No. 18-7739

In the Supreme Court of the United States

GONZALO HOLGUIN-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
SUPPORTING VACATUR

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QUESTION PRESENTED

Whether, to properly preserve a claim that the district court ordered a substantively unreasonable term of imprisonment, a criminal defendant who requests a shorter term must also object to the reasonableness of a longer term of imprisonment after it is ordered.

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OPINION BELOW

The opinion of the court of appeals (J.A. 1-3) is not published in the Federal Reporter but is reprinted at 746 Fed. Appx. 403.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2018. The petition for a writ of certiorari was filed on January 22, 2019, and was granted on June 3, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 51 of the Federal Rules of Criminal Procedure provides:

> (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.

Rule 52 of the Federal Rules of Criminal Procedure provides:

> (a) **Harmless Error**. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) **Plain Error**. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. 841 and 18 U.S.C. 2. J.A. 17-18. He was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. J.A. 19-20. The district court subsequently determined that petitioner had violated the conditions of his supervised release, and it ordered a 12-month term of imprisonment. J.A. 5. The court of appeals affirmed. J.A. 1-3.

A. Legal Background

1. Imposition of a sentence

a. Under 18 U.S.C. 3553(a), a district court's "overarching duty" in sentencing a defendant following a criminal conviction is to impose a "'sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper* v. *United States*, 562 U.S. 476, 491 (2011) (quoting 18 U.S.C. 3553(a)). Those purposes are "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(2).

Section 3553(a) also provides a list of additional, more specific, factors that supplement those overall purposes to inform the appropriate sentence. 18 U.S.C. 3553(a). Those factors include "the nature and circumstances of the offense and the history and characteristics of the defendant"; the range of sentences recommended by the Sentencing Guidelines promulgated by the United States Sentencing Commission (Commission), along with any Commission policy statements; "the need to avoid unwarranted sentence disparities among [similarly situated] defendants"; and "the need to provide restitution to any victims of the offense." *Ibid.*

A sentencing court is required to "consider all of the § 3553(a) factors" before imposing a sentence. *Gall* v. *United States*, 552 U.S. 38, 49-50 (2007). At the sentencing hearing, the court must "verify that the defendant and the defendant's attorney have read and discussed

the presentence report" prepared by the Probation Office "and any addendum to the report," Fed. R. Crim. P. 32(i)(1)(A), and "giv[e] both parties an opportunity to argue for whatever sentence they deem appropriate," *Gall*, 552 U.S. at 49-50. In addition, Section 3553(c) requires the district court, "at the time of sentencing, [to] state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. 3553(c); see *Rita* v. *United States*, 551 U.S. 338, 356 (2007).

b. Since this Court rendered the Guidelines advisory in *United States* v. *Booker*, 543 U.S. 220 (2005), appellate review of a sentence has been "limited to determining whether [the sentence imposed is] 'reasonable.'" *Gall*, 552 U.S. at 46; see *Booker*, 543 U.S. at 260-262. Reasonableness review has two components—one procedural and one substantive.

When reviewing a sentence for procedural reasonableness, a court of appeals "must * * * ensure that the district court committed no significant procedural error." *Gall*, 552 U.S. at 51. Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Ibid.*

When "consider[ing] the substantive reasonableness of the sentence," a court of appeals applies "an abuse-of-discretion standard" to review the length of the sentence. *Gall*, 552 U.S. at 51. "If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness." *Ibid.* (citing *Rita*, 551 U.S. at 347). If, instead, "the sentence is outside the Guidelines range, the court * * * may consider the extent of the deviation, but must give

due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Ibid.* "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Ibid.*

The Court in *Booker* emphasized that it "expect[ed] reviewing courts" considering sentencing appeals "to apply ordinary prudential doctrines" such as "whether [an] issue was raised below and whether it fails the 'plain-error' test." 543 U.S. at 268. Federal Rule of Criminal Procedure 51(b) requires parties to "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." Fed. R. Crim. P. 51(b). And Federal Rule of Criminal Procedure 52(b) provides that an error "not brought to the [district] court's attention" can "be considered" only if it is a "plain error that affects substantial rights." Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993). Since *Booker*, the Court has specifically noted that when a defendant fails to object to a district court's guidelines calculation, "appellate review of the error is governed by Federal Rule of Criminal Procedure 52(b)," which calls for plain-error review. *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016) (guidelines error); see also *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1904-1905 (2018) (applying plain-error review to miscalculation of guidelines range).

2. Revocation of supervised release

When a court "impos[es] a sentence to a term of imprisonment for a felony or a misdemeanor," it "may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. 3583(a). If it does so, the court must specify release conditions, see 18 U.S.C. 3583(d) (2012 & Supp. V 2017), the violation of which may result in revocation of supervised release and reimprisonment of the defendant, see 18 U.S.C. 3583(e)(3). For example, a mandatory condition of any supervised-release term is that "the defendant not commit another Federal, State, or local crime during the term of supervision." 18 U.S.C. 3583(d) (2012 & Supp. V 2017). Reimprisonment for violating such a condition reflects the defendant's breach of the trust that was placed in him by allowing him to serve part of his sentence in the community at large. See *Johnson* v. *United States*, 529 U.S. 694, 700-701 (2000); Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b).

A defendant who has completed the term of imprisonment specified in his sentence, and who is serving a term of supervised release, may be subject to further proceedings if a violation of the supervised-release conditions is alleged. Under Section 3583(e)(3), a district court may "revoke a term of supervised release" if the court "finds by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. 3583(e)(3). In considering whether to revoke supervised release and order reimprisonment, courts must consider the same factors that govern the original imposition of the sentence, see 18 U.S.C. 3553(a), except for the need for the sentence to provide "just punishment," 18 U.S.C. 3553(a)(2)(A); see 18 U.S.C. 3583(c).

