No. _____

IN THE
Supreme Court of the United States

JACOB L. SMITH,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court varied upward and sentenced Jacob Smith to 25 years' imprisonment. Because the district court varied upward, it was required to provide "specific" reasons for the imposed sentence. 18 U.S.C. § 3553(c)(2). As this Court has explained, a district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. 38, 50 (2007). On appeal, Mr. Smith challenged the adequacy of the district court's explanation for the upward variance. But the Tenth Circuit held this claim forfeited and affirmed the sentence under plain error review. In contrast, and consistent with Federal Rule of Criminal Procedure 51, at least six courts of appeals would have held the claim preserved either because parties need not take exception in this instance or because Mr. Smith had no opportunity to object to the adequacy of the district court's explanation. The question presented is:

> In order to preserve a § 3553(c) challenge to the adequacy of the district court's sentencing explanation, must a party, who is given no opportunity to object to the imposed sentence, take exception or object to that explanation in the district court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jacob L. Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished order is available at 730 Fed. Appx. 710 (10th Cir. 2018), and is included as Appendix A. The Tenth Circuit's unpublished order granting panel rehearing in part, but otherwise denying rehearing en banc, is included as Appendix C. The relevant portions of the sentencing transcript are included as Appendix B.

JURISDICTION

The Tenth Circuit's judgment was entered on July 6, 2018. Pet. App. 1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V, states in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 3553(a) provides in relevant part:

> **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;

18 U.S.C. § 3553(c)(2) provides, in relevant part:

> **(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—
>
> (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.

Federal Rule of Criminal Procedure 51 provides, in relevant part:

> **(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.

STATEMENT OF THE CASE

The Circuits are split six to five over whether a party must take exception or object to the adequacy of the district court's sentencing explanation in order to preserve a challenge to that explanation on appeal. Below, the Tenth Circuit held that Mr. Smith forfeited his § 3553(c) claim that the district court failed to provide an adequate

explanation for the imposed sentence because he failed to object to that explanation in the district court. And it did so even though Mr. Smith did not have an opportunity to object below. While four other courts of appeals have adopted similar forfeiture rules, six other courts of appeals have adopted contrary rules and hold that a party either need not object to preserve the issue for appeal or need only object when expressly given an opportunity to do so. This Court should grant this petition to resolve this conflict.

The resolution of this conflict is critically important. "Each year, thousands of individuals are sentenced to terms of imprisonment for violations of federal law." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1903 (2018). And for each sentence, the district court is required to give reasons for the imposed sentence. 18 U.S.C. § 3553(c). Criminal defendants should not be required to do and say different things, depending on the location of the sentencing court, in order to preserve § 3553(c) challenges on appeal.

On the merits, the Tenth Circuit's rule is wrong. It conflicts with Federal Rule of Criminal Procedure 51, and it does nothing other than add an unnecessary (an often impossible) formality to the sentencing process. The Tenth Circuit's rule also improperly equates a "tentative" sentence announced before allocution or argument by the parties with the final sentence, and it results in arbitrariness and unfairness.

Finally, this case is an excellent vehicle to resolve the conflict. The issue was preserved below, there are no procedural hurdles to relief, and there is an irreconcilable conflict in the Circuits on this issue. Moreover, if the Tenth Circuit

were to review Mr. Smith's procedural sentencing claim de novo (as it should have), he would almost certainly be resentenced. Review is necessary.

1. In April 2016, a federal grand jury in Kansas City, Kansas returned a superseding indictment against Jacob Smith, Gary Jordan, and Danille Morris, charging each with armed bank robbery, 18 U.S.C. §§ 2113(a), (d) & 2 (Count One), and discharging a firearm during and in relation to a crime of violence – the bank robbery, 18 U.S.C. §§ 924(c)(1)(A) & 2 (Count Two). R1.26; Pet. App. 1a. Mr. Smith pleaded guilty to both counts. Pet. App. 1a; R1.43 at 1.

