No. 18-7739

In the
Supreme Court of the United States

GONZALO HOLGUIN-HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF JUDGMENT BELOW

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QUESTION PRESENTED

Whether an appellate court reviews for plain error an argument raised for the first time on appeal that a criminal sentence is substantively unreasonable.

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Amicus curiae K. Winn Allen was appointed by the Court to brief and argue this case in support of the Fifth Circuit's judgment below.

INTRODUCTION

The ordinary rule in our legal system is that "[i]f a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue." *Puckett v. United States*, 556 U.S. 129, 134 (2009). The question in this case is whether that ordinary rule applies when a criminal defendant believes that a district court ordered a substantively unreasonable term of imprisonment. Petitioner and the Government argue that it does not, and that a defendant fully preserves a substantive-reasonableness challenge merely by asking the district court to impose a shorter sentence—something nearly every defendant will do.

The Fifth Circuit has correctly required defendants to do more. As with all other arguments, a defendant wishing to argue on appeal that his sentence is substantively unreasonable must assert the basis for that argument in the district court. That rule requires a defendant to both make the argument itself—namely, that a particular sentence exceeds the range of reasonable sentences that is sufficient, but not greater than necessary, to serve the purposes of 18 U.S.C. §3553(a)(2)—and to raise the specific grounds for that argument by identifying the facts and circumstances supporting it. The Court has already recognized that a defendant must take similar steps to preserve a procedural-reasonableness challenge. There is no good reason to adopt a different rule in the substantive-reasonableness context. For these reasons, and for those explained below, the Court should affirm.

STATEMENT OF THE CASE

A. Legal Background

1. A federal criminal defendant's ability to appeal the length of his sentence has changed substantially over the last four decades. Until 1984, district courts had nearly unfettered discretion to impose any sentence so long as it fell somewhere between the minimum and maximum sentence allowed by statute. A sentence imposed "within statutory limits was, for all practical purposes, not reviewable on appeal." *Koon v. United States*, 518 U.S. 81, 96 (1996); *see also Dorszynski v. United States*, 418 U.S. 424, 431 (1974).

Because that near-unfettered discretion resulted in significant sentencing discrepancies for federal crimes, Congress passed the Sentencing Reform Act of 1984 ("the SRA"), Pub. L. No. 98-473, Ch. II, 98 Stat. 1837, 1987 (1984), dramatically changing the sentencing landscape. The SRA created the United States Sentencing Commission and directed the Commission to develop sentencing guidelines that would constrain sentencing discretion. *See* 18 U.S.C. §3553(b)(1). The SRA established specific factors that a federal court must consider when imposing a sentence, providing that a district court "shall impose a sentence sufficient, but not greater than necessary," to accomplish an enumerated list of purposes. *See id.* §3553(a) (listing purposes and factors).[1]

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[1] Sentences for revocation of supervised release are generally governed by the same factors that govern the original imposition of the sentence for a substantive offense, except for the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. §3553(a)(2)(A); *see* 18 U.S.C. §3583(e).

For the first time, Congress also provided for meaningful appellate review of sentencing decisions. The SRA directed an appellate court to overturn any sentence that was "imposed in violation of law," "imposed as a result of an incorrect application of the sentencing guidelines," or "outside the guideline[s] range and … unreasonable," and to affirm any sentence that was within the correct guidelines range. *Id.* §3742(f)(1)-(3). The courts of appeals initially interpreted the SRA to require them to review departures from the guidelines for an abuse of discretion. *See Koon*, 518 U.S. at 97, 99. But Congress later clarified—in an amendment to the SRA known as the Feeney Amendment—that appellate courts should review *de novo* sentences imposed outside the guidelines range. *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. No. 108-21, §401(d)(2), 117 Stat. 650, 670 (2003), codified at 18 U.S.C. §3742(e).

2. The Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), changed the sentencing landscape again. In *Booker*, the Court invalidated the statutory provisions of the SRA that made the sentencing guidelines mandatory. *Id.* at 244-45. In lieu of those now-invalidated standards of appellate review, *Booker* instructed courts of appeals to review sentences for "reasonableness," *id.* at 260-61, "under an abuse-of-discretion standard," *Gall v. United States*, 552 U.S. 38, 51 (2007). The Court in *Booker* also instructed "reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test," as well as whether

"resentencing is warranted … upon application of the harmless-error doctrine." 543 U.S. at 268.

In the years since *Booker*, the Court has clarified the district court's task at sentencing in light of the fact that the sentencing guidelines are only advisory. A district court must "begin all sentencing proceedings by correctly calculating the applicable [g]uidelines range," which is the "starting point and the initial benchmark." *Gall*, 552 U.S. at 49; *see Rita v. United States*, 551 U.S. 338, 347-48 (2007). The guidelines, however, are "not the only consideration"—or even the most-important consideration. *Gall*, 552 U.S. at 49. The district court principally must "consider all of the §3553(a) factors" and determine whether those factors "support the sentence requested by a party." *Id.* at 49-50. In evaluating the §3553(a) factors, the district court "may not presume that the [g]uidelines range is reasonable," but "must make an individualized assessment based on the facts presented." *Id.* at 50. "After settling on the appropriate sentence," the court must "adequately explain the chosen sentence" to, among other things, "allow for meaningful appellate review." *Id.*

The Court has also clarified the nature of appellate review in the post-*Booker* world. To "determin[e] whether [the sentence imposed] is reasonable," an appellate court must undertake two inquiries: The appellate court must "first ensure that the district court committed no significant procedural error." *Id.* at 51. If the district court's decision is "procedurally sound," the appellate court must "then consider the substantive reasonableness of the sentence imposed." *Id.* A sentence may be

"procedurally" unreasonable if the district court, for example, "fail[ed] to calculate (or improperly calculat[ed]) the [g]uidelines range, treat[ed] the [g]uidelines as mandatory, fail[ed] to consider §3553(a) factors, select[ed] a sentence based on clearly erroneous facts, or fail[ed] to adequately explain the chosen sentence." *Id.* A sentence may be substantively unreasonable if, in view of "the totality of the circumstances," the §3553(a) factors do not "justify" the sentence. *Id.*

In reviewing for substantive reasonableness, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.* That is because "[t]he sentencing judge is in a superior position to find facts and judge their import under §3553(a) in the individual case," given that the sentencing judge "sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Id.* (quotations omitted); *see Rita*, 551 U.S. at 357-58 ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than … the appeals court."). District courts also "have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more [g]uidelines cases than appellate courts do." *Koon*, 518 U.S. at 98.