The Commission has promulgated policy statements covering revocation, which include the recommended length of a term of reimprisonment. See Sentencing Guidelines §§ 7B1.1-7B1.5.

Both before and after *Booker*, courts of appeals have reviewed procedural and substantive challenges to district courts' orders of reimprisonment for supervised-release violations. See, *e.g.*, *United States* v. *Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005); *United States* v. *Washington*, 147 F.3d 490, 491 (6th Cir.), cert. denied, 525 U.S. 954 (1998). Before *Booker*, courts of appeals applied a "plainly unreasonable" standard to substantive challenges to the length of a revocation term. See, *e.g.*, *United States* v. *Huusko*, 275 F.3d 600, 602 (7th Cir. 2001); *United States* v. *Gonzalez*, 250 F.3d 923, 925 (5th Cir. 2001). After *Booker*, some courts of appeals have continued to employ the "plainly unreasonable" terminology, see, *e.g.*, *United States* v. *Miller*, 634 F.3d 841, 843 (5th Cir.), cert. denied, 565 U.S. 976 (2011), while others have relied on the "reasonableness" language from *Booker*, see, *e.g.*, *United States* v. *Fleming*, 397 F.3d 95, 99 (2d Cir. 2005). Several courts of appeals have observed, however, that the formulations do not appear meaningfully different in practice. See, *e.g.*, *United States* v. *Sweeting*, 437 F.3d 1105, 1106-1107 (11th Cir. 2006) (per curiam); *United States* v. *Tedford*, 405 F.3d 1159, 1161 (10th Cir. 2005); *United States* v. *Cotton*, 399 F.3d 913, 916 (8th Cir. 2005).

B. Factual And Procedural Background

1. In January 2016, United States Border Patrol agents encountered petitioner as he was traveling on foot with a group near the U.S.-Mexico border. Presentence Investigation Report (PSR) ¶¶ 7-10. Petitioner admitted to the agents that he was a citizen of Mexico

and that he was illegally present in the United States. PSR ¶ 7. Petitioner later also admitted that he had illegally entered the United States in order to smuggle marijuana. PSR ¶¶ 9-10. A search of petitioner's and his companions' backpacks revealed that they were carrying approximately 272 pounds of marijuana. PSR ¶ 7.

Following a guilty plea, petitioner was convicted of possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. J.A. 17-18. The district court sentenced him to 24 months of imprisonment, to be followed by two years of supervised release. J.A. 19-20. Among other conditions of supervised release, the district court required that petitioner "not commit another federal, state, or local crime"; that he "not illegally reenter the United States" if removed after his prison term; and that, if he were able to lawfully reenter the United States after being removed, he "immediately report in person to the nearest U.S. Probation Office." J.A. 21, 26. In October 2017, petitioner completed his term of incarceration and began his term of supervised release. J.A. 13. He was removed from the United States at that time. See J.A. 14-15.

2. In November 2017, while petitioner was still on supervised release, Border Patrol agents again arrested him, along with other suspects, for possessing approximately 272 pounds of marijuana. J.A. 14; see 17-cr-354 Docket entry No. 1, at 2 (W.D. Tex. Nov. 17, 2017). Petitioner admitted that he had once again carried marijuana into the United States from Mexico. 17-cr-354 Docket entry No. 1, at 2 (W.D. Tex. Nov. 17, 2017).

A federal grand jury charged petitioner with a new count of possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

17-cr-354 Docket entry No. 22, at 1-2 (W.D. Tex. Dec. 12, 2017); see J.A. 14-15. Petitioner pleaded guilty to the new drug-trafficking offense, and the district court sentenced him to 60 months of imprisonment, to be followed by five years of supervised release. 17-cr-354 Docket entry No. 110, at 1-3 (W.D. Tex. Apr. 30, 2018).

3. While petitioner's second prosecution was pending, the Probation Office filed a petition alleging that petitioner had violated the conditions of the supervised-release term from his first conviction, both by committing the second drug-trafficking offense and by reentering the United State illegally or failing to report to the Probation Office upon reentering the United States. J.A. 13-15. After the conviction and sentencing for the second offense, the district court convened a hearing to consider whether petitioner's supervised-release term from his first conviction should be revoked. J.A. 6-12.

At the revocation hearing, petitioner admitted both supervised-release violations, and the district court found that the violations had occurred. J.A. 7-9. The court then explained that the statutory maximum revocation term of imprisonment for those violations was three years and that the applicable policy statement from the Sentencing Commission recommended a revocation term of 12 to 18 months. J.A. 9; see 18 U.S.C. 3583(e)(3); Sentencing Guidelines § 7B1.1(a)(1) (classifying petitioner's violation as Grade A); Sentencing Guidelines § 7B1.4(a) (table of recommended ranges).

Counsel for petitioner contended that, because petitioner had already been sentenced to 60 months of imprisonment for the second drug-trafficking offense, there "would be no reason under [Section] 3553 that an additional consecutive sentence would get his attention any better than five years does." J.A. 10. She stated

that "[t]hese people routinely are very economically motivated"; that "sometimes perhaps they're not strong enough to be able to [say] no when they're tapped to do this kind of job"; and that, if petitioner "comes back, he's going to serve his life in prison." *Ibid.* Petitioner's counsel thus requested that the district court "consider no additional time or certainly less than the guidelines," particularly if the court ordered that petitioner's revocation sentence run consecutively to the 60-month sentence for his November 2017 drug-trafficking offense. *Ibid.*