Mr. Smith was eighteen years old when the trio robbed the bank. R3.89 at 3-4. He had recently joined a gang, of which Jordan was one of its leaders. R3.100 at 2. The day prior to the robbery, Jordan called Mr. Smith and told him that the two would rob the bank the next day. R3.89 at 10. And they did. When fleeing from officers after the robbery, Mr. Smith, at Jordan's direction, shot multiple rounds, one of which hit a police cruiser (none of which hit anything else). *Id.* at 8-10.

Mr. Smith had never done anything remotely similar to the bank robbery. His two prior juvenile adjudications were for misdemeanor battery (when he was fourteen) and theft (when he was seventeen). R3.89 at 16. But he does have a history of mental illness. *Id.* at 18; R3.100 at 3-7. As early as age six, Mr. Smith was diagnosed with bipolar disorder and attention deficit hyperactivity disorder. R3.89 at 18; R3.100 at 4. He has taken medications throughout his life until the year preceding the bank robbery. R3.89 at 18. He also has a history of suicide attempts (the first documented attempt at age ten), and a history of drug use. R3.89 at 18; R3.100 at 3.

Mr. Smith had a difficult childhood. He grew up poor, sometimes homeless. R3.100 at 5. He struggled in school and dropped out after the ninth grade. R3.89 at 18. While in school he was bullied. R3.100 at 3-4, 6. On one occasion, he was beaten so bad that he had to go to the emergency room. *Id.* at 4. Mr. Smith was also sexually abused by a cousin, then by a neighbor, and physically abused by an uncle (who is now in prison for sexually abusing Mr. Smith's sisters). *Id.* at 4-6. This abuse, and his inability to fit in anywhere, led him to the likes of Gary Jordan. *Id.* at 7.

Prior to sentencing, the probation officer prepared the PSR. R3.89. The PSR set the guidelines range at 97 to 121 months' imprisonment on Count One. *Id.* at 19; Pet. App. 1a-2a. Count Two carried a ten-year statutory minimum, to run consecutively to the sentence imposed on Count One. *Id.*

The government moved for a significant upward departure and variance based on the circumstances of the offense. Pet. App. 2a. The government asked for a 262-month term of imprisonment on Count One, consecutive to a 10-year term of imprisonment on Count Two, for a total term of imprisonment of 382 months (almost 32 years).

Mr. Smith filed a sentencing memorandum, asking the district court to impose a sentence on Count One at the lowest end of the guidelines range (97 months), to run consecutively to the 10-year term of imprisonment on Count Two, for a total term of imprisonment of 217 months. R3.100 at 1. He asked the district court to deny the government's motion for an upward departure and variance. *Id.* In support, he cited: (1) his age; (2) Jordan's influence on his actions; (3) his mental health issues; (4) his difficult upbringing; and (5) his acceptance of responsibility. *Id.* at 3-10. He explained

that "the government's argument for an upward departure fails to take into account the history and characteristics of the defendant—facts that could persuade the Court to vary downward from [the] calculated range." *Id.* at 8.

At sentencing in March 2017, the district court indicated that it intended to grant the government's motion for an upward departure and variance. Pet. App. 5a. But the district court also acknowledged Mr. Smith's "very real and very troubling history of mental illness and all of the many challenges that he has had, even though he's fairly young, with mental illness." R1.132 at 6-7. In light of Mr. Smith's "individual circumstances, including his extensive history of mental illness," the district court indicated that it did not intend to grant the "variance and departure upward to the extent the government asks." Pet. App. 5a.

The district court announced a "tentative sentence" of 300 months' imprisonment (180 months on Count One, 120 months consecutive on Count Two). Pet. App. 5a-6a. The district court acknowledged that the 180-month sentence on Count One exceeded the guidelines range, but noted that it agreed with three of the government's arguments: (1) that Mr. Smith's conduct was intentional; (2) that he put a number of people at risk; and (3) that some of these at-risk people were law enforcement officers. *Id.* 7a-9a. In contrast, the district court rejected the government's third reason to vary (to avoid an unwarranted disparity with Jordan's sentence), noting that Jordan was a substantially older career criminal who provided weapons to Mr. Smith and greatly influenced his conduct. *Id.* 9a-10a. "And but for Mr. Jordan, this particular crime probably would not have occurred, at least not in the manner that it did." *Id.* 10a.

