deferential standard of review. In *Holguin-Hernandez*, the defense requested a sentence of fewer than 12 months for violating the terms of his release. *See Holguin-Hernandez*, 140 S.Ct. at 764. When he did not object to a greater term as unreasonable, the Fifth Circuit applied plain error review to his substantive reasonableness claim on appeal. *See id*. at 765.

This Court, however, found that no such objection was necessary. *See id*. at 764. Federal Rule of Criminal Procedure 51 states that "[a] party may preserve a claim of error by informing the court ... of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action and the grounds for that objection." Fed. Rule Crim. Proc. 51(b). Applying this standard, this Court held that a request for a lesser sentence presented the same claim to the district court that a defendant might assert in an appellate reasonableness claim. Both forms of advocacy claimed that the sentence exceeded what is necessary to satisfy the §3553(a) factors. *See Holguin-Hernandez*, 140 S. Ct. at 766–767. As this Court explained, "[a] defendant who, by advocating for a particular sentence, communicates to the trial

judge his view that a longer sentence is 'greater than necessary' has thereby informed the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence." *Id*. at 766-767.

The core of the *Holguin-Hernandez* holding is thus that the defendant asserting a reasonableness claim is doing the same thing in the court of appeals that he or she does when requesting leniency in the district court– arguing the weight of the 3553(a) factors. If the courts of appeals faithfully undertake reasonableness review, then, they must to some extent "reweigh the sentencing factors", "substantively second guess" the district court, and entertain mere "disagreement with the district court's weighing of the § 3553(a) factors." As noted, this overturns the view of substantive reasonableness review applied below.

As an alternative remedy, this Court could 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). In the absence of its misguided view of reasonableness review, it is reasonably probable that the court of appeals would have reversed the sentence.

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted this 25th day of September, 2020.

Respectfully submitted,

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