

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**VICTOR ALFREDO BERMUDEZ,**  
*Petitioner*

-v-

**UNITED STATES OF AMERICA,**  
*Respondent*

On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

Whether a specific objection must be lodged to preserve a procedural error claim when the trial court was put on notice of the objection through defendant's argument.

## **STATEMENT REGARDING PARTIES TO THE CASE**

The names of all parties to the case are contained in the caption of the case.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Victor Alfredo Bermudez respectfully petitions for a Writ of Certiorari to review the judgement of the United States Circuit Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

On April 25, 2022, the United States District Court for the Northern District of Texas Dallas Division (District Court) sentenced Bermudez to a total of 30-month imprisonment. The Fifth Circuit Court of Appeals (Fifth Circuit) affirmed this sentence on February 15, 2023. (Appendix A).

### **STATEMENT OF JURISDICTION**

This Petition is being filed within 90 days after entry of the Judgment, pursuant to Supreme Court Emergency Orders (Order List: 589 U.S.) and (Order List: 594 U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

#### **Fed. Rule Crim. Proc. 51(b)**

#### **Fed. Rule Crim. Proc. 52(b)**

### **INTRODUCTION**

This case provides this Court an opportunity to exercise its supervisory power to establish a precedent on an issue that has split the opinions of the United States Court of Appeals. The circuit courts have differing postures on the specificity

required of an objection for a procedural error in federal criminal sentencing, in order to preserve such objection for appeal.

### **STATEMENT OF THE CASE**

On September 22, 2020, an Indictment was filed in the Northern District of Texas, Dallas Division, which charged Appellant, Victor Alfredo Bermudez, on 4 counts arising from possession of an unregistered firearm. Specifically, against Bermudez, the Indictment alleged violations in the following: Count One - Conspiracy to Possess Unregistered Firearms, in violation of 18 U.S.C. § 371 and 26 U.S.C. §§ 5841 and 5861(d); Count Two – Possession of an Unregistered Firearm; Aiding and Abetting, in violation of 26 U.S.C. §§ 5841 and 5861(d) and 18 U.S.C. § 2; and Count Four – Possession of an Unregistered Firearm; Aiding and Abetting, in violation of 26 U.S.C. §§ 5841 and 5861(d) and 18 U.S.C. § 2.

On November 23, 2021, Bermudez appeared before United States Magistrate Judge Renee Harris Toliver for Rearraignment. (ROA. 303 – 23). After being placed under oath and admonished, Bermudez pled guilty to Counts One, Two and Four.

A Presentence Report was prepared and filed with the Court on January 18, 2022. The PSR calculated Bermudez's Total Offense Level of 15, his criminal history category at Level II, which led to an advisory guideline range of 21 to 27 months on Counts 1, 2, and 4. Counsel for Bermudez filed objections to the PSR on

February 16, 2022. A PSR Addendum was filed on March 7, 2022. The Government filed a response to Bermudez' objections and objections to the PSR Addendum on March 22, 2022. A Second Addendum to the PSR was filed on April 19, 2022.

On April 25, 2022, Bermudez appeared before United States District Judge David C. Godbey for sentencing. After adopting the factual contents of the Presentence Report and adopting the two addenda as his factual determination, Judge Godbey sentenced Bermudez to 30 months for each Count, 1; 2; and 4, to run concurrently for a total term of imprisonment of 30 months. (Appendix B).

Bermudez appealed, contending the district court erred in failing to properly consider Bermudez's mitigating argument and give appropriate weight to it. Ultimately, challenging the procedural and substantive unreasonableness of his sentence. Bermudez objected to the procedural and substantive unreasonableness throughout his argument. At the start of sentencing, the district court cautioned of its "serious consideration" of an upward departure from the Guidelines. Subsequently, Bermudez spent his argument addressing the concerns and warnings of the court. (Appellee's Reply Brief 4-6). Bermudez urged the court to consider a downward departure, rather than the upward departure it warned of, based on the factors he addressed with the court. Although he did not object when addressed by the court at the end of the proceeding, Bermudez closed his argument by acknowledging the court's preliminary determination for sentencing.

And if you are committed to sending [Bermudez] to the penitentiary, I'd ask that you look at the lower end of the guidelines, Judge Godbey. And, though, I do respect and I heard what you told us at the beginning that you're considering a departure in the other direction, I'm asking that because the effect of the federal felony conviction on [Bermudez] will be profound and your punishment of him by sending him to prison will have an added effect. But I'm asking that you consider the lower end of the guidelines based on his specific history and characteristics, based on his exceptional work history, his remorse and his attempts at rehabilitation through community engagement since his arrest.

(Appellee's Reply Brief 5-6).