In recognition of district courts' "greater familiarity" with the facts and "institutional advantage" over appellate courts, the Court has recognized that a defendant must raise a procedural-

reasonableness argument in the district court to preserve it for appeal. In *Rosales-Mireles v. United States*, the Court explained that when "a defendant rais[es] [a guidelines-calculation] error for the first time on appeal," an appellate court reviews that error for "plain error" under Federal Rule of Criminal Procedure 52. 138 S. Ct. 1897, 1904 (2018). And in *Molina-Martinez v. United States*, the Court similarly recognized that plain-error review applies to arguments concerning "the application of an incorrect [g]uidelines range at sentencing." 136 S. Ct. 1338, 1345 (2016).

The question in this case is whether an appellate court likewise reviews for plain error an argument concerning substantive reasonableness that a defendant raises for the first time on appeal.

B. Factual Background

1. In 2016, Petitioner Gonzalo Holguin-Hernandez pleaded guilty to possession of marijuana with intent to distribute, in violation of 18 U.S.C. §2 and 21 U.S.C. §841. The district court sentenced him to 24 months of imprisonment, to be followed by two years of supervised release. JA 17-20. After his release from prison and during his two-year term of supervised release, Petitioner violated a condition of his supervised release by committing a new crime—trafficking approximately 123.5 kilograms of marijuana into the United States. JA 8-9. For the new crime, Petitioner pleaded guilty to aiding and abetting the possession of marijuana with the intent to distribute. The district court sentenced him to 60 months of imprisonment, to be followed by five years

of supervised release. 17-cr-354 Dkt. No. 110, at 1-3 (W.D. Tex. Apr. 30, 2018).

Petitioner's parole officer then petitioned the district court to revoke his term of supervised release from his initial conviction. At the revocation hearing, counsel for Petitioner argued that the court should impose "no additional time," but "certainly less than the guidelines," and that if the court were "going to add [the new sentence] consecutive[ly]," it should "depart from below" the guidelines range. JA 10. Counsel contended that Petitioner had already been sentenced to 60 months of imprisonment for the new crime, and that there "would be no reason under [§]3553 that an additional consecutive sentence would get [Petitioner's] attention any better than five years does." *Id.* She explained that "[t]hese people routinely are very economically motivated" and "sometimes perhaps they're not strong enough to be able to [say] no when they're tapped to do this kind of job." *Id.* And she noted that if Petitioner "comes back, he's going to serve his life in prison." *Id.*

After considering these arguments, the district court revoked Petitioner's term of supervised release and imposed a 12-month term of imprisonment to run consecutively with his 60-month sentence for the new crime. JA 5. 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." JA 11. The court explained that it did not disagree with the argument made by Petitioner's counsel, but that it "believe[d] the underlying case, the original case means

something." *Id.* The court asked whether Petitioner's counsel had "[a]nything further," and she responded that she did not. *Id.*

2. On appeal, Petitioner argued that his sentence was substantively unreasonable, raising somewhat different arguments than he raised in the district court. In the district court, Petitioner's counsel asked the court to "consider no additional time or certainly less than the guidelines;" if the court was "going to add it consecutive," counsel asked the court to "depart from below" the guidelines. JA 10. Petitioner's appellate counsel argued that "[a] sentence of 12 months with a month or two [to] run consecutively to the 60-month sentence would have been sufficient." Pet'r CA5 Br. at 12; *see id.* at 6 ("[a] partially consecutive sentence … would have achieved the purposes of §3553 sentencing and constituted a sentence that was sufficient but not greater than necessary"). And he supported that position by raising a new argument—namely, that "[n]othing in the record suggested that [Petitioner] posed a danger to the public," particularly because "both times [Petitioner] was arrested he was found in remote areas of Texas, far from people." *Id.* at 11. Petitioner also argued that the sentence imposed was not "necessary for deterrent purposes" because his new sentence for the drug-trafficking offense was already high and Petitioner knew that he would face a life sentence if he offended again. *Id.*

The Fifth Circuit affirmed. The Court of Appeals began its analysis by explaining that, because Petitioner "failed to raise his [substantive-reasonableness] challenges in the district court," it

would review "for plain error only." JA 2 (citing *United States v. Whitelaw*, 580 F.3d 256, 259-60 (5th Cir. 2009)). The court explained that Petitioner had "failed to show that the imposition of the 12-month total sentence constituted a clear or obvious error," and indeed the 12-month sentence was presumptively reasonable because it was "within the applicable advisory [g]uidelines policy statement ranges." *Id.* (citing Sentencing Guidelines §7B1.4(a)). The court also noted that ordering Petitioner's revocation term to run consecutively to the term of imprisonment for the new offense was consistent with the Sentencing Guidelines §7B1.3(f) policy statement, 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." JA 2-3.

SUMMARY OF THE ARGUMENT

I. To preserve for appellate review an argument that a criminal sentence is substantively unreasonable, a defendant must raise the basis for that argument in the district court, including the *argument* that his sentence is beyond the range of reasonable sentences that §3553(a) allows and the *facts and circumstances* supporting that argument.

A. It is well-established in our legal system that a party must timely assert an argument in the district court to preserve it for appeal. *United States v. Olano*, 507 U.S. 725, 731 (1993). That "timely assertion" principle promotes a number of important interests, including providing the court most familiar with the facts and most able to correct errors the opportunity to do so in the first instance. The principle is embodied

in Rule 51 of the Federal Rules of Criminal Procedure, which, properly read, requires a party asserting a potential error to timely raise in the district court both the argument it believes entities it to relief and the grounds that support that argument. Failure to do so results in plain-error review.