The district court ultimately ordered a 12-month revocation term, to run consecutively to the 60-month sentence imposed for petitioner's second drug-trafficking conviction. J.A. 11. The court stated that it had "reviewed the policy statements contained in Chapter 7 of the guidelines in determining the appropriate disposition of this matter in relation to the defendant's violations of his conditions of release." *Ibid.* And it explained that although it did not disagree with the argument made by petitioner's counsel, it "believe[d] the underlying case, the original case means something and so thus" justified the separate 12-month term for petitioner's violation of his supervised-release conditions. *Ibid.* The court also expressed "hope" that petitioner would be "able to withstand the pressure next time and not to do what you've done a few times now already." *Ibid.*

The district court asked whether petitioner's counsel had "[a]nything further," and she responded that she did not. J.A. 11. Petitioner did not object to the reasonableness of the revocation term, or otherwise ask the court to reconsider that term, after the court ordered it. *Ibid.*

4. The court of appeals affirmed in an unpublished per curiam decision. J.A. 1-3. On appeal, petitioner argued that his 12-month revocation term was substantively unreasonable because it was "greater than necessary to effectuate the sentencing goals of 18 U.S.C. § 3553(a)." J.A. 2. The court of appeals took the view that, because petitioner had "failed to raise his challenges in the district court, [its] review [wa]s for plain error only," and determined that petitioner could not satisfy the plain-error standard. *Ibid.* (citing *United States* v. *Whitelaw*, 580 F.3d 256, 259-260 (5th Cir. 2009)).

Specifically, the court of appeals found that petitioner had "failed to show that the imposition of the 12-month total sentence constituted a clear or obvious error." J.A. 2. The court observed that the 12-month term fell "within the applicable advisory Guidelines policy statement ranges." *Ibid.* (citing Sentencing Guidelines § 7B1.4(a)). The court further noted (*ibid.*) that the district court's decision to run the reimprisonment term consecutively to petitioner's term of imprisonment for the second offense was consistent with Sentencing Guidelines § 7B1.3(f), which provides that "[a]ny term of imprisonment imposed upon the revocation of * * * supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving."

SUMMARY OF THE ARGUMENT

The court of appeals erred in applying plain-error review to petitioner's challenge to the substantive reasonableness of his term of imprisonment. A defendant's request for a shorter term is sufficient to raise and preserve a substantive, although not a procedural, objection to a longer term.

A. The Federal Rules of Criminal Procedure specify that in order to preserve a claim for appellate review, a criminal defendant must "inform[] the court—when the court ruling or order is made or sought—of the action [he] wishes the court to take, or [his] objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). A claim that is not preserved in that manner is subject to review only for plain error. Fed. R. Crim. P. 52(b). The Rules thus promote judicial efficiency by "induc[ing] the timely raising of claims and objections" in the district court, which "can often correct or avoid [a] mistake" that a party identifies. *Puckett* v. *United States*, 556 U.S. 129, 134 (2009). They also discourage gamesmanship by preventing a party from "remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Ibid.*

Rules 51 and 52 apply with the same force in the sentencing context as they do in other parts of a criminal proceeding. As a result, a criminal defendant must specifically identify a claim of error at sentencing to properly preserve that claim for appellate review. This Court has made clear, for example, that plain-error review applies to unpreserved claims of procedural error at sentencing. See *United States* v. *Booker*, 543 U.S. 220, 268 (2005); see, *e.g.*, *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016). For example, a defendant who disagrees with the district court's calculation of the applicable Sentencing Guidelines range or with the adequacy of the district court's explanation for the sentence must identify the asserted error at the time that it is made. As the Rules contemplate, a specific contemporaneous objection is necessary to provide

the district court with "the opportunity to consider and resolve" that objection. *Puckett*, 556 U.S. at 134.

B. A criminal defendant's request for a shorter sentence does not in itself identify or preserve any procedural objections to the sentencing process. It does, however, identify and preserve a general substantive objection to the subsequent imposition of a longer sentence. It does so by putting the district court on notice "of the action the [defendant] wishes the court to take," Fed. R. Crim. P. 51(b)—namely, agreeing with the defendant that the circumstances warrant a shorter sentence.

The additional preservation requirement applied by the court of appeals—that a defendant also expressly object to the reasonableness of a sentence after it is imposed—finds no support in the text of Rule 51. Instead, it appears to conflate the error being asserted (the district court's substantive misapplication of the relevant sentencing factors) with the appellate standard of review for that error (reasonableness). Nothing in Rule 51 requires that objecting parties recite the applicable appellate standard to preserve their claims for appeal. To the contrary, Rule 51 specifically provides that "[e]xceptions" to unsatisfactory rulings are "unnecessary." Fed. R. Crim. P. 51(a). A requirement that a defendant repeat his dissatisfaction with a district court's sentence by reciting the appellate standard of review would amount to precisely the sort of formalistic and redundant "[e]xception[]" that the drafters of Rule 51 sought to avoid.

As a practical matter, too, a requirement that defendants object to a sentence as unreasonable after it is imposed would have little value. A defendant who has already advocated for a shorter sentence has presented

all of his arguments against a longer sentence to the district court, which has rejected them. Another objection at that point would not serve the purposes of Rules 51 and 52. A pro forma reiteration of what the district court already knows—that the defendant believed a lower sentence was appropriate—does not enhance judicial efficiency. Nor does requiring such a rote objection discourage gamesmanship, because a defendant has no incentive to withhold his sentencing arguments until appeal.

C. The same principles govern the imposition of a term of imprisonment upon revocation of supervised release. As a result, the court of appeals should have assessed the reasonableness of petitioner's 12-month term of imprisonment without applying plain-error review. And although petitioner's 12-month term, at the bottom of the range that the Sentencing Commission's policy statement recommends, should be affirmed even without plain-error review, the court of appeals has not yet applied the appropriate standard itself. Thus, consistent with its ordinary practice, this Court should vacate the decision below and remand the case to the court of appeals so that it may consider petitioner's claim under the correct standard of review in the first instance. See, *e.g.*, *Tapia* v. *United States*, 564 U.S. 319, 335 (2011); *United States* v. *Marcus*, 560 U.S. 258, 266-267 (2010).