The district court acknowledged that it had to impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing, and that it had considered the guidelines, "as well as aggravating and mitigating factors." Pet. App. 9a. It also acknowledged the § 3553(a) factors. *Id.* It commented:

> So the Court wants to impose a sentence that reflects the highly dangerous and highly violent conduct that Mr. Smith has engaged in, but at the same time to recognize that Mr. Smith has a long history of mental illness, was under the influence of a highly dangerous man in Mr. Jordan. And so for that reason, the Court thinks it appropriate that Mr. Smith receive, while a great sentence, not a sentence quite as high as his co-defendant Gary Jordan.

Id. "After considering all of these factors," the district court indicated its belief that an upward departure and/or variance was warranted. *Id.* 13a.

Defense counsel objected to the tentatively announced upward departure/variance for those reasons expressed in the sentencing memorandum. Pet. App. 15a. The district court expressly acknowledged that defense counsel had preserved for appeal the objection to the announced upward departure and variance. *Id.* 15a-16a. Defense counsel also asked the district court to reconsider the tentative sentence, noting Mr. Smith's difficult childhood, his sincere remorse, his age, and his mental health issues. *Id.* 16a-19a. Mr. Smith allocuted, also touching on, *inter alia*, his sincere remorse, difficult upbringing, and his mental health issues. *Id.* 19a-24a. In response, the district court addressed Mr. Smith personally, telling him that:

> this was a difficult sentence to impose because you are young and you've had a lot of challenges and I've tried to come up with a sentence that recognized that. At the same time, what you did, just as you know, placed so many people in risk of their lives and was such a dangerous thing and such a horrendous crime against the entire community, as you recognize. So I have to weigh all of those things.

Id. 25a-26a. Ultimately, the district court imposed the tentative sentence: 300 months' imprisonment (180 months on Count One, 120 months consecutive on Count Two), to be followed by three years' supervised release (both counts concurrent). *Id.* 29a; R1.106. Mr. district court did not give Mr. Smith an opportunity to take exception (or object) to the final sentence, but simply remanded him to custody and wished him luck. *Id.* 30a-31a.

In its written statement of reasons, and consistent with its oral statements, the district court reiterated its reasons to depart/vary upward. R3.107 at 2. Without explanation, the district court also checked the following seven boxes in support of the variance: (1) the nature and circumstances of the offense; (2) the nature and characteristics of the defendant; (3) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (4) to afford adequate deterrence to criminal conduct; (5) to protect the public from further crimes of the defendant; (6) to provide the defendant with needed educational or vocational training; and (7) to avoid unwarranted sentencing disparities among defendants. *Id.*

2. On appeal, Mr. Smith raised, *inter alia*, a procedural challenge to the final sentence: that the district court failed to give an adequate explanation to justify the upward departure/variance. Br. 18-24. He explained that, because the district court did not give him an opportunity to object to the adequacy of the final sentence, his claim on appeal was properly preserved under Federal Rule of Criminal Procedure Rule 51. *Id.* 18. On the merits, Mr. Smith asserted that the district court failed to

give an adequate explanation of the sentence, as it was required to do under § 3553(c)(2) and this Court's decision in *Gall*, 552 U.S. at 50, because it imposed the five-year upward variance/departure despite its own recognition of several mitigating factors (i.e., Mr. Smith's mental health issues, young age, and difficult upbringing). *Id.* 19-23. Mr. Smith further noted that the district court's written statement of reasons not only failed to explain the final sentence, but contradicted it (by identifying as aggravating factors, factors considered mitigating at sentencing). *Id.* 23-24.

In response, the government claimed that Mr. Smith forfeited this issue because he did not object "[a]fter the district court imposed sentence." Gov't Br. 25. According to the government, a trial attorney must always object, even without an opportunity to do so, "by way of interruption." *Id.* (quoting *United States v. Craig*, 794 F.3d 1234, 1238 (10th Cir. 2015)). Although the government mentioned that Mr. Smith did not object to the adequacy of the explanation for the *tentative* sentence, the government did not assert that this failure constituted a forfeiture of the issue. Gov't Br. 25.

