No._____

In The
SUPREME COURT OF THE UNITED STATES

ALVIN GEORGE VONNER

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

STEPHEN ROSS JOHNSON
Ritchie, Dillard, & Davies, P.C.
606 W. Main St., Suite 300
Knoxville, TN 37902
(865) 637-0661
Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

WHETHER A CRIMINAL DEFENDANT MUST OBJECT AFTER THE DISTRICT COURT HAS IMPOSED A SENTENCE IN ORDER TO PRESERVE PROCEDURAL AND/OR SUBSTANTIVE REASONABLENESS CLAIMS UNDER *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alvin George Vonner, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit in *United States v. Vonner*, 516 F.3d 382 (6th Cir. 2008) (en banc) [App. 33].

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit, sitting en banc, decided and filed an opinion on February 7, 2008, affirming the petitioner's sentence. *United States v. Vonner*, 516 F.3d 382 (6th Cir. 2008) (en banc) [App. 33].

Petitioner seeks certiorari review of an Opinion of a United States court of appeals. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(2).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amendment VI [App. 110]
Fed. R. Crim. Proc. 51 [App. 111]

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STATEMENT OF THE CASE

This case involves an issue in which there is a significant split among the United States courts of appeals in interpreting this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), namely whether, at the conclusion of sentencing, a criminal defendant must object to the procedural and/or substantive unreasonableness of the sentence just pronounced in order to preserve reasonableness claims on appeal.

A deeply divided United States Court of Appeals for the Sixth Circuit, sitting en banc, released four opinions in this case on February 7, 2008. One of the three dissents described the compelling need for this Court's review:

> **In light of the strikingly different approaches adopted by the circuits, we can only hope that the Supreme Court chooses to resolve the issue of whether defendants must object after the district court has imposed a sentence to**

preserve some, any, or all, of their *Booker* reasonableness claims.

United States v. Vonner, 516 F.3d 382, 409-410 (Moore, J., dissenting, joined by Martin, Daughtrey, Cole, and Clay, JJ) (footnote omitted) (emphasis added). [App. 100-103].

Alvin George Vonner was indicted on December 9, 2003, for distributing five (5) grams or more of a mixture and substance containing cocaine base on or about August 7, 2002, within the Eastern District of Tennessee, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). The district court had jurisdiction pursuant to 18 U.S.C. § 3231 to hear allegations of a violation of a federal criminal statute.

Mr. Vonner pled guilty to the indictment on January 27, 2004. Mr. Vonner's sentencing hearing was delayed several times in anticipation of this Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005). Following *Booker*, the defense filed a sentencing memorandum with the district court raising several grounds for a lesser sentence by way of a downward departure from the advisory

guidelines range and/or a variance under the remaining 18 U.S.C. § 3553(a) factors pursuant to *Booker*. [App. 5-7]. A sentencing hearing was held on February 7, 2005. [App. 2].

> At sentencing, the defense introduced extensive evidence that it claimed made a sentence lower than the advisory guideline range proper under 18 U.S.C. § 3553(a). This evidence related to: (1) Vonner's traumatic childhood; (2) the impairment to Vonner as a result of his long history of alcohol and drug abuse; (3) the circumstance surrounding Vonner's involvement in selling narcotics; (4) the conditions of his presentence confinement; (5) Vonner's cooperation and assistance to the government.

United States v. Vonner, 452 F.3d 560, 562 (6th Cir. 2006), rehearing en banc granted, judgment vacated Oct. 12, 2006. [App. 6-7].

After the sentencing presentation by counsel, the district court sentenced Mr. Vonner to 117 months imprisonment to be followed by a 5 year term of supervised release, "a sentence in the middle of the advisory guidelines range." *Vonner*, 452 F.3d at 564 [App. 11]. The district court did not explain why it rejected the defendant's multiple grounds for a lesser sentence; rather, the only explanation of the reasoning behind the sentence provided was:

> With respect to the sentence in this case, the Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, and the advisory Guidelines, as well as the other factors listed in 18 United States 3553(a). Pursuant to Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Alvin George Vonner, is hereby committed to the custody of the Bureau of Prisons for a term of imprisonment of a hundred and seventeen months. It is felt that this term is reasonable in light of the aforementioned, in light of the aforementioned factors and is a sentence, furthermore, that will afford

> adequate deterrent and provide just punishment.