ARGUMENT

A CRIMINAL DEFENDANT WHO ADVOCATED FOR A SHORTER TERM OF IMPRISONMENT NEED NOT ALSO OBJECT AFTER THE DISTRICT COURT'S RULING TO PRESERVE A CLAIM THAT A LONGER TERM IS SUBSTANTIVELY UNREASONABLE

Timely objections are central to the "focused, adversarial resolution" of sentencing disputes. *Burns* v. *United States*, 501 U.S. 129, 137 (1991). If a criminal defendant believes that a court has erred, the Federal Rules of Criminal Procedure require him to preserve his claim of error by taking one of two actions "when the court ruling or order is made or sought": (1) informing the court of "the action the party wishes the court to take"; or (2) "object[ing] to the court's action" and providing "the grounds for that objection." Fed. R. Crim. P. 51(b). A defendant who "fails to do so in a timely manner" forfeits a claim of error and may obtain relief from that error on appeal only by satisfying the rigorous requirements of the plain-error standard of review under Federal Rule of Criminal Procedure 52(b). *Puckett* v. *United States*, 556 U.S. 129, 134 (2009).

When a defendant unambiguously asks the district court for a lower sentence, he puts the court on notice of his objection to a higher one, and adequately preserves an appellate claim that renews such an objection. And the Rules work the same way in the context of a term of imprisonment that a court orders in conjunction with revoking supervised release. The court of appeals in this case thus incorrectly applied plain-error review to petitioner's appellate claim that his 12-month revocation term was substantively unreasonable. Although affirmance of the district court's order would be war-

ranted under any standard, the proper course is to vacate and remand so that the court of appeals can apply the correct standard in the first instance.

A. A Sentencing Claim That A Defendant Did Not Specifically Identify To The District Court Is Subject To Plain-Error Review On Appeal

1. This Court has found "[n]o procedural principle" to be "more familiar" than the principle that "a right of any * * * sort[] 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Rule 51(b) prescribes how parties may avoid such a forfeiture in a criminal case, namely, "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." Fed. R. Crim. P. 51(b). "Failure to abide by [Rule 51's] contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error." *Puckett*, 556 U.S. at 135.

Rule 52(b), however, "tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by providing "strictly circumscribed" authority for an appellate court "to remedy [an] error" that has not been "properly preserved," *Puckett*, 556 U.S. at 134. Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). That standard allows a complaining party to obtain relief on a new claim by establishing (1) that the

district court committed an error; (2) that the error is "clear" or "obvious" under the law at the time of review; and (3) that the error "affect[ed] [the party's] substantial rights." *Olano*, 507 U.S. at 732-735 (citation omitted). If all three of those requirements are satisfied, "the court of appeals has authority to order correction" of the error, provided that the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 735-736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)) (brackets in original); see *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1911 (2018).

2. Rule 51's contemporaneous-objection requirement, and Rule 52's corresponding plain-error review, reflect longstanding "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact," barring "exceptional circumstances." *Atkinson*, 297 U.S. at 159-160. The two Rules strike a "careful balanc[e]" between the "need to encourage all trial participants to seek a fair and accurate trial the first time around" and this Court's "insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982); see *Puckett*, 556 U.S. at 135.

The rigorous application of Rule 51's contemporaneous-objection requirement and Rule 52's plain-error standard serves important purposes related to the functioning of federal trial and appellate courts. First, those Rules promote finality and judicial efficiency by "induc[ing] the timely raising of claims and objections" in district court, "which gives the district court the opportunity to consider and resolve them" in the first instance. *Puckett*, 556 U.S. at 134. In particular, a district

court that has been alerted to a potential error can examine it with the benefit of direct participants and fresh recollections and "can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome." *Ibid.* Second, the Rules diminish opportunities and incentives for gamesmanship. As this Court has explained, they "prevent[] a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Ibid.*

3. Those considerations, and the Rules themselves, apply with full force in sentencing-related contexts. For example, this Court has previously indicated that plain-error review applies to unpreserved claims of procedural error at sentencing. In *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory and described the appropriate standard of appellate review in that regime, the Court observed that appellate courts should continue to apply "ordinary prudential doctrines," such as "whether the issue was raised below and whether it fails the 'plain-error' test." *Id.* at 268. Since *Booker*, the Court has specifically noted that when a defendant fails to object to a district court's guidelines calculation, "appellate review of the error is governed by Federal Rule of Criminal Procedure 52(b)," which requires plain-error review. *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016); see Fed. R. Crim. P. 52(b); see also *Rosales-Mireles*, 138 S. Ct. at 1904-1905 (similarly applying plain-error review to miscalculation of guidelines range).

A defendant who allows a guidelines-calculation error to pass without objection has forfeited that objection, because he has neither "inform[ed] the court * * * of the action [the defendant] wishes the court to take, or

[the defendant's] objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). The same is true of objections to other procedural errors. This Court has likened "failing to calculate (or improperly calculating) the Guidelines range" to other "significant procedural error[s]" at sentencing, such as "treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Gall* v. *United States*, 552 U.S. 38, 51 (2007). Potential procedural errors also include violations of Federal Rule of Criminal Procedure 32, such as failing to "verify that the defendant and the defendant's attorney have read and discussed the presentence report," failing to "allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence," and failing to resolve any disputed portion of the presentence report affecting the court's sentencing decision. Fed. R. Crim. P. 32(i)(1)(A), (1)(C), and (3)(B).