On direct appeal, the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) applied plain error to Bermudez's procedural unreasonableness claim and affirmed the sentence imposed from the District Court via nonpublished opinion on February 15, 2023. (Appendix A). The Fifth Circuit relied on its holding in *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009). *United States v. Bermudez*, No. 22-10464; No. 3:20-CR-440-2 (filed February 15, 2023).

## REASONS FOR GRANTING THE WRIT

**This Court should invoke its supervisory powers to rule on this case and set a clear standard for the preservation of an objection for procedural error to a criminal sentence.**

**a. The Fifth Circuit decision directly conflicts with the logic of this Court.**

This Court continues to uphold a long-standing precedent: a defendant must object when he believes an error occurred during a federal judicial proceeding to preserve the issue for later appellate review. *Puckett v. United States*, 556 U.S. 129,

134, 129 S. Cit. 1423, 1428, 173 L. Ed. 2d 266 (2009). Otherwise, the error is forfeited, and the appellate court may only review the error for plain error. *Id.* This procedure has long been recognized as the most basic procedural principle within the federal court system. *Id.* (citing *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944)). The importance of this procedural principle is vast. This procedure, requiring an objection to an error be raised at the district court level, 1) provides a district court the opportunity to correct an error before it affects the overall outcome of a case; 2) allows the court that is in the best position to determine whether an error exists based on relevant facts, the opportunity to make such decision; and 3) prevents a defendant from being permitted to raise an error only after a negative resolution is obtained for him. See generally *Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); see also *United States v. Vonn*, 535 U.S. 55, 72, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). These safeguards are vital to fairness and efficiency.

However, such general safeguards become complex without guidance. Three years ago, this Court provided that guidance in regard to the substantive reasonableness of a federal criminal sentence. With these protections in mind, this Court clarified its precedent: arguing for a desired sentence during a sentencing hearing is specific enough to properly preserve a substantive reasonableness claim.

*Holguin-Hernandez v. United States*, 206 L. Ed. 2d 95, 140 S. Ct. 762 (2020). The foundation of this logic is based in Federal Rule of Criminal Procedure 51(b):

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.

When a defendant advocates for a sentence shorter than the sentence that is ultimately imposed, the defendant has adequately “inform[ed] the court” of the “action” he “wishes the court [] take[]”. *Holguin-Hernandez*, at 766. Such notice properly informs the court of a defendant's objection to any sentence that is contrary to his request, properly preserving the error for appellate review. *Id.*

This Court acknowledged the invitation for such a standard to universally apply to procedural error in sentencing as well. However, the Court of Appeals in *Holguin-Hernandez* did not address the procedural error claim, in turn barring this Court from ruling on such issues. *Id.* at 767 (citing *Tapia v. United States*, 564 U.S. 319, 335, 131 S.Ct. 2382, 180 L.Ed.2d 357 (2011)).

**b. The Fifth Circuit precedent directly conflicts with other court of appeals opinions.**

Since *Holguin-Hernandez*, select courts of appeals have extended the *Holguin-Hernandez* precedent to apply to procedural error while other courts have continued to require specific objections to procedural error, undermining the logic

set forth in *Holguin-Hernandez*, including the Fifth Circuit in the decision below. Likewise, some circuit courts have not addressed the issue since *Holguin-Hernandez* – confusing the standard even further. The need for consistency in federal criminal sentencing is critical to ensure that similarly situated defendants receive equal treatment under the law regardless of the prosecuting district. The split among the circuits on this issue has created confusion, inconsistency, and unfairness in sentencing outcomes, making it essential for the Supreme Court to address this issue and establish a consistent and coherent standard for federal criminal sentencing.

There is a need for this Court to extend the *Holguin-Hernandez* standard to procedural unreasonableness error. The policies behind the preservation of error requirement are not hindered by extending the *Holguin-Hernandez* substantial unreasonableness error preservation to procedural unreasonableness. Rather, these safeguards are guaranteed with a universal precedent set by this Court.

### **ARGUMENT AND AUTHORITIES**

This decision will resolve inconsistencies between the Court of Appeals. When a court is on notice of a potential procedural error, and ultimately has the opportunity to correct the error pursuant to Federal Rule of Criminal Procedure Rule 51(b), such procedural error should be considered preserved.