In reply, Mr. Smith countered with three points. First, under Rule 51(a), "[e]xceptions to rulings or orders of the court are unnecessary." Reply Br. 3. "Thus, under Rule 51(a)'s plain terms, once a district court imposes sentence, a criminal defendant need not take exception to the sentence in order to preserve a claim of error." *Id.* Second, Mr. Smith explained that Rule 51(b) and Tenth Circuit precedent only required an objection if the district court provided the parties an opportunity to object after the imposition of sentence. *Id.* 4-5. Because the district court did not give him that opportunity here, the issue was properly preserved. *Id.* And finally, Mr.

Smith explained that the government's contrary rule, if adopted, would conflict with published decisions from five other courts of appeals. *Id.* 6.

The Tenth Circuit held the claim forfeited and affirmed on plain error review. Pet. App. 1a-4a (concluding that the explanation was not "plainly inadequate"). The panel did not hold the issue forfeited under the government's theory (that Mr. Smith should have taken exception after the imposition of sentence), but instead held that Mr. Smith should have objected to the adequacy of the explanation given for the *tentative* sentence. *Id.* 2a-3a. The panel cited no precedent for this proposition.

Mr. Smith petitioned for rehearing en banc. He explained that, because he did not have an opportunity to object after the district court imposed the *final* sentence, the panel should have deemed the issue preserved under Rule 51. Pet. for Reh'g 8-10. He also explained that the panel's decision conflicted with published decisions from at least five other courts of appeals. *Id.* 13-15. The Tenth Circuit ordered the government to file an answer, but ultimately denied rehearing en banc. Pet. App. 1a-2a. The panel instead granted rehearing "for the limited purpose of adding a new citation to the decision." *Id.* 1a. The panel added this sentence (and citation): "[f]urther, attorneys are generally expected to object even if a court does not explicitly ask them if they would like to." Pet. App. 3a. (citing *Craig*, 794 F.3d at 1238) ("It is a lawyer's job to object—by way of interruption, if the circumstances warrant—when the court is in the midst of committing an error."), *overruled on other grounds by United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017)).

REASONS FOR GRANTING THE WRIT

The courts of appeals are divided six to five over whether a party must take exception or object to the adequacy of the district court's sentencing explanation. This Court should use this case – which turned entirely on the erroneous application of plain error review to an otherwise preserved claim – to resolve the conflict on this important question. This Court should hold that, under Rule 51(a)'s plain text, a party need not take exception to the district court's sentencing explanation in order to preserve a challenge to that explanation on appeal. At a minimum, under Rule 51(b)'s plain text, this Court should hold that a party need not object to the district court's sentencing explanation when the district court does not give the party an opportunity to do so. Either way, the Tenth Circuit erred when it held that Mr. Smith forfeited his challenge to the district court's sentencing explanation by failing to take exception or object to that explanation in the district court. Review is necessary.

I. The Circuits are intractably divided over whether a party must take exception or object to a district court's sentencing explanation in order to preserve a § 3553(c) challenge on appeal.

It is well established that the sentencing process "must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.*; *see also Betterman v. Montana*, 136 S. Ct. 1609, 1617 (2016) (recognizing that defendants "retain[] a[] [due process] interest in a sentencing proceeding that is fundamentally fair").

Congress acknowledged this due-process right in § 3553(c), which requires a

district court to state its reasons for imposing a particular sentence in each case. Moreover, when a district court varies from the guidelines range, the district court must state, in open court, "specific" reasons for its sentence. 18 U.S.C. § 3553(c)(2). As this Court has explained, a district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. "[A] major departure should be supported by a more significant justification than a minor one." *Id.*

But what happens if a party is dissatisfied with the adequacy of the reasons given for the imposed sentence? Must that party take exception to the sentence after it is imposed? At present, the answer to this question depends upon the location of the district court.