Simply requesting a lower sentence does not sufficiently identify an asserted procedural error to the district court. Because such errors occur in the course of the district court's deliberations, they must be pointed out at the time. Take, for example, an error in calculating the guidelines range. See 18 U.S.C. 3553(a)(4). Unless a defendant has already argued to the district court that the court should apply a particular guidelines provision in a particular way, he may (and must) object to a guidelines calculation after that calculation has been made. Or take a district court's failure to adequately explain its chosen sentence. See 18 U.S.C. 3553(c). Only after the district court has explained (or failed to

explain) the sentence that it ultimately decided to impose can the defendant object to the adequacy of that explanation. In neither case would a generalized argument in favor of less imprisonment provide the district court with "the opportunity to consider and resolve" the specific claim of error, *Puckett*, 556 U.S. at 134.

Claims of guidelines errors, deficient sentencing explanations, and other procedural sentencing claims are precisely the sort of errors that can be, and should be, litigated in the district court in the first instance. See *United States* v. *Vonn*, 535 U.S. 55, 72 (2002) (noting the benefits of "concentrat[ing] * * * litigation in the trial courts, where genuine mistakes can be corrected easily"). If such a procedural issue is brought to a district court's attention, the court will "often correct or avoid the mistake" on its own, promoting judicial economy through the more efficient resolution of sentencing disputes, *Puckett*, 556 U.S. at 134. In the above examples, for instance, a district court that is informed of a potential error in its computation of the defendant's guidelines range may correct any inadvertent mistake or make any relevant factual findings. Similarly, a district court that is alerted to the defendant's view that its explanation was inadequate may well supplement that explanation. Indeed, even a court that believes its existing explanation already suffices may choose to add more detail to satisfy an inquiring defendant or to obviate the need for an appeal and potential remand.

B. A Specific Request For A Lower Sentence Can Satisfy Rule 51's Contemporaneous-Objection Requirement

Although a request for a lower sentence does not preserve a defendant's objection to any procedural error, it does generally preserve a substantive objection to any higher sentence that he receives. The decision

below, which holds that a defendant preserves a substantive-reasonableness claim only by expressly objecting to the reasonableness of a term of imprisonment after it is ordered, see J.A. 2; see also *United States* v. *Peltier*, 505 F.3d 389, 391-392 (5th Cir. 2007), cert. denied, 554 U.S. 921 (2008), cannot be squared with the text or purposes of Rules 51 and 52.

1. Under Rule 51's text, a defendant preserves a substantive challenge to a sentence by arguing for a different one

a. A defendant's request for a lower sentence satisfies Rule 51's requirement that he "preserve a claim of error by informing the court—when the court ruling or order is * * * sought—of the action the party wishes the court to take." Fed. R. Crim. P. 51(b). Put simply, the point of a sentencing hearing is to obtain the court's ruling on a defendant's sentence. And if the defendant requests a specific sentence at that hearing, he plainly wishes the court to impose that sentence.

Described more technically, the "action" that the defendant has "sought," Fed. R. Crim. P. 51(b), is a different substantive evaluation of the circumstances as presented to the court. Under 18 U.S.C. 3553(a)'s "parsimony principle," *Dean* v. *United States*, 137 S. Ct. 1170, 1175 (2017), district courts must impose sentences that are "'sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)," *Pepper* v. *United States*, 562 U.S. 476, 491 (2011) (quoting 18 U.S.C. 3553(a)). A defendant who requests a specific sentence, or a sentence below a specific threshold (for example, one below the guidelines range) does not merely inform the court that the defendant prefers the requested sentence. Instead, the request

also necessarily informs the court that, in the defendant's view, any lengthier sentence would be "greater than necessary." By the same token, when the government requests a longer sentence or a sentence above a specific threshold (for example, one above the guidelines range), it informs the court that, in the government's view, any lesser term would not be "sufficient." See, *e.g.*, *United States* v. *Autery*, 555 F.3d 864, 869-871 (9th Cir. 2009); *United States* v. *Curry*, 461 F.3d 452, 459 (4th Cir. 2006).

When either party challenges a sentence as substantively unreasonable on appeal, that challenge fundamentally asserts that "the District Judge abused his discretion in determining that the § 3553(a) factors supported [the] sentence"—*i.e.*, in applying the parsimony principle. *Gall*, 552 U.S. at 56. A party that sought a different sentence—and thereby informed the district court of its view that the parsimony principle required that sentence—has therefore done all that Rule 51 requires to preserve a claim that the district court's actual sentence reflects a misapprehension of the circumstances of the case. The text of Rule 52(b), which applies plain-error review only to those errors that were "not brought to the court's attention," Fed. R. Crim. P. 52(b), confirms the point. As a matter of common sense, a defendant who argues that the circumstances call for a shorter sentence has "br[ought] to the court's attention" a substantive error in deeming the circumstances to warrant a longer one. *Ibid.*

As discussed above, such an argument does not preserve a *procedural* claim, which is an objection to the evaluation process, rather than the result of that process. See pp. 18-20, *supra*. Nor does it preserve a claim

that the court's sentence fails to account for circumstances that were never presented to the court in the first place. A defendant who requests a lower sentence but fails to raise a relevant circumstance in support of that request (*e.g.*, his efforts to rehabilitate since his crime) has forfeited reliance on that circumstance for purposes of appeal. He has neither sought his desired "action" (a sentence that accounts for that circumstance) nor objected to the sentence on the proper "ground[]" (that it does not take the unmentioned circumstance into account). Fed. R. Crim. P. 51(b); see *United States* v. *Vonner*, 516 F.3d 382, 391-392 (6th Cir.) (en banc), cert. denied, 555 U.S. 816 (2008). Nevertheless, he has preserved a basic objection that the district court made an unreasonable substantive decision based on the facts and arguments before it.

b. The court of appeals' inflexible requirement of a specific objection to the "reasonableness" of a sentence after it is imposed confuses the error being asserted (a misevaluation of the circumstances) with the appellate standard of review for that error (reasonableness). A defendant who asks for a shorter sentence has not necessarily informed the district court that he believes the sentence it ultimately imposed is *unreasonably* long. But because substantive reasonableness is a standard of review applied by appellate courts, not an independent directive to district courts, a defendant is not required to label a sentence "unreasonable" if he otherwise properly preserves an objection to the length of the sentence.