B. The timely assertion principle applies with full force in the sentencing context, including with respect to substantive-reasonableness challenges. A litigant challenging the substantive reasonableness of a sentence is raising the distinct argument that the sentence the district court imposed is beyond the range of reasonable sentences that §3553(a) allows. Only by raising *that* argument, with reference to the relevant sentencing factors and relevant facts and circumstances that support it, has a defendant preserved the basis for a substantive-reasonableness challenge on appeal.

II. The Court should reject Petitioner and the Government's contrary rule—that a defendant preserves a substantive-reasonableness challenge merely by requesting a "shorter sentence" in the district court. A defendant asking for a shorter sentence is not necessarily arguing that his imposed sentence is beyond the range of reasonable sentences that §3553(a) allows. And simply asking for a "shorter sentence" does not satisfy Rule 51's requirement that a defendant articulate the grounds (*i.e.*, the facts and circumstances) supporting his argument. Petitioner and the Government's rule also would create an unsupported distinction between preservation rules for procedural- and substantive-reasonableness challenges, and undermine the important purposes

served by the "timely assertion" principle by putting courts of appeals in the unenviable position of having to address and resolve new facts and arguments in the first instance.

III. Petitioner is not entitled to relief. The Fifth Circuit correctly concluded that the district court made no "clear or obvious error," JA 2, and that finding is sufficient to defeat Petitioner's substantive-reasonableness challenge under either plain-error or abuse-of-discretion review.

ARGUMENT

I. A Defendant Must Raise The Basis For A Substantive-Reasonableness Argument In The District Court To Preserve It For Appellate Review.

A. Rule 51 Requires A Party To Timely Assert An Argument, And the Grounds Supporting It, In The District Court.

"No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before the tribunal having jurisdiction to determine it." *Olano*, 507 U.S. at 731 (quotations omitted). If a "litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue." *Puckett*, 556 U.S. at 134. This "timely assertion" rule applies in both civil and criminal proceedings, and to even the most precious rights in our legal system—those protected by the Constitution. *See Olano*, 507 U.S. at 731.

The timely assertion rule promotes a number of important interests. It "induce[s] the timely raising of claims and objections, which gives the district court"—the court most familiar with the case and in the best position to correct any errors—"the opportunity to consider and resolve them" in the first instance. *Puckett*, 556 U.S. at 134. It also "prevents 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." *Id.* (quotations omitted); *see also United States v. del Carpio Frescas*, 932 F.3d 324, 333 (5th Cir. 2019) (Oldham, J., concurring) (the timely assertion rule "aligns incentives" by "motivat[ing] the defendant—who might otherwise be tempted to hold objections in reserve for appeal—to bring any errors to the attention of the court as early as possible"). And it preserves the record "when the recollections of witnesses are freshest, not years later" after an appeal. *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977).

Today, the timely assertion principle is embodied in Rule 51 of the Federal Rules of Criminal Procedure. Rule 51 provides that a "party may preserve a claim of error" only 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). Although Rule 51 was enacted to "obviate[] the necessity for taking formal exception to matters occurring during the course of a trial," it "retains the requirement that in some way an alleged error must be brought to the attention of the trial court." *Hill v. United States*, 261 F.2d 483, 489 (9th Cir. 1958). Failure to abide by the

timely assertion rule ordinarily precludes a litigant from raising the unpreserved claim on appeal. *See Puckett*, 556 U.S. at 135. The federal rules, however, "recognize[] a limited exception to that preclusion," *id.*, providing 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). The Court has repeatedly cautioned against expanding the exception created by Rule 52(b), as doing so would "disturb the careful balance it strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135.

To preserve an argument under Rule 51, a generalized statement of error will not suffice: "An objection is not properly raised if it is couched in terms too general to have alerted the trial court to the substance of the [party's] point." *United States v. Bolla*, 346 F.3d 1148, 1152 (D.C. Cir. 2003) (Roberts, J.) (quotations omitted); *see also United States v. Dupree*, 617 F.3d 724, 728 (3d Cir. 2010) (noting a "fleeting reference or vague allusion to an issue will not suffice to preserve it for appeal" (quotations omitted)). Rather, Rule 51 requires a party asserting a potential error to timely raise in the district court both (1) the argument it thinks entitles it to relief, styled as either a request for a specific future action or an objection to a court's prior action; and (2) the specific grounds (*i.e.*, the facts and circumstances) that a party believes supports the asserted argument. *See, e.g.*, 1 Fed. Crim. App. §4:13 (Mar. 2019 Update) ("[A]ll preservation rules require not only that an objection be made but also that the objector state specifically (1) the action requested; and (2) the ground upon which the objection is made, at a time when the error

may be cured."); *Thomas v. Booker*, 784 F.2d 299, 304 (8th Cir. 1986) (en banc) ("Rule 51 requires that an objection be sufficiently specific to bring into focus the precise nature of the alleged error." (quotations omitted)).

To be sure, the text of Rule 51 does not specifically require a party to state his or her supporting "grounds" when articulating an "action the party wishes the court to take," as it does expressly require with respect to lodged "objections." *See* Fed. R. Crim. P. 51(b). But the better reading of Rule 51 is that a party must include a statement of grounds for both. Rule 51 is "practically identical with Rule 46 of the Federal Rules of Civil Procedure." Fed. R. Crim. P. 51 (advisory committee's note to 1944 adoption). That decision was deliberate: Criminal Rule 51 and Civil Rule 46 both "relate[] to a matter of trial practice which should be the same in civil and criminal cases in the interest of avoiding confusion." *Id.*; *see also United States v. Hayat*, 710 F.3d 875, 894 (9th Cir. 2013) (the rules are "practically identical"); *United States v. Castillo*, 430 F.3d 230, 242 (5th Cir. 2005) ("[C]ivil cases regarding the preservation of error [are] authoritative with respect to the interpretation of [Rule] 51."); *United States v. Arnold*, 486 F.3d 177, 195-96 (6th Cir. 2007) (en banc) ("Criminal Rule 51 mirrors Civil Rule 46."); *Isaacs v. United States*, 301 F.2d 706, 735 (8th Cir. 1962) (noting that Rule 51 is the "same as Rule 46"). Significantly, Rule 46 expressly requires a party to identify supporting grounds both with respect to requests for future action and objections to past action: "[w]hen the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to,

along with the grounds for the request or objection," Fed. R. Civ. P. 46 (emphasis added).