[App. 2-3].

At the conclusion of the sentencing hearing, the district court asked counsel if there were any objections to the sentence just pronounced that had not previously been raised, and counsel for both parties indicated there were no additional objections. [App. 3]. Mr. Vonner timely filed a notice of appeal.

A panel of the United States Court of Appeals for the Sixth Circuit reversed Mr. Vonner's sentence as being procedurally unreasonable under this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *See United States v. Vonner*, 452 F.3d 560 (6th Cir. 2006). [App. 4, 22-25]. However, upon the goverment's petition, rehearing en banc was granted and the panel decision vacated. *Id.*

After delaying decision in anticipation of this Court's opinion in *Rita v. United States*, 127 S.Ct. 2456 (2007), a fractured Sixth Circuit, sitting en banc, issued four separate opinions on February 7,

2008. *United States v. Vonner*, 516 F.3d 382 (6th Cir. 2008) (en banc) [App. 33]. The nine member majority affirmed the sentence of the defendant on the basis that plain error review, as opposed to review for reasonableness, was appropriate since Mr. Vonner did not object to the procedural unreasonableness of his sentence at the conclusion of his sentencing hearing. *Id.*

The six dissenting judges filed three separate opinions articulating how the majority's opinion widened a split among the United States courts of appeals and conflicted with this Court's federal sentencing decisions in *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S.Ct. 2456 (2007); and *Gall v. United States*, 128 S.Ct. 586 (2007). [App. 56, 65, 93].

REASONS FOR GRANTING THE WRIT

DEFENDANTS MUST NOT BE REQUIRED TO OBJECT AFTER THE DISTRICT COURT HAS IMPOSED A SENTENCE IN ORDER TO PRESERVE SOME, ANY, OR ALL OF THEIR *BOOKER* REASONABLENESS CLAIMS.

> **In light of the strikingly different approaches adopted by the circuits, we can only hope that the Supreme Court chooses to resolve the issue of whether defendants must object after the district court has imposed a sentence to preserve some, any, or all, of their *Booker* reasonableness claims.**

United States v. Vonner, 516 F.3d 382, 409-410 (Moore, J., dissenting, joined by Martin, Daughtrey, Cole, and Clay, JJ) (footnote omitted) (emphasis added). [App. 100-103].

Criminal defendants in federal court should not be required to object to the reasonableness of the sentence just pronounced in order to preserve procedural or substantive claims of reasonableness on appeal under *United States v. Booker*, 543 U.S.

220 (2005).

A compelling reason for the granting of the writ of certiorari is that United States courts of appeals have entered decisions in conflict with one another on this important issue. *See* Rule 10(a). Furthermore, those courts of appeals requiring a reasonableness objection at the district court level, to include the en banc majority opinion from the Sixth Circuit in this case, have decided an important federal question in a way that conflicts with the decisions of this Court in *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S.Ct. 2456 (2007); and *Gall v. United States*, 128 S.Ct. 586 (2007). *See* Rule 10(c).

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the once mandatory federal sentencing guidelines violated the Sixth Amendment's jury trial guarantee as interpreted by the Court's decisions in *Jones v. United States*, 526 U.S. 227, 230 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Blakely v. Washington*, 542 U.S. 296 (2004). As a remedy for the constitutional violation, the Court in *Booker* held that certain

provisions of the Sentencing Reform Act must be severed and excised, to include a provision concerning the appellate standard of review.

> Application of these criteria indicates that we must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), *see* 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, *see* § 3742(e) (2000 ed. and Supp. IV). ...With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements.
>
> ...
>
> We concede that the excision of § 3553(b)(1) requires the excision of a different, appeals-related section, namely, § 3742(e) (2000 ed. and Supp. IV), which sets forth standards of review on appeal. That section contains critical cross-references to the

> (now-excised) § 3553(b)(1) and consequently must be severed and excised for similar reasons.

Booker, 543 U.S. at 259-260.