In *Booker*, this Court invalidated the statutory provision rendering the Sentencing Guidelines mandatory and excised the corresponding statutory standards of appellate review. See 543 U.S. at 260. In place of those

standards, the Court prescribed "a practical standard of review already familiar to appellate courts: review for unreasonableness." *Id.* at 261 (brackets, citation, and internal quotation marks omitted); see *id.* at 260-263 (describing appellate review under advisory Guidelines system). *Booker* accordingly made "pellucidly clear" that reasonableness is the standard that "applies to appellate review of sentencing decisions"—not the standard that guides the district court's initial sentencing determination. *Gall*, 552 U.S. at 46; see, *e.g.*, *Kimbrough* v. *United States*, 552 U.S. 90, 90-91 (2007) (explaining that *Booker* "instructed that 'reasonableness' is the standard controlling appellate review of the sentences district courts impose").

The court of appeals' preservation requirement appears to rest on the misapprehension that, "[a]fter *Booker*, 'reasonableness' has become *both* a substantive standard to be applied by the district court *and* a standard of review to be applied on appeal in assessing a district court's exercise of its sentencing discretion." *Peltier*, 505 F.3d at 391 n.2 (emphasis added; citation omitted). That is incorrect. District courts are "charged in the first instance with determining whether * * * a sentence is 'sufficient, but not greater than necessary'" under Section 3553(a). *Rosales-Mireles*, 138 S. Ct. at 1910 (quoting 18 U.S.C. 3553(a)). And, as discussed, a defendant puts a sentencing court on notice of his disagreement with a sentencing court's assessment of what is sufficient or necessary by arguing for a lower sentence. See pp. 20-23, *supra*. Substantive reasonableness, in contrast, is the separate standard by which a court of appeals assesses whether a district court's choice of a sentence falls within an acceptable range of discretion. See *Gall*, 552 U.S. at 56 (observing that the

court of appeals was required to consider "whether the sentence was reasonable—*i.e.*, whether the District Judge abused his discretion in determining that the § 3553(a) factors supported" it); *Rita* v. *United States*, 551 U.S. 338, 351 (2007) (explaining that "appellate 'reasonableness' review merely asks whether the trial court abused its discretion").

Once reasonableness is correctly understood as a standard of appellate review, nothing in Rule 51 supports a requirement that objecting parties recite that appellate standard to preserve their claim for appeal. See, *e.g.*, *Vonner*, 516 F.3d at 389 ("A litigant has no duty to object to the 'reasonableness' of the length of a sentence * * * *during* a sentencing hearing * * * because reasonableness is the standard of *appellate* review, not the standard a district court uses in imposing a sentence."). Litigants are ordinarily tasked with informing a district court that they disagree with a particular ruling, not that the ruling will also fail the applicable standard of appellate review. For example, a district court's factual findings are generally reviewed on appeal for clear error. See, *e.g.*, *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985). Yet no one would contend that, to preserve a claim of factual error, a litigant who requests a finding of fact must object when the district court enters a contrary finding, to clarify that the litigant believes the finding is not just wrong but also clearly erroneous. The same is true with respect to sentencing—a defendant need only disagree with the sentence itself, not specifically assert its unreasonableness.

c. The court of appeals' inflexible preservation requirement also contravenes Rule 51 in an even more direct way. In practice, the requirement effectively ne-

cessitates that litigants take an "[e]xception[]" to an adverse ruling—which Rule 51 specifically instructs is "unnecessary." Fed. R. Crim. P. 51(a).

In evidence law, an "exception" is an announcement, made "at the time of [an] unsatisfactory ruling," that counsel intends to "treat [the ruling] as an error for purposes of appeal." 1 John Henry Wigmore, *Evidence in Trials at Common Law* § 20, at 355 (3d ed. 1940) (emphasis omitted). Before the advent of stenographic reporting, English and American courts required parties wishing to challenge a trial court's ruling on a point of law to take such an "exception" after the court's ruling and to prepare a written "bill of exceptions" setting forth the disputed legal issue, the relevant facts, the parties' arguments, and the disposition. *Ibid.*; see *Bouvier's Law Dictionary* 123 (1934); *Poole* v. *Fleeger*, 36 U.S. (11 Pet.) 185, 211 (1837). The exception requirement applied even when the party had objected before the court's ruling. 1 Wigmore § 20, at 355. That is because its primary purpose was to create, through the written bill, a "record for the information of the court having cognizance of the cause in error." *Bouvier's Law Dictionary* 123; accord 1 Wigmore § 20, at 353.

But as stenographic recording became available in the early twentieth century, it rendered the exception's record-preserving function obsolete, and many jurisdictions abandoned the practice. See 1 Wigmore at 355 & n.4; see also Fed. R. Crim. P. 51 advisory committee's note (1944 adoption) (explaining that, by 1944, "[m]any States ha[d] abolished the use of exceptions in criminal and civil cases"). Consistent with that trend, the inaugural editions of the federal rules of procedure expressly abandoned the exception requirement. See Fed. R. Crim. P. 51(a) (1944); Fed. R. Civ. P. 46 (1938)

("Formal exceptions to rulings or orders of the court are unnecessary.").