Rule 51 should be construed in the same manner. An interpretation that draws distinctions between requests for future action and objections to prior rulings, and further establishes different rules for criminal and civil cases, would create needless confusion without any compensating benefits. After all, the purpose of Rule 51 is to assure the timely assertion of rights before the district court, and the need for such timely assertion does not vary depending on whether a defendant is requesting future action or objecting to action already taken. Nor is there any obvious justification for having divergent rules in civil and criminal cases. The much better reading is that, under both Rule 51 of the Criminal Rules and Rule 46 of the Civil Rules, a party must identify both (1) the argument it thinks entitles it to relief; (2) the specific grounds (*i.e.*, the facts and circumstances) that it believes support that argument.

B. The Timely Assertion Rule Applies To Substantive Reasonableness Challenges.

Rule 51 and the timely assertion rule apply with full force to errors that occur during sentencing proceedings. Nothing in Rule 51 creates an exception to the timely assertion rule for sentencing, and nothing in Rule 52 creates an exception to the plain-error standard for sentencing. Nor did Congress include anything in the SRA that supersedes those rules. Indeed, *Booker* contemplated that the timely assertion rule would apply to sentencing, instructing "reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue

was raised below and whether it fails the 'plain-error' test," as well as whether "resentencing is warranted … upon application of the harmless-error doctrine." 543 U.S. at 268.

Sentencing proceedings, by their nature, involve a multi-factored inquiry. A district court must "consider all of the §3553(a) factors" and "make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 49-50. Section 3553(a), in turn, provides that a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. §3553(a). And those purposes are the need for the sentence imposed 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." *Id.* §3553(a)(2).

Given their breadth and variety, the §3553(a) factors typically will support a range of sentences that are "sufficient, but not greater than necessary, to comply with the purposes set forth in" §3553(a)(2). That follows from the plain text of §3553(a) itself. The statute provides that a court "shall impose *a* sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." *Id.* §3553(a) (emphasis added). It does not say the court "shall impose *the* sentence sufficient, but not greater than necessary, to comply with the purposes set forth

in paragraph (2)." The deliberate use of the phrase "*a* sentence"—rather than "*the* sentence"—suggests that Congress envisioned that a range of possible sentences would be reasonable, and that a district court may impose any sentence within that range of reasonable sentences. Moreover, now that the sentencing guidelines are no longer mandatory, "the range of choice dictated by the facts of the case is significantly broadened." *Gall*, 552 U.S. at 59 (quotations omitted).

Consistent with the text of §3553(a), this Court and the courts of appeals have repeatedly recognized that there is no single "correct" sentence and different judges could reasonably reach different conclusions regarding the appropriate sentence for a particular defendant. As the Court has observed, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51. The First Circuit has similarly noted that "[t]here will rarely, if ever, be a single 'perfect' sentence in any given case. Rather, there will be a range of reasonable sentences for a particular subset of criminal activity. Within this range, district courts have wide discretion to fashion specific sentences." *United States v. Suarez-Gonzalez*, 760 F.3d 96, 102 (1st Cir. 2014) (citation omitted).

A defendant challenging his sentence as substantively unreasonable is arguing that his imposed sentence is beyond the range of reasonable sentences "sufficient, but not greater than necessary, to comply with the purposes" of §3553(a)(2). *See, e.g.*, *Gall*, 552 U.S. at 50 n.6; *see also United States v. Nagel*, 835 F.3d 1371, 1376 (11th Cir. 2016) ("We will

only vacate a sentence [as substantively unreasonable] if we are convinced the sentence is outside the reasonable range of sentences for a given case."). To preserve that argument for appeal, a defendant must specifically argue to the district court that his imposed sentence exceeds the range of reasonable sentences that §3553(a) allows. Only by doing so does a defendant inform the court of the "action [he] wishes the court to take" or his "objection to the court's action," Fed. R. Crim. P. 51(b)—namely, that his imposed sentence is outside the range of reasonable sentences that §3553(a) allows and should therefore be reduced.

In addition, and consistent with the best interpretation of Rule 51 as explained above, a defendant seeking to preserve a substantive-reasonableness argument must also state the *specific grounds* he believes supports that argument. *See supra* pp.13-15. There are any number of reasons that a defendant could give for why he believes his sentence is outside the range of reasonable sentences that §3553(a) allows. For example, he might argue that his sentence is greater than necessary to afford adequate deterrence given the specific factual circumstances of his offense. *See, e.g.*, *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010). Or that his sentence is greater than necessary to protect the public in light of his personal circumstances. *See, e.g.*, *United States v. Singh*, 877 F.3d 107, 117 (2d Cir. 2017). Or that he suffers from a medical condition that makes his imposed sentence excessive. *United States v. Soto-Cruz*, 763 F. App'x 766, 770 (10th Cir. 2019). Or that his sentence fails to provide him with needed educational training. *See, e.g.*, *United States. v.*

Ramirez-Garcia, 195 F. App'x 888, 890-91 (11th Cir. 2006) (per curiam). Or needed vocational training. *See, e.g.*, *United States v. Stephens*, 393 F. App'x 340, 347-48 (6th Cir. 2010).