With the appeal provision of § 3742(e) excised, the Court in *Booker* held that the appropriate appellate standard of review on an appeal from a federal criminal sentence would be whether the sentence is reasonable. *Id.* at 261-262. In a post-*Booker* decision, this Court held that when a defendant has raised grounds for a departure under the guidelines or a variance under the 18 U.S.C. § 3553(a) factors, and the sentencing court rejects those arguments, the court must explain why those arguments have been rejected. *Rita v. United States*, 127 S.Ct. 2456, 2468 (2007). This procedural aspect of the district court's sentencing decision is subjected to reasonableness review on appeal. *Id.*

The majority in *Rita* also provided that the "reasonableness" of the sentence is the appellate standard of review; district courts are to be guided by a full consideration of the factors contained

within 18 U.S.C. § 3553(a). *Rita*, 127 S.Ct. at 2464-2465; *see also Gall v. United States*, 128 S.Ct. 586, 596-597 (2007) (district court may not presume a sentence within the guidelines is reasonable); *id.* at 597 (directing appellate courts to review both the procedural and substantive reasonableness of a sentence). In *Gall*, the Court elaborated on *Booker*'s reasonableness appellate standard of review, and held that review for reasonableness entailed an abuse of discretion analysis. *Gall*, 128 S.Ct. at 591.

Despite this Court's post-*Booker* federal sentencing jurisprudence, considerable confusion still exists among the lower courts over the mechanics of reasonableness review. The Seventh Circuit, in grappling with this issue, found that requiring an objection to procedural reasonableness of the sentence at the conclusion of the sentencing hearing, in effect the raising of the appellate standard of review with the district court, is at odds with Fed. R. Crim. Proc. 51(a). *See United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) (reversing sentence on basis of inadequate explanation by district court of rejection of factors raised by defense for lesser sentence; rejecting

argument advanced by government that defense counsel was required to object to inadequate explanation of sentence just pronounced since "a lawyer in federal court is not required to except to rulings by the trial judge.") (citing Fed. R. Crim. Proc. 51(a); *United States v. Rashad*, 396 F.3d 398, 401 (D.C. Cir. 2005)). In the instant case, Judge Moore's dissent highlights the post-*Booker* circuit conflict:

> Second, the majority's decision to apply plain error-review to one aspect of Vonner's *Booker* reasonableness claim also deepens a growing circuit split. For instance, in *United States v. Bras*, 483 F.3d 103 (D.C. Cir. 2007), the D.C. Circuit rejected the partial plain-error review approach that the majority today embraces. In *Bras*, the defendant argued "that his sentence was unreasonable because the district court failed to adequately consider the sentencing factors listed in ...§ 3553(a)," and "the government insist[ed] that [the appellate court] may review this claim only for 'plain error,' because [the defendant] did not ... object that the [district] court did not adequately consider the factors set

forth in § 3553." *Id.* at 112-13 (internal quotation omitted). The D.C. Circuit rejected the government's argument, stating that "[r]easonableness ... is the standard of appellate review, not an objection that must be raised upon the pronouncement of a sentence." *Id.* at 113 (internal citation omitted). The Fourth Circuit has also adopted this view. *See United States v. Baham*, 215 Fed.Appx. 258, 261-62 (4th Cir. 2007) (rejecting government's argument that defendant's failure to object rendered "his challenge to the procedure employed by the district court ... reviewable only for plain error, not for reasonableness" because the defendant "adequately preserved the issue for appeal by arguing that a sentence above the low end of the advisory guidelines range was unwarranted") (citing *United States v. Curry*, 461 F.3d 452, 459 (4th Cir. 2006)).

Admittedly, the majority is not alone in partially applying plain-error review to defendants' challenges that their sentences are unreasonable under *Booker*. *See United States v. Torres-Duenas*, 461 F.3d 1178, 1182-83 (10th Cir. 2006) (explaining that plain-error review applies to

defendants' challenges to the "method by which the sentence was determined" in the absence of a objection but stating that "when the claim is merely that the sentence is unreasonably long, we do not require the defendant to object in order to preserve the issue"). Furthermore, the Fifth Circuit applies plain-error review not only to the "procedural" component of defendants' *Booker* reasonableness claims but also to the "substantive" component of reasonableness review. *See United States v. Peltier*, 505 F.3d 389, 391-94 (5th Cir. 2007). Several other circuits have rejected the argument that defendants must object after the imposition of their sentence to preserve the substantive component of reasonableness review. *See United States v. Curry*, 461 F.3d 452, 459 (4th Cir. 2006) (stating that a party's failure to "restate its position after the sentence was announced, by lodging a futile objection at the end of a sentencing colloquy, is without consequence"); *United States v. Swehla*, 442 F.3d 1143, 1145 (8th Cir. 2006) ("Once a defendant has argued for a sentence different than the one given by the district court, we see no reason to require the defendant to