By requiring an objection that repeats a party's previously announced disagreement with the length of the sentence imposed, the court of appeals effectively resurrected the archaic exception requirement that the drafters of Rule 51 abandoned 75 years ago. Where the record already reflects the defendant's request and argument for a shorter sentence, the objection required by the court of appeals here, like the exception practice, does not convey any additional information that might be necessary for an appeal. Instead, it primarily serves to communicate that the defendant may challenge the sentence imposed as substantively unreasonable on appeal. Under Rule 51, no need exists for such a formality.

2. Requiring a substantive-reasonableness objection would not serve the purposes of the plain-error rule

The court of appeals' requirement is also inconsistent with the purposes of Rules 51 and 52(b). First, that requirement would not advance the interests of finality and efficiency, see *Puckett*, 556 U.S. at 134, because it would not notify the court of any potentially inadvertent errors or clarify any misunderstandings. For most asserted errors, like procedural sentencing-related claims, "the district court if apprised of the claim will be in a position to adjudicate the matter in the first instance, creating a factual record and facilitating appellate review," or even correcting the error "and thus avoid[ing] the delay and expense of a full appeal." *Id.* at 140. That is not true of substantive challenges to the district court's selection of a particular sentence.

In the context of "a substantive reasonableness challenge" to a disputed sentence, "the parties have already fully argued the relevant issues * * * and the court is

already apprised of the parties' positions and what sentences the parties believe are appropriate." *Autery*, 555 F.3d at 871. In those circumstances, "requiring the parties to restate their views after sentencing" would not alert the district court to any error about which the court has not been previously informed; it instead would be "both redundant and futile." *Ibid.*; see, *e.g.*, *Curry*, 461 F.3d at 459; *United States* v. *Castro-Juarez*, 425 F.3d 430, 434 (7th Cir. 2005). As experience in the Fifth Circuit illustrates, requiring such an objection would simply lead defendants to assert, "I object to the reasonableness of the sentence," whenever a court imposes a sentence longer than they requested. See, *e.g.*, D. Ct. Doc. 37, at 28, *United States* v. *Ocampo-Mejia*, No. 06-cr-251 (N.D. Tex. Aug. 26, 2008) (defense counsel's statement at end of sentencing hearing that, "just in the event that Mr. Ocampo-Mejia chooses to appeal, I would like to object to the sentence as unreasonable"); D. Ct. Doc. 19, at 1, *United States* v. *Key*, No. 08-cr-123 (W.D. Tex. Dec. 10, 2008) (post-sentencing filing stating that "upon the advice of * * * Defendant's attorney," the "Defendant OBJECTS to the reasonableness of the sentence in this case"). That would reveal nothing new to the district court, and no reason exists to think that such a formulaic objection would prompt any further consideration by the district court.

Second, requiring a substantive-reasonableness objection would not mitigate any risk of gamesmanship, see *Puckett*, 556 U.S. at 134. This Court has explained that "the point of the plain-error rule" is that "the defendant who just sits there when a mistake can be fixed" cannot "wait to see" whether he is satisfied with the judgment and, if not, complain to the court of appeals. *Vonn*, 535 U.S. at 73. But to properly preserve a

substantive-reasonableness claim, a defendant cannot "just sit[] there," *ibid.* Instead, he must request a lower sentence in the district court and raise any relevant arguments in favor of that lower sentence. As a result, he simply has no ability to "sandbag[]" the proceedings by "remaining silent." *Puckett*, 556 U.S. at 134.

Moreover, even assuming that a defendant had some theoretical ability to hide the ball, he would have no apparent incentive to do so. An objection that labels a sentence as "unreasonable" would necessarily be offered at the end of the criminal proceeding, after the district court has imposed its sentence. At that point, the defendant already knows whether the case has "conclude[d] in his favor," and a rational defendant would have every incentive to object if it could do any good. *Puckett*, 556 U.S. at 134; cf., *e.g.*, *id.* at 140 (requiring objection to breach of plea agreement in order to prevent a defendant from "'gam[ing]' the system" by waiting to receive his sentence and then "seeking a second bite at the apple" if unsatisfied); *Vonn*, 535 U.S. at 73 (requiring objection to guilty-plea colloquy to forestall the risk that "a defendant could choose to say nothing about a judge's plain lapse * * * and wait to see if the sentence later struck him as satisfactory"). The absence of an objection in that situation reflects the objection's pointlessness, not any effort to game the system.

Rather than encouraging the healthy functioning of the judicial system, adopting the court of appeals' preservation rule would have multiple negative consequences. If defendants (or prosecutors) remembered to reiterate their challenges to the length of a sentence, they would "saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case." *Castro-Juarez*, 425 F.3d at 434. If an

objection is raised, but is less than clear, it would require sentencing courts to waste time determining whether a defendant is in fact raising a new argument that the court should address or is merely reiterating his disagreement with the already-disputed sentence for preservation purposes. And if the objection requirement is overlooked, it would "create a trap for" the "unwary." *Id.* at 433-434. Those costs may not be large, but it makes little sense to impose them when no apparent countervailing benefits exist.

3. Prevailing circuit practice reflects the proper approach

Given the text of the Rules, the policies behind plain-error review, and this Court's precedents, it is unsurprising that most courts of appeals have coalesced around the same approach to the preservation of sentencing errors. They recognize that although arguing for a shorter sentence is insufficient to preserve a procedural challenge to the sentencing proceeding, it does preserve a general substantive challenge to the length of the sentence. The en banc Sixth Circuit, for example, has emphasized a defendant's "obligation to raise all arguments concerning the appropriate procedures at sentencing," but has recognized that "counsel need not register a complaint with the district court that the proposed sentence is 'unreasonable.'" *Vonner*, 516 F.3d at 391.