It would hardly be fair to the courts of appeals, or consistent with the principles predating and animating Rule 51, to allow defendants to advance those grounds for the first time on appeal. A defendant who never argued below that his sentence was unreasonably excessive because, for example, he suffers from a severe medical condition or requires educational or vocational training, has forfeited his ability to argue those grounds on appeal. This is not a controversial proposition. It is both reflected in the plain text of Rule 51 itself, *see* Fed. R. Crim. P. 51(b), and well supported in case law stretching back decades, *see, e.g.*, *Puckett*, 556 U.S. at 135-36; *Johnson v. United States*, 520 U.S. 461, 465-67 (1997); *Yakus v. United States*, 321 U.S. 414, 444 (1944); *United States v. Hall*, 735 F. App'x 188, 190 (6th Cir. 2018); *United States v. Jones*, 680 F. App'x 649, 658 (10th Cir. 2017); *United States v. Hunter*, 786 F.3d 1006, 1007-08 (D.C. Cir. 2015); *United States v. Brown*, 517 F. App'x 657, 663 (11th Cir. 2013) (per curiam); *United States v. Martinez*, 432 F. App'x 526, 532 (6th Cir. 2011); *United States v. Bain*, 586 F.3d 634, 639-40 (8th Cir. 2009) (per curiam); *United States v. Mercado*, 412 F.3d 243, 247 (1st Cir. 2005); *United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002).

This rule also advances the interests that underlie the timely assertion principle. *See supra* p.12. It gives district courts the opportunity to address the basis for a substantive-reasonableness argument in the first

instance, allowing those courts to bring to bear their "superior position to find facts and judge their import under §3553(a) in the individual case," *Gall*, 552 U.S. at 51, as well as their "institutional advantage … in making these sorts of determinations," *Koon*, 518 U.S. at 98. It also prevents "sandbagging," where a defendant waits to raise a §3553(a)(2) consideration until after sentencing is complete and everyone (including the victims) have put the trial and sentencing behind them. *Puckett*, 556 U.S. at 134.

In short, under Rule 51 and longstanding background principles underlying the timely assertion rule, a defendant seeking to preserve a substantive-reasonableness challenge to a criminal sentence must (1) argue in the district court that his sentence is beyond the range of reasonable sentences supported by §3553(a)(2); and (2) state the specific facts and circumstances supporting that argument. If a defendant fails to do either of those things, he has not preserved a substantive-reasonableness challenge, and the appellate court should review only for plain error. *See Olano*, 507 U.S. at 731; *Puckett*, 556 U.S. at 134; *see also, e.g.*, *United States v. Peltier*, 505 F.3d 389, 391 (5th Cir. 2007), at JA 32-43; *United States v. Heard*, 709 F.3d 413, 425 (5th Cir. 2013).

II. Petitioner And The Government's Contrary Rule Does Not Withstand Scrutiny.

In contrast to the timely assertion rule, which requires specific and timely objections to promote the efficient administration of justice, Petitioner and the Government claim that a defendant sufficiently preserves the basis of a substantive-reasonableness argument merely by requesting a "shorter sentence"

in the district court. *See* Pet'r Br. at 8 ("A criminal defendant fully preserves for appeal a claim that his sentence is substantively unreasonable if he argues in the district court for a shorter sentence."); Gov't Br. at 15 ("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"). That is wrong for several reasons.

a. Most fundamentally, arguing in favor of a "shorter sentence" (which nearly all defendants will do) is not the same as arguing that a sentence is substantively unreasonable. A defendant who asks for a "shorter sentence" is in most cases arguing about the specific sentence the district court *should* impose after evaluating the §3553(a) factors—not about the maximum sentence the court *could* impose under those factors.[2] He is essentially saying, "within the range of reasonable sentences the law allows, the district court should sentence me to X." But expressing a preference for a certain sentence says nothing about the potential range of reasonable sentences that would be legally permissible. And it is that latter argument that is the stuff of substantive reasonableness. Indeed, the Government appears to concede the point: "[a] defendant who asks for a shorter sentence has not necessarily informed the district court that he believes the sentence it

[2] Likewise, an argument by the Government for a higher sentence than the one ultimately imposed is not the same as arguing that a particular sentence is below the range of reasonable sentences that §3553(a) allows.

ultimately imposed is *unreasonably* long." Gov't Br. at 23 (emphasis in original).

Petitioner appears to believe that, in seeking a particular sentence (*e.g.*, "not more than 12 months"), a defendant necessarily is asserting that any longer sentence would fall outside the range of reasonable sentences allowed by §3553(a). For this theory to be correct, however, the defendant would have to be seeking the *highest* sentence that §3553(a) permits—*i.e.*, the sentence beyond which all other sentences are unreasonable. To state the obvious, that will rarely, if ever, be the case. Rather, a typical defendant will follow the sensible course of requesting a sentence at the *lowest* end of the range of reasonable sentences allowed by §3553(a). And a district court's decision to deny that request sheds little light on the question that is ultimately before the court of appeals when a defendant raises a substantive-reasonableness argument: whether the sentence imposed is beyond the range of reasonable sentences "sufficient, but not greater than necessary, to comply with the purposes" in §3553(a)(2).

b. At bottom, Petitioner and the Government derive their rule from a flawed interpretation of Rule 51. The text of Rule 51, they say, allows a party 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." Fed. R. Crim. P. 51(b) (emphases added); *see* Pet'r Br. at 11; Gov't Br. 15. By their reasoning, a defendant who asked for a shorter sentence than the one ultimately imposed necessarily "inform[ed] the court … of the action [he] wishe[d] the court to take"—namely, the

imposition of a shorter sentence. Pet'r Br. at 12. Because he asked for a shorter sentence, the argument goes, he need not do anything more; he has identified "the action" he wants the court to take and that is sufficient to preserve any and all subsequent arguments relating to the substantive reasonableness of the sentence ultimately imposed.

To begin, that reasoning disregards the fundamental requirement that a defendant set forth the specific grounds for his objection or request. As explained, *see supra* pp.13-15, Rule 51 is best read as requiring a defendant to raise not only the specific argument he intends to make, but also the facts and circumstances supporting that argument. Petitioner and the Government, however, would do away with that latter obligation and require only that a defendant ask for a "shorter sentence." But there is no persuasive reason why a mere request for a shorter sentence—with no specific mention of any §3553(a) factors and no presentation of particular circumstances that relate to those factors—should have the effect of preserving *all* arguments regarding the length of a sentence, regardless of whether the facts supporting those arguments were ever presented to the district court. Indeed, we are aware of no other context in which a defendant can make a rote request of a district court, accompany that argument with no supporting facts, and yet fully preserve that argument for appeal, together with all facts and circumstances he might decide to present to the court of appeals in the first instance.