1a. In the **Tenth Circuit**, as this case confirms, a party must object to the adequacy of the explanation in order to preserve a § 3553(c) claim on appeal. Pet. App. 2a-3. And this is so "even if a court does not explicitly ask them if they would like to" (i.e., if the party is not given an opportunity to object). *Id.* 3a. Parties are expected to object "by way of interruption." *Id.* (quoting *Craig*, 794 F.3d at 1238).

1b. Four other Circuits – the **First**, **Third**, **Fifth**, and **Eighth** – appear to agree with the Tenth Circuit that a party must take exception (or object) to the adequacy of the district court's sentencing explanation even if the party did not have an opportunity to do so. *See, e.g., United States v. Medina-Villegas*, 700 F.3d 580, 583 (1st Cir. 2012) (turning to plain error review simply because "appellant did not object to the court's failure to offer an explanation of the reasons underlying the sentence");

United States v. Flores-Mejia, 759 F.3d 253, (3d Cir. 2014) ("a defendant must raise any procedural objection to his sentence at the time the procedural error is made, *i.e.*, when sentence is imposed"); *United States v. Rouland*, 726 F.3d 728, 732 (5th Cir. 2013) (same); *United States v. Fry*, 792 F.3d 884, 891 (8th Cir. 2015) (same).[1]

2a. In contrast, in the **Fourth** and **Eleventh** Circuits, and consistent with Rule 51(a), a party need not take exception (or object) to the adequacy of the sentencing explanation in order to preserve such a claim for appeal. *United States v. Lynn*, 592 F.3d 572, 578-579 (4th Cir. 2010); *United States v. Bonilla*, 463 F.3d 1176, 1181 (11th Cir. 2006) (adequacy of district court's § 3553(c) statement of reasons for its sentence "is reviewed de novo, even if the defendant did not object below"). By arguing for a sentence "different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim." *Lynn*, 592 F.2d at 578. "When the sentencing court has already heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence . . .

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[1] In other contexts, the First and Fifth Circuits consider whether the party had an opportunity to object, and, if not, treat the issue as preserved. *See, e.g.*, *United States v. Padilla*, 415 F.3d 211, 218 (1st Cir. 2005) (conditions of supervised release); *United States v. Mojica-Rivera*, 435 F.3d 28, 35 (1st Cir. 2006) (same); *United States v. Delgado-Hernandez*, 420 F.3d 16, 19-20 (1st Cir. 2005) (plea proceedings); *United States v. Warren*, 720 F.3d 321, 327 (5th Cir. 2013) (recognizing that Rule 51(b) requires "the appellant, if given the opportunity to object in district court [to] have made an objection" or else face plain error review). Moreover, in *United States v. Burrell*, 622 F.3d 961, 965-966 (8th Cir. 2010), the Eighth Circuit recognized that, "if a party does not have an opportunity to object . . . the absence of an objection does not later prejudice the party." But it has applied this rule (which comes straight from Rule 51(b)) in the sentencing context only where the "lack of opportunity" was due to the total absence of a sentencing hearing. *Id.*; *see also United States v. Smith*, 771 F.3d 1060, 1063 (8th Cir. 2014) (holding abuse of discretion rather and plain error standard applies to defendant's challenge on appeal that the district court should have notified defense about the jury's request to replay the video evidence because under Rule 51(b), defendant did not have an opportunity to object).

we see no benefit in requiring the defendant to protest further." *Id.* at 578-79 (internal quotation marks and citation omitted). *See also United States v. Cirilo–Muñoz*, 504 F.3d 106, 132 n. 91 (1st Cir.2007) (Lipez, J., concurring) (disagreeing with the First Circuit's contrary rule).