**Bermudez sentence was procedurally unreasonable, and he properly preserved this objection at sentencing.**

#### **A. The failure to universally apply this Court's standard in *Holguin-***

***Hernandez* to procedural error in sentencing will lead to more detrimental and disparate sentences for similar defendants.**

A criminal sentence must be sufficient, but not greater than necessary to ascertain the basic objectives of “just punishment, deterrence, protection of the public, and rehabilitation. *Dean v. United States*, 581 U.S. 62, 137 S. Ct. 1170, 197 L. Ed. 2d 490 (2017); see *Pepper v. United States*, 562 U.S. 476, 491, 493, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011). Following *Gall v. United States*, 552 U.S. 38 (2007) and *Rita v. United States*, 551 U.S. 338 (2007), district courts must explain all sentencing decisions. When a court sentences within the Guideline range, such explanation can be brief, allowing the Guideline range itself to provide part of its explanation. *Rita* at 356-57. District courts have a duty to provide sufficient explanation for a sentence to ensure appellate review is feasible. When sentencing outside of the Guideline range or when parties provide nonfrivolous arguments for outside Guideline range sentences, more detail is required. This explanation must “allow for meaningful appellate review and . . . promote the perception of fair sentencing.” *Gall*, 552 U.S. at 50, 128 S.Ct. 586. Assuming a sound procedural process, appellate courts have a duty to ensure district courts’ sentencing decisions are procedurally and substantively reasonable. *Gall* at 51. However, ‘a sound procedural process’ for procedural error preservation in federal criminal sentencing has yet to be given parameters by this Court.

The procedural requirements to preserve an error of substantial unreasonableness were defined by this Court in *Holguin-Hernandez*. A substantial unreasonableness claim is preserved when a party informs the court of “[1] the action the party wishes the court [] take, or [2] the party[] object[]s to the court’s action and the grounds of that objection”. *Holguin-Hernandez*, 140 S. Ct. at 763 (citing Fed. R. Crim. P. 51(b)). Simply, an error is preserved if the error has been brought to the court’s attention. *Id.* at 766. The logic and policy behind this new inquiry marries the principal behind both *Puckett v. United States* and *United States v. Rita*. The Fifth Circuit, in the unpublished opinion below and further in *United States v. Coto-Mendoza*, 986 F.3d 583 (5th Cir.), cert. denied, 211 L. Ed. 2d 88, 142 S. Ct. 207 (2021), restricts the *Holguin-Hernandez* application strictly to substantive reasonableness claims.

However, requiring a separate objection – despite a party’s request for an outside of Guideline sentence, a party’s nonfrivolous argument for a lesser sentence, and a party’s direct response to the district court’s greater sentence consideration – does not embody the logic created by this Court. *Holguin-Hernandez* clarified Federal Rule of Criminal Procedure 51 simply requires a party to tell the court its wishes and provide grounds for its request in order for an error to be preserved. *Holguin-Hernandez* at 766-767. This reasoning provides support Rule 51 can be met, without a direct objection referencing the reasonableness of an error, when the

district court is informed of the parties wishes – eliminating the need for the formulaic procedural reasonableness objections currently required in the Fifth Circuit.

Bermudez clearly put the court on notice of his objections. Bermudez was made aware of the court's position at the outset of the hearing and spent the remainder of his argument addressing the court's concerns. The court did not address those arguments from Bermudez in its explanation. It would be unnecessary and inconsistent with this Court's reasoning to require a separate objection after Bermudez's lengthy argument addressing the Court's precursory decision.

**1. The Fourth Circuit, First Circuit, Seventh Circuit, and D.C. Circuit precedents align with the reasoning of the prior principle set out by the Supreme Court of the United States: the request of the lower end of the Guidelines constitutes a preserved procedural error.**

The Fourth Circuit has long held that a procedural error is preserved when a party requests sentences at the low end of the advisory Guideline range. *United States v. Monroe*, 396 F. App'x 33, 42 (4th Cir. 2010) (citing *United States v. Lynn*, 592 F.3d 572, 577, 581 (4th Cir. 2010)). A non-frivolous request for a lower sentence is sufficient to preserve procedural error and an objection after a sentence is pronounced is not required for preservation purposes. This has been a long-standing rule of the Fourth Circuit – existing before this Court's ruling in *Holguin-Hernandez*. *Lynn* at 578. The Fourth Circuit has solidified its precedent post *Holguin-Hernandez*.

*See United States v. Rivera*, 819 Fed. Appx. 139 (July 2020) (unpublished); *United States v. Myles*, 805 Fed. Appx 184 (4th Cir. 2020) (unpublished).

The Fourth Circuit has consistently provided relief to procedural error claims. In addition to requiring procedural error abuse of discretion review when the court is made aware of an objection through a lower sentence request, the Fourth Circuit requires a higher standard regarding the procedure itself. Under its duty to explain, a district court must do more than merely acknowledge a defendant's request for a lower sentence. *United States v. Hardin*, No. 19-4556, 2021 WL 2096368, at 7-8 (4th Cir. 2021)(unpublished). Additionally, even some response by the district court to explain a sentence can fail to satisfy the Fourth Circuit's duty to explain requirement when the explanation is general and could be applied to every case<sup>1</sup>; while the Fifth Circuit has accepted reference to a governing statute and the factors therein as sufficient to its duty to explain. *United States v. Coto-Mendoza*, 986 F.3d 583, 585 (5th Cir.), cert. denied, 211 L. Ed. 2d 88, 142 S. Ct. 207 (2021). These circuits' clear disagreement on the requirement to preserve a procedural error merits review by this court.<sup>2</sup>

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<sup>1</sup> The judge in *Hardin* "heard and understood" defendant's argument, responding that the term of release could be modified or terminated. *Hardin* at 7.