Petitioner and the Government's logic also proves too much. By their logic, a defendant who asked the

district court to impose a shorter sentence seemingly would also preserve any *procedural-reasonableness* challenge to his sentence. After all, the point of raising a procedural-reasonableness challenge on appeal is ultimately to obtain a shorter sentence than that which the district court imposed, and so a defendant who sought a shorter sentence in the district court would have "inform[ed] the court … of the action [he] wishe[d] the court to take." Pet'r Br. at 12. But this Court has twice recognized that arguments about procedural reasonableness are subject to plain-error review and are not properly preserved if not raised in the district court. *See Molina-Martinez*, 136 S. Ct. at 1343; *Rosales-Mirales*, 138 S. Ct. at 1904-05. And both Petitioner and the Government concede that merely asking for a lower sentence does not preserve arguments about procedural reasonableness. *See* Pet'r Br. at 20-21; Gov't Br. at 18. If that is the governing rule in the procedural-reasonableness context, it is difficult to see why it should not also be the rule in the substantive-reasonableness context.

Along similar lines, embracing Petitioner and the Government's proposed rule would create an unsupported distinction between preservation rules for substantive-reasonableness challenges and procedural-reasonableness challenges. Rule 51 does not distinguish between *types* of errors. And procedural reasonableness and substantive reasonableness are both sub-elements of the overarching "reasonableness" review described in *Booker*, making it hard to see why different preservation rules should apply depending upon which sub-element is raised in a given case. 543 U.S.

at 264-65; *see also Gall*, 552 U.S. at 53-56; *Rosales-Mirales*, 138 S. Ct. at 1910.

Adopting different preservation rules for procedural- and substantive-reasonableness challenges would also put even more pressure on the already blurry line between the two concepts. *See, e.g.*, *United States v. Barnes*, 890 F.3d 910, 917 (10th Cir. 2018) (noting that "the line between procedural and substantive reasonableness is blurred"); *United States v. Adams*, 873 F.3d 512, 520 (6th Cir. 2017) (noting that the Sixth Circuit had not fully settled the difference between substantive and procedural reasonableness and describing the analyses of both as "entangled"); *United States v. Reyes-Santiago*, 804 F.3d 453, 468 n.19 (1st Cir. 2015) ("The line between procedural and substantive sentencing issues is often blurred."). And it will give defendants incentives to try to couch their arguments under the rubric of substantive reasonableness, where possible, in an attempt to evade plain-error review.[3]

Rather than draw a distinction between procedural and substantive errors, the far better approach is to apply the traditional timely assertion rule to *both* procedural- and substantive-reasonableness challenges: just as a defendant must

[3] For example, if a defendant failed to raise the basis for a quintessentially procedural-reasonableness challenge below—*e.g.*, an argument that the district court "fail[ed] to consider the §3553(a) factors," *Gall*, 552 U.S. at 51—and wanted to appeal his sentence, the defendant would be able to secure a more favorable standard of review for his unpreserved claim if he restyled it as a substantive-reasonableness argument—*e.g.*, that the district court gave improper weight to certain factors, which resulted in a sentence greater than necessary under §3553(a).

raise a procedural error in the district court, so too he must argue to the district court that he believes his sentence exceeds the range of lawful sentences under §3553(a).

c. Embracing Petitioner and the Government's rule would also undermine the purposes served by the timely assertion principle by depriving district courts of the opportunity to address in the first instance the relevance of key facts, circumstances, and arguments. If a criminal defendant need do nothing more than ask the district court to impose "a shorter sentence" to preserve a substantive-reasonableness challenge, defendants who made only cursory arguments below would nonetheless be able to advance all manner of new facts and circumstances on appeal. For instance, a defendant who said little more than "I deserve 10 months" in the district court, could then appeal a 15-month sentence and argue for the first time on appeal that his sentence was substantively unreasonable for factual reasons he never raised below—such as because he required certain medical care, suffered an abusive childhood, or would benefit from a halfway house or other diversion program. That undermines the core purpose of Rule 51, which is to "alert[] the trial court to the substance of the [party's] point." *Bolla*, 346 F.3d at 1152; *see also del Carpio Frescas*, 932 F.3d at 333-34 (Oldham, J., concurring). And it puts appellate courts in the unenviable position of having to address and resolve facts and arguments in the first instance.

That is largely what happened in *United States v. Peltier*, the Fifth Circuit case that first articulated its plain-error rule. 505 F.3d 389 (5th Cir. 2007), at

JA 32-43. At sentencing in that case, the defendant and his attorney said very little; they mostly discussed mitigating circumstances, including the defendant's drug and alcohol problems. The defendant also asked that the court consider a split sentence where he would go to a halfway house after a period of incarceration. JA 33. On appeal, however, the defendant argued that the district court: (1) failed to consider the need to avoid sentencing disparities among defendants with similar records; (2) gave significant weight to an improper factor (his socioeconomic status); (3) failed to make a connection between the two sentencing factors it looked to—namely, deterrence and the need for correctional treatment; and (4) failed to explain why the need for treatment demanded a sentence far longer than the guidelines advised. JA 38, 40-42. Peltier raised none of those arguments in the district court during sentencing. Under Petitioner and the Government's rule, a defendant would be free to make all of those arguments for the first time on appeal, receiving abuse-of-discretion review, just as if he had made all of those arguments in the district court. The Fifth Circuit rightly concluded that these arguments had been forfeited and should be reviewed only for plain error. *See* JA 34-37.