2b. Similarly, in the **Sixth**, **Seventh**, and **D.C.** Circuits, and consistent with Rule 51(b), the claim is considered preserved if the district court fails to provide the parties with an opportunity to object to the adequacy of the imposed sentence's explanation. *United States v. Bostic*, 371 F.3d 865, 872 (6th Cir. 2004) (district court must "after pronouncing the defendant's sentence . . . ask the parties whether they have any objections to the sentence just pronounced that have not previously been raised. If the district court fails to provide the parties with this opportunity, they will not have forfeited their objections and thus will not be required to demonstrate plain error on appeal."); *United States v. Gabbard*, 586 F.3d 1046, 1050-1051 (6th Cir. 2009) (applying *Bostic*); *United States v. Garcia-Segura*, 717 F.3d 566, 568-659 (7th Cir. 2013) (same); *United States v. Hunter*, 809 F.3d 677, 683 (D.C. Cir. 2016) (where a party is not given an opportunity to object after imposition of sentence, the claim is not forfeited).

2c. The **Ninth** Circuit also inquires into whether the party had a sufficient opportunity to object before holding such a claim forfeited (although it does not require that the district court expressly give the parties an opportunity to object). *United States v. Vanderwerfhorst*, 576 F.3d 929, 934 (9th Cir. 2009).

4. Considering the depth of the conflict between the Circuits, as well as the various

apparent intra-Circuit conflicts, there is no reason to think that the lower courts can resolve the conflict on their own. It would take five Circuits to switch sides, and the other Circuits to remain firm in their positions, to eliminate this conflict without this Court's review. There is no reason to think that this could happen. Moreover, when asked to switch sides below, the Tenth Circuit declined without comment. Pet. for Reh'g 6-11. The conflict will persist until this Court resolves it. Review is necessary.

II. The question presented is critically important to federal sentencing procedure.

The question presented merits this Court's attention. Standards of review are important to the administration of justice. Not only do they frame the issues for appeal and, as this case illustrates, often determine the result of the appeal, but they also provide context for practitioners litigating issues in the district and appellate courts (as well as inform the district courts how their rulings will be reviewed). Standards of review should not differ depending on the geographic location of the court of appeals. The government should not have a better opportunity at an affirmance in one court over another. *See*, *e.g.*, *Concrete Pipe v. Construction Laborers Pension*, 508 U.S. 602, 625-626 (1993) (explaining that the case turned on the proper standard of review); *United States v. Gallegos*, 314 F.3d 456, 463 (10th Cir. 2002) (explaining that the standard of review can have a "substantial impact on the resolution of a particular case").

This Court has often granted certiorari to resolve conflicts in the Circuits on standard-of-review issues. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 502 (2005) ("We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy."); *Adarand Constructors v. Pena*, 515 U.S. 200,

204 (1995) (holding that "courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied"). This Court recently issued two decisions resolving such conflicts. *U.S. Bank Nat'l Ass'n v. Village at Lakeridge*, 138 S.Ct. 960, 963 (2018) ("we address how an appellate court should review that kind of determination: de novo or for clear error"); *McLane v. EEOC*, 137 S.Ct. 1159, 1164 (2017) (resolving "whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena de novo or for abuse of discretion").

The same need for this Court's guidance exists here. This Court agrees to resolve so many standard-of-review issues because those issues affect virtually every aspect of any given case. Standards of review are the equivalent of rules to a game. If those standards differ in the appellate courts, then those courts will necessarily resolve legal issues under different rules. Because the courts of appeals are currently operating under different rules in this specific context, the conflict presented in this petition is in need of prompt resolution.

Moreover, as this Court has recognized, sentencing explanations "allow for meaningful appellate review and [] promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. Such explanations also assist the Sentencing Commission in helping to revise the guidelines. *See* 18 U.S.C. § 3553(c)(2) (cross-referencing 28 U.S.C. § 994(w)(1)(B)). When the rules surrounding sentencing explanations differ from court to court, it calls into question meaningful appellate review and fair sentencing procedures, and it undermines any attempts to revise the guidelines to respond to

subsequent developments. Review is necessary.

III. The Tenth Circuit erred.

For three reasons, the Tenth Circuit erred when it held that Mr. Smith forfeited his § 3553(c)(2) claim by failing to take exception or object to the adequacy of the district court's sentencing explanation below.