The other courts of appeals largely agree. See, *e.g.*, *United States* v. *Flores-Mejia*, 759 F.3d 253, 256-257 (3d Cir. 2014) (en banc) ("While a substantive objection to the sentence that a court will impose is noted when made and need not be repeated after sentencing, a procedural objection is to the form that the sentencing procedure has taken."); *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1221 (10th Cir. 2006) ("Although * * * it

is unnecessary to argue to the district court after imposition of the sentence that the sentence is unreasonably long, the usual reasons for requiring a contemporaneous objection apply to challenges to the district court's method of arriving at a sentence."), cert. denied, 551 U.S. 1162 (2007); see also *United States* v. *Rangel*, 697 F.3d 795, 805 (9th Cir. 2012), cert. denied, 568 U.S. 1182 (2013); *United States* v. *Rice*, 699 F.3d 1043, 1049 (8th Cir. 2012); *United States* v. *Corona-Gonzalez*, 628 F.3d 336, 340 (7th Cir. 2010); *United States* v. *Wilson*, 605 F.3d 985, 1033-1034 (D.C. Cir.) (per curiam), cert. denied, 562 U.S. 1116, and 562 U.S. 1117 (2010); *United States* v. *Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007), cert. denied, 553 U.S. 1019 (2008); *United States* v. *Villafuerte*, 502 F.3d 204, 211 (2d Cir. 2007).

The only outliers are the Fifth Circuit, which is alone in its requirement that a defendant object to the substantive reasonableness of a just-pronounced sentence, see J.A. 2, and the Fourth Circuit, which does not require a contemporaneous objection to preserve a claim that the district court provided an inadequate explanation of its sentence, see *United States* v. *Lynn*, 592 F.3d 572, 578 (2010). For the reasons discussed above, neither of those idiosyncratic approaches is sound. This Court can and should clarify that Rules 51 and 52 require preservation of claims of sentencing error, but that a defendant's claim that a sentence is unreasonably long is sufficiently preserved by an argument for a shorter one.

C. This Court Should Vacate The Judgment Below And Remand The Case To The Court Of Appeals, Which Should In Turn Affirm Petitioner's Revocation Term

1. This case does not arise in the context of an initial sentencing, but instead involves an order of reimprisonment following the revocation of petitioner's supervised release. Although the two types of proceedings and judgments are not congruent in all respects, see pp. 3-7, *supra*, none of the differences supports the court of appeals' application of plain-error review here.

At the revocation hearing, petitioner requested that the district court order zero months of imprisonment, or at least less than 12 months, citing his role in the offense and his punishment for a separate conviction. J.A. 9-10. In ordering a revocation term of 12 months of imprisonment, J.A. 11, the court necessarily rejected petitioner's arguments and ruled against him. Yet the court of appeals applied plain-error review, relying on its unique approach to preservation in the context of initial sentencings. See J.A. 2 (citing *United States* v. *Whitelaw*, 580 F.3d 256, 259-260 (5th Cir. 2009)); see also *Whitelaw*, 580 F.3d 259-260 (applying *United States* v. *Peltier*, *supra*, to a revocation proceeding); *Peltier*, 505 F.3d at 391 (formulating objection rule in context of sentence imposition). That approach is no more consistent with the Rules, and makes no more sense, in the revocation context than it does in the sentencing context.

2. As the government explained in its brief in opposition to certiorari (at 8-11), petitioner's revocation term should be affirmed even in the absence of plain-error review. The consecutive 12-month term of imprisonment that the district court ordered in this case is at the bottom of the 12-to-18-month range that the Commission's policy statement recommends. See J.A. 9, 11; see

also Sentencing Guidelines § 7B1.4(a) (recommending that "[a]ny term of imprisonment imposed upon the revocation of * * * supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of * * * supervised release"); Sentencing Guidelines § 7B1.3(f); Sentencing Guidelines § 7B1.3(f), comment. (n.4). And the revocation term appropriately accounts for petitioner's breach of trust in committing his crime while on supervised release. See *United States* v. *Gonzalez*, 250 F.3d 923, 929-931 (5th Cir. 2001); see also *United States* v. *Haymond*, 139 S. Ct. 2369, 2379-2380 (2019) (opinion of Gorsuch, J.) (explaining that "supervised release punishments arise from and are 'treated as part of the penalty for the initial offense'") (brackets, citation, and ellipses omitted).

Nevertheless, this is "a court of review, not of first view," *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) (citation omitted), and the court of appeals has not itself considered petitioner's challenge to the revocation term under the correct standard. Thus, consistent with its ordinary practice, this Court should vacate the court of appeals' decision and remand the case to the court of appeals so that it may consider petitioner's substantive challenge to his revocation term under the correct standard of review in the first instance. See, *e.g.*, *Tapia* v. *United States*, 564 U.S. 319, 335 (2011); *United States* v. *Marcus*, 560 U.S. 258, 266-267 (2010).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to that court for further consideration of petitioner's substantive challenge to his 12-month revocation term.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3553 provides:

Imposition of a sentence

(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.[1]

(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.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by

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[1] So in original. The period probably should be a semicolon.

guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) CHILD CRIMES AND SEXUAL OFFENSES.—

(A)[2] SENTENCING.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

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[2] So in original. No subpar. (B) has been enacted.

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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[3] So in original.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing

Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

2. 18 U.S.C. 3583 (2012 & Supp. V 2017) provides:

Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a mis-

demeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant

not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such

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[1] See References in Text note below.

failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/ mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is

subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) MODIFICATION OF CONDITIONS OR REVOCATION. —The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to

the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(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).

(h) SUPERVISED RELEASE FOLLOWING REVOCATION.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the

defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) DELAYED REVOCATION.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) SUPERVISED RELEASE TERMS FOR TERRORISM PREDICATES.—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) 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.