Indeed, under Petitioner and the Government's rule, a substantive-reasonableness argument seemingly would be preserved in nearly every case, *regardless* of the defendant's actions below. Any defendant appealing his sentence presumably asked the district court to impose a sentence shorter than that which he is appealing. It is therefore difficult to imagine a circumstance in which plain-error review

would ever apply to a substantive-reasonableness challenge, if the Court were to adopt Petitioner and the Government's approach. We know of no other argument that receives such sweeping immunity from plain-error review. And embracing such a rule would contravene the Court's admonition in *Booker* that "ordinary prudential doctrines," including, "*whether the issue was raised below and whether it fails the 'plain-error' test*," would continue to apply in the post-*Booker* sentencing context. 543 U.S. at 268 (emphasis added).

d. It is no answer to say, as Petitioner and the Government do, that substantive reasonableness is exclusively an appellate standard of review. *See* Pet'r Br. at 16-20; Gov't Br. at 23-27. No one disputes that "substantive reasonableness" as such is an appellate inquiry. *See Gall*, 552 U.S. at 56 (describing substantive reasonableness as asking "whether the District Judge abused his discretion in determining that the §3553(a) factors supported a [specific] sentence"). Rather, the key point is that the legal and factual arguments that form the basis of a substantive-reasonableness challenge can and should be presented to the district court, which is just as capable as any appellate court of assessing whether a particular sentence exceeds the range of lawful sentences permitted by §3553(a), in light of the various facts and circumstances a defendant chooses to raise. Proving the point, "procedural reasonableness" is also an appellate standard, *see Gall*, 552 U.S. at 48, 51; *United States v. Lane*, 509 F.3d 771, 774 n.1 (6th Cir. 2007), and yet everyone agrees that the specific arguments supporting a procedural-reasonableness challenge must have been

raised in the district court or else plain-error review applies on appeal. *See Rosales-Mirales*, 138 S. Ct. at 1904-05 (applying plain-error review to a guideline miscalculation); *Molina-Martinez*, 136 S. Ct. at 1342-43 (same). There is no reason for a different approach in the substantive-reasonableness context.

e. Petitioner and the Government also argue that enforcing the timely assertion rule in the context of substantive reasonableness would "effectively resurrect[] the archaic exception requirement that the drafters of Rule 51 abandoned 75 years ago." Gov't Br. at 27. But the timely assertion rule does not impose an outmoded or "empty 'ritual'" of noting exceptions that is "unnecessary" "[i]n modern times." Pet'r Br. at 14. Requiring a defendant to articulate why a particular sentence exceeds the range of reasonable sentences that §3553(a) allows, and to explain the grounds for that argument, does not require a defendant to note a formal "exception" or repeat an argument already made after a sentence is issued. Instead, it ensures timely expression of a specific argument that the district court should have the opportunity to consider and address before the defendant may raise it on appeal.

To be sure, a defendant might most commonly assert the bases for a substantive-reasonableness argument *after* the district court imposes a sentence. After all, that is the point in time at which the defendant knows what his sentence will be and what reasons the district court has given in support of it. But acknowledging that reality does not resurrect the exception requirement. Rule 51 itself contemplates parties making objections after rulings are made. *See*

Fed. R. Crim. P. 51(b) ("A party may preserve a claim of error by informing the court … 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." (emphasis added)). And, in any event, an after-the-fact objection is not the *only* way to preserve a substantive-reasonableness challenge. For example, prior to the imposition of sentence, a defendant could argue that he should be sentenced to a specific sentence (*e.g.*, 10 months), and *also* argue that anything above a different specific sentence (*e.g.*, 15 months) would be beyond the range of reasonable sentences sufficient, but not greater than necessary, to comply with the purposes of §3553(a)(2). When a defendant makes that kind of argument before a sentence is imposed, he has preserved a substantive-reasonableness challenge based on the reasons and facts he articulates to the sentencing judge.

It is not at all clear that the Fifth Circuit, as Petitioner claims, requires "a defendant who has already presented his arguments" to the district court to then "object[] after [the] sentence is imposed." Pet'r Br. 15. Although the cases are not always easy to reconcile, it seems that the Fifth Circuit may simply require that the defendant, at some point during the sentencing process, inform the district court that he believes a certain sentence will exceed the range of reasonable sentences allowed by §3553(a) and provide the facts and circumstances that support that argument. *See, e.g.*, *United States v. Heard*, 709 F.3d 413, 425 (5th Cir. 2013); *United States v. Neal*, 578 F.3d 270, 272 (5th Cir. 2009). As previously noted, that kind of submission is most likely to happen after a sentence is imposed (because it is only then that a

defendant will know what sentence the court has selected), but a defendant could preserve those arguments earlier. The critical point is not *when* the defendant makes the argument to the district court, but *that* he makes the argument to the district court.

Even if the Fifth Circuit's rule did require a stringent post-sentencing objection, that would be no reason to reject it. There is nothing inherently wrong with a rule that requires after-the-fact objections to properly preserve issues for appeal, even when the same or similar arguments had previously been made and rejected. For example, the federal civil and criminal rules provide that, if a party proposes a jury instruction that the district court rejects, the party must still object to the instruction the district court actually gives to fully preserve a challenge to that instruction on appeal. *See* Fed. R. Crim. P. 30; Fed. R. Civ. P. 51. "[T]he mere tendering of a proposed instruction will not preserve error for appeal." *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 912 F.3d 731, 737 (4th Cir. 2019) (quotations omitted); *see also, e.g.*, *United States v. Crowley*, 318 F.3d 401, 413 (2d Cir. 2003) ("[T]he mere fact that a defendant submitted his proposed language as a part of a requested charge does not in itself preserve the point for appeal."); *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128, 133-34 (1st Cir. 2002) (similar); 1 Federal Jury Practice & Instructions §7:4 (5th ed. 2012) ("[E]ven though a timely request for an instruction has been made, the failure to object to the court not giving the instruction waives any error.").