1. The Tenth Circuit's rule is at odds with Rule 51(a). That rule provides that "[e]xceptions to rulings or orders of the court are unnecessary." As Judge Easterbrook has explained, "the rules do not require a litigant to complain about a judicial choice after it has been made. Such a complaint is properly called, not an objection, but an exception." *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009). Thus, once a district court imposes sentence, the "judicial choice" "has been made." Under Rule 51(a), neither party (the defendant nor the government) is required to take exception to any aspect of the imposed sentence (its length or the adequacy of its explanation).

The courts of appeals have adopted just such a rule in terms of substantive reasonableness – whether the imposed sentence is too short or too long. *See*, *e.g.*, *United States v. Walker*, 844 F.3d 1253, 1256 (10th 2017) ("claims of substantive reasonableness need not be raised in district court"). Such a rule is entirely consistent with Rule 51(a). Once the district court has imposed sentence, any exception to that sentence is unnecessary.

> To insist that defendants object at sentencing to preserve appellate review for reasonableness would create a trap for unwary defendants and saddle busy district courts with the burden of sitting through an objection - probably formulaic - in every criminal case. Since the district court will already have heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence, we fail to see how requiring the defendant to then protest the term handed down as unreasonable will further

the sentencing process in any meaningful way.

United States v. Castro-Juarez, 425 F.3d 430, 433-434 (10th Cir. 2005).

There is no plausible reason why this rule should apply only to the length of the imposed sentence. Indeed, the Tenth Circuit just (rightly) acknowledged that the "distinction between procedural and substantive reasonableness is a significant but not necessarily sharp one, especially as it concerns a sentencing court's explanation for the sentence. That explanation serves both procedural and substantive functions." *United States v. Barnes*, 890 F.3d 910, 916–917 (10th Cir. 2018). The explanation is "the procedural step" that demonstrates that the district court either has or has not considered the statutory sentencing factors. *Id.* at 917. But it is also "relevant to whether the length of the sentence is substantively reasonable." *Id.* "A sentence is more likely to be within the bounds of reasonable choice when the court has provided a cogent and reasonable explanation for it." *Id.*

"This dual purpose of the court's sentencing explanation is one reason the line between procedural and substantive reasonableness is blurred." *Id.* In practice, the Tenth Circuit considers "the explanation given for the challenged sentences to assist [it] in determining whether the district court abused its discretion in weighing the § 3553(a) factors – and thus whether the sentences are substantively reasonable." *Id.* "[W]hile courts should avoid unduly blurring the line between substantive and procedural reasonableness, there is nevertheless some unavoidable overlap." *Id.*

If there is "unavoidable overlap" between the explanation of the sentence and the sentence imposed, we fail to see why different preservation rules would apply in this

context. And this is particularly true because district courts have been on notice for a decade that they must provide adequate explanations for a chosen sentence. *Gall*, 552 U.S. at 51. Indeed, the controlling sentencing statute *requires* district courts to "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c).

Courts presume that district courts "know the law and apply it in making their decisions." *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 2007 (10th Cir. 2007) (Gorsuch, J.). If this presumption means anything, it must mean that sentencing courts necessarily provide explanations for their chosen sentences. Whether those explanations are sufficiently adequate is an issue either party should be free to pursue on appeal, without further exception or objection below, just as either party is free to challenge on appeal, without exception or objection below, the length of the imposed sentence. For a party to "object" to the sentence's explanation as inadequate is just as pointless as "objecting" to the length of the sentence imposed. In both instances, "we fail to see how requiring the defendant to then protest" the adequacy of the district court's explanation "will further the sentencing process in any meaningful way." *Castro-Juarez*, 425 F.3d at 434.

In practice, it is not as if the district court who is faced with such an objection is required to give a further explanation for the sentence (just as a district court faced with an objection to the length of the sentence is not required to give a different sentence). Why would it? The district court knows the law, and it no doubt thinks the explanation it has given is adequate under it. Whether the explanation is in fact

adequate is something left for *meaningful* appellate review. An objection does nothing but "create a trap for unwary defendants and saddle busy district courts with the burden of sitting through an objection - probably formulaic - in every criminal case." *Id.* at 433-434; *see also Lynn*, 592 F.3d at 578-579 ("When the sentencing court has already heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence . . . we see no benefit in requiring the defendant to protest further.")