<sup>2</sup> The Tenth and Eleventh Circuit produced opinions echoing the analysis of the Fifth Circuit, restricting the *Holguin-Hernandez* ruling to substantive reasonableness. *See United States v. Finnesy*, 953 F.3d 675, 691, n.8 (10th Cir 2020); *United States v. Sanders*, 820 F. App'x 932, 937, n.4 (11th Cir. 2020) (unpublished). The Sixth Circuit has not issued an opinion considering its analysis on *Holguin-Hernandez*, it has continued its pre *Holguin-Hernandez* procedural error

The D.C. Circuit extended *Holguin-Hernandez* to the preservation of a defendant's allocution request. Using the analysis of *Holguin-Hernandez*, a defendant's request to provide allocution sufficed to preserve error when allocution did not occur after a request by the defendant for it, despite a failure to formally object to the court's refusal. *United States v. Abney*, 957 F.3d 241 (D.C. Cir. 2020). The D.C. Circuit acknowledged that while *Abney* involved a procedural right and *Holguin-Hernandez* addressed the substantive right of reasonable sentencing, it treated the two errors akin for preservation purposes. *Id* at 248-249.

The First Circuit clarified its procedural error preservation precedent in *United States v. Pupo*, 995 F.3d 23 (1st Cir. 2021), holding “[t]o preserve a claim of procedural sentencing error for appellate review, a defendant's objection need not be framed with exquisite precision.” *Pupo*, 995 F.3d at 29, n.9 (citing *United States v. Rivera-Berrios*, 968 F.3d 130, 134 (1st Cir. 2020)). An objection to a procedural error is sufficient if the court is aware of the alleged error. *Id*. The First Circuit further clarified in *Pupo* that a clear contention in a sentencing memorandum for a sentence lower than what the court announced puts the court on notice and preserves

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test: requiring courts to ask if the parties after any objections to a sentence, once it is announced. *United States v. Milliron*, 984 F.3d 1188, 1196 (6th Cir.), cert. denied, 209 L. Ed. 2d 768, 141 S. Ct. 2653 (2021). The Third Circuit has reaffirmed its pre *Holguin-Hernandez* in *United States v. Flores-Mejia*, 759 F.3d 253, 255 (3d Cir. 2014), requiring a party object of the procedural error complained of after a sentence is imposed in order to preserve error. *United States v. Dawson*, 32 F.4th 254, 267 (3d Cir. 2022).

the error. The First Circuit’s reasoning is aligned with the reasoning of this Court in *Holguin-Hernandez* and the policy of Rule 51.

The Seventh Circuit continues to recognize its longstanding precedent in *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005), requiring “a court to address each of the movant’s principal arguments, unless they are ‘too weak to require discussion’ or ‘without factual foundation’”. *United States v. Joiner*, 988 F.3d 993, 995 (7th Cir. 2021). This position furthers the idea that a procedural error is preserved when a party argues for a sentence outside of the guidelines, even if a specific objection is not provided after the court announces the sentence. The decision below cannot be reconciled with the analysis of the Seventh Circuit.

## **CONCLUSION**

For the forgoing reasons, the Court should grant the Petition for Writ of Certiorari and extend its holding in *Holguin-Hernandez* to the preservation of error for procedural reasonableness. Mr. Victor Alfredo Bermudez respectfully asks the Court to grant a Writ of Certiorari.

Respectfully submitted this 12<sup>th</sup> day of May 2023.

Respectfully submitted,

WHALEN LAW OFFICE

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**VICTOR ALFREDO BERMUDEZ**

## **CERTIFICATE OF SERVICE BY MAILING**

I hereby certify that, on the 12<sup>th</sup> day of May 2023, the original Petition and its Appendix, **as well as the Motion to Proceed in Forma Pauperis**, were sent to the Court by overnight mail.

I also certify that on the same day, one copy of both the Petition and its Appendix were sent to Victor Alfredo Bermudez, at:

Seagoville FCI  
P.O. Box 9000  
Seagoville, TX 75159

Lastly, I hereby certify that, on the same day, a true and correct copy of this Petition and Appendix was sent by overnight mail, as well as email, to:

Solicitor General of the United States  
950 Pennsylvania Ave., N.W.; Room 5616  
Washington, DC 20530-0001

*/s/ James P. Whalen*  
JAMES P. WHALEN

## **CERTIFICATE OF COMPLIANCE**

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 4,025 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED THIS THE 12<sup>TH</sup> DAY OF MAY 2023.

*/s/ James P. Whalen*  
JAMES P. WHALEN