Moreover, even where there is not a specific federal rule on point, courts require a defendant to

make after-the-fact objections to preserve arguments challenging the imposition or amount of damages—the civil law equivalent of a sentence. Even if a defendant had previously argued for no damages or low damages, the defendant nonetheless must still challenge the excessiveness of a damages award via a post-trial motion to preserve an excessiveness claim for appeal. *See, e.g.*, *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Pelella*, 350 F.3d 73, 89 (2d Cir. 2003) (defendant "failed to preserve" challenge to punitive damages for appellate review by failing to raise the issue in its post-trial motions); *O'Connor v. Huard*, 117 F.3d 12, 18 (1st Cir. 1997) ("We generally will not review a party's contention that the damages award is excessive or insufficient where the party has failed to allow the district court to rule on the matter."); *Young v. Langley*, 793 F.2d 792, 794 (6th Cir. 1986) ("This court may not review the alleged excessiveness of [damages] verdicts absent a timely motion for new trial and the trial court's ruling thereon.").

f. Finally, it is worth noting that proper adherence to the timely assertion rule will become only more important going forward. The more time that passes since *Booker*, "and as judges who spent decades applying mandatory [g]uidelines ranges are replaced with new judges less wedded to the [g]uidelines," it stands to reason that more and more judges will be willing to depart from the guidelines. *See Molina-Martinez*, 136 S. Ct. at 1352-53 & n.6 (Alito, J., concurring in part and concurring in the judgment). As the number of outside-guidelines sentences increase, it will be critical for defendants not only to tell the district court what sentence they

want, but also to tell the district court when they believe a variance renders a sentence beyond the range of reasonable sentences that §3553(a) permits.

III. Petitioner Is Not Entitled To Relief.

The Court should affirm the judgment below. Petitioner's substantive-reasonableness challenge fails regardless of whether plain-error or abuse-of-discretion review applies.

In challenging the substantive reasonableness of his sentence, Petitioner made two basic arguments to the Fifth Circuit: first, that his sentence was greater than necessary because he did not pose a danger to the public and, second, that his sentence was greater than necessary because it was not needed for deterrence purposes. *See* Pet'r CA5 Br. at 11. Before the district court, Petitioner had made no argument at all about public dangerousness, and so the Fifth Circuit was eminently correct to review that argument only for plain error. The Fifth Circuit also was correct to review Petitioner's deterrence argument for plain error. But even if Petitioner had preserved his deterrence argument, the Fifth Circuit's finding that the district court did not commit any "clear or obvious error" would dispose of that argument under even the more lenient abuse-of-discretion standard.

a. As to public dangerousness, Petitioner did not raise that argument at all in the district court. *See* JA 10. He therefore failed to satisfy the requirement of Rule 51 that he identify in the district court the specific grounds (*i.e.*, the facts and circumstances) that he believes supports a substantive-reasonableness argument. The Fifth Circuit thus correctly reviewed for plain error Petitioner's new public-dangerousness

argument and correctly concluded that Petitioner had not satisfied the plain-error standard.

Plain-error review is a demanding standard that, although not impossible, is intentionally "difficult" to meet. *Puckett*, 556 U.S. at 135. It requires a defendant to prove four elements: (1) "there must be an error or defect—some sort of '[d]eviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings'"; and (4) "if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (alterations in original) (quoting *Olano*, 507 U.S. at 732-36).

The Fifth Circuit correctly held that Petitioner did not satisfy that standard at steps one and two, because he "fail[ed] to show that the imposition of the 12-month total sentence constituted a clear or obvious error," even in light of Petitioner's newly made public-dangerousness argument. JA 2. As the court explained, "[t]he 12-month revocation sentence is within the applicable advisory [g]uidelines policy statement ranges," and "[t]he district court's order that the revocation sentence run consecutively to the illegal reentry sentence is consistent with U.S.S.G. §7B1.3(f), p.s., 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.'" JA 2-3 (fourth and fifth alterations in original) (citation omitted). Given those facts, the Fifth Circuit was correct that Petitioner's public-dangerousness argument did not render the district court's sentencing determination a "clear or obvious" error.

b. Petitioner stands on somewhat better footing with respect to preserving his deterrence argument. His counsel argued in the district court that "[t]here would be no reason under [§]3553 that an additional consecutive sentence would get his attention any better than five years does," emphasizing that Petitioner understood that, as a repeat offender, he faced "life in prison" for any future crime. JA 10. And although counsel asked for "no additional time," she asked in the alternative for "certainly less than the guidelines." *Id.*

While those statements advanced a deterrence rationale, and while Petitioner's counsel used that rationale to argue in favor of a shorter sentence, she stopped short of arguing that any particular sentence would exceed the range of reasonable sentences permitted by §3553(a). The Fifth Circuit was therefore justified in applying the plain-error standard to Petitioner's substantive-reasonableness argument on appeal.

But even assuming that Petitioner's arguments in the district court were enough to preserve a substantive-reasonableness challenge, that would get Petitioner only so far. Although the Fifth Circuit

stated that it was applying the plain-error standard to Petitioner's arguments, its actual finding that a 12-month consecutive sentence did not "constitute[] a clear or obvious error" would doom Petitioner's deterrence argument even under abuse-of-discretion review. JA 2. In practical terms, a finding of no "clear or obvious error" is not materially different from a finding that the district court did not commit a reversible error under the highly deferential abuse-of-discretion test. The Fifth Circuit's reasoning here—that the sentence is within the guidelines range and comports with the relevant policy statements, *see* JA 2-3—would be more than enough to defeat a claim that, in imposing a 12-month consecutive sentence, the district court had abused its discretion.

To be sure, the analysis would be different if the Fifth Circuit had found the existence of a clear or obvious error (the first and second prongs of the plain error test) but had nevertheless rejected Petitioner's claims on the ground that the error did not affect Petitioner's substantial rights (the third prong of the plain error test) or that the error did not affect the integrity of the proceedings (the fourth prong of the plain error test). There are no comparable requirements under the abuse-of-discretion standard. But it is hard to imagine an abuse of discretion with respect to sentencing that would not have, at its core, a clear or obvious error. *See, e.g.*, *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." (quotations omitted)). The decision below, albeit proceeding under a different test, found no such

error here. Thus, even if Petitioner were entitled to abuse-of-discretion review of his deterrence argument, he would fail to satisfy that standard, too.

In sum, there is no reason for the Court to disturb the district court's reasonable sentence, regardless of the standard of review that ultimately applies to Petitioner's substantive-reasonableness arguments.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth Circuit's judgment below.

Respectfully submitted,

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