> object to the reasonableness of the sentence after the court has pronounced its sentence."); *United States v. Castro-Juarez*, 425 F.3d 430, 433-34 (7th Cir. 2005) (stating that the court "fail[ed] to see how requiring the defendant to then protest the term handed down as unreasonable [after arguing for a lower sentence at the hearing and in a previously filed sentencing memorandum] will further the sentencing process in any meaningful way").
>
> **In light of the strikingly different approaches adopted by the circuits, we can only hope that the Supreme Court chooses to resolve the issue of whether defendants must object after the district court has imposed a sentence to preserve some, any, or all, of their *Booker* reasonableness claims.**

United States v. Vonner, 516 F.3d 382, 409-410 (Moore, J., dissenting, joined by Martin, Daughtrey, Cole, and Clay, JJ) (footnote omitted) (emphasis added). [App. 100-103].

Additionally, the separate dissenting

opinions of Judges Martin and Clay argue that raising procedural reasonableness to a just pronounced sentence conflicts with the relevant decisions of this Court. Judge Martin found that "[t]he majority concedes that this explanation [by the district court of the basis for the sentence] is not ideal, and that it 'failed to ensure that the defendant, the public and, if necessary, the court of appeals understood why the trial court picked the sentence it did.' *United States v. Vonner*, 516 F.3d at 386 (6th Cir. 2008)." *Id.* at 393 (Martin, J., dissenting, joined by Cole and Clay, JJ). [App. 57-58]. "In fact, I believe the Supreme Court's decision in *Gall* would mandate reversal." *Id.* (citing *Gall v. United States*, 128 S.Ct. 586 (2007)). "I believe it is obvious that the explanation given for Vonner's sentence was sorely lacking and would not pass muster under *Gall*." *Id.*

Judge Clay's dissenting opinion articulated the following conflict between the majority opinion and this Court's federal sentencing decisions:

> Today, the majority misapplies our holding in *United States v. Bostic*, 371 F.3d 865 (6th Cir. 2004), and

> ignores the Supreme Court's command in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), *Rita v. United States*, --- U.S. ----, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), and *Gall v. United States*, 552 U.S. ----, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), that we review sentences for reasonableness, in a strained effort to uphold a sentencing procedure that "[n]o one would call ... ideal." *United States v. Vonner*, 516 F.3d at 386, No. 05-5295 (6th Cir. Feb. 7, 2008). Because *Rita* and *Gall* do not require a defendant to object to the procedural or substantive reasonableness of his sentence at the time of sentencing, and indeed suggest that it would be improper to raise such an objection with the district court, I find the majority's application of plain error review inappropriate. I also consider the sentence in this case to be procedurally unreasonable, even when analyzed under a plain error standard.

United States v. Vonner, 516 F.3d at 395 (6th Cir. 2008) (Clay, J., dissenting, joined by Martin, Daughtrey, Moore, Cole and Gilman, JJ). [App. 57-58].

Accordingly, certiorari review is necessary to settle the conflict and split of authority over this important federal question under the Sixth Amendment and this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

CONCLUSION

For the above reasons, Mr. Vonner respectfully prays that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

STEPHEN ROSS JOHNSON
RITCHIE, DILLARD, & DAVIES, P.C.
606 W. MAIN ST., SUITE 300
KNOXVILLE, TN 37902
(865) 637-0661
COUNSEL OF RECORD

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APPENDIX

STEPHEN ROSS JOHNSON
Ritchie, Dillard, & Davies, P.C.
606 W. Main St., Suite 300
P.O. Box 1126
Knoxville, TN 37901-1126
(865) 637-0661
Counsel of Record for Petitioner