2. Even assuming an objection is required and that Rule 51(a) is inapplicable, the Tenth Circuit's decision still conflicts with Rule 51(b). Rule 51(b) makes clear that a party who does not have an opportunity to object to an error made below has nonetheless preserved a challenge to that error on appeal. Even the Tenth Circuit has acknowledged the point (in other contexts). *Silbrico Corp. v. Ortiz*, 878 F.2d 333, 336 n.1 (10th Cir. 1989) ("When the district court rules without affording the parties an opportunity to object, the issue is preserved for appeal."). But here, the district court simply did not give either party an opportunity to object to the final sentence. Pet. App. 30a-31a.

The Tenth Circuit's retort – that a party can still object "by way of interruption" – is wrong for two reasons. First, it's wrong because Rule 51(b) does not require a party to "interrupt" or otherwise argue with a district court about its decisions. Of course it doesn't. The point of Rule 51 is to ensure that litigants object when they have the opportunity to object. And when they don't have that opportunity, nothing in the rules requires the litigant to attempt to create such an opportunity. *See* Fed.R.Crim.P.

51(b). And second, the case where this language comes from – *Craig*, 794 F.3d at 1238 – involved a situation where the district court, after the imposition of sentence, "asked counsel if there were any other issues to be addressed." Thus, the "by way of interruption" language was dicta, with no support for it anywhere else in Tenth Circuit precedent. The panel should not have relied on it.

3. The Tenth Circuit's decision is also wrong because it held, without citation, that a party must object to the adequacy of the district court's explanation for the *tentative* sentence in order to preserve a claim that the district court failed to give an adequate explanation for the *final* sentence. Pet. App. 2a-3a. As a definitional matter, however, a tentative sentence is not a final sentence. *See*, *e.g.*, *Iceland S.S. Co.-Eimskip v. U.S. Dep't of Army*, 201 F.3d 451, 464 (D.C. Cir. 2000) ("'tentative' means 'subject to change or withdrawal' or otherwise 'not final'"); *Jefferson Smurfit Corp. v. United States*, 439 F.3d 448, 453 (8th Cir. 2006) (same) (both cases quoting Webster's Third New World Dictionary). And nothing in Rule 51 even hints that a party must object to a non-final decision made by a district court. Nor would it. As with all non-final decisions, a tentative decision is immaterial precisely because it is not the final decision. *See id.*; *see also* 28 U.S.C. § 1291 (permitting appeals only of "final decisions"); *United States v. Valdez-Aguirre*, 861 F.3d 1164, 1168 (10th Cir. 2017) (referring to remarks made during discussion of tentative sentence as "immaterial").

Again, what is important is the "final" sentence. *Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017) (statute authorizes notice of appeal only upon an "otherwise final sentence"). "[P]rinciples of federal appellate procedure require recognition of the

defendant's right to await the imposition of *final sentence* before seeking review of the conviction." *Corey v. United States*, 375 U.S. 169, 176 (1963). The Tenth Circuit's decision to equate a distort court's non-binding "tentative" sentence with a "final" sentence was obviously wrong.

In the end, the Tenth Circuit's decision in this case is in direct conflict with Rule 51. Where, as here, a district court imposes final sentence without giving the defendant any further opportunity to speak, the defendant is not obligated to attempt to take exception or to object in order to preserve a challenge to the final sentence. The correction of this error is particularly important here, where Mr. Smith received an above-range 25-year term of imprisonment, and where the Tenth Circuit only found the explanation for that sentence adequate because it employed plain error review. Pet. App. 3a. Plain error review under these circumstances precluded meaningful appellate review and does nothing to indicate that Mr. Smith received a fair sentencing below. *Gall*, 552 U.S. at 50. Review is necessary.

IV. This case is an excellent vehicle to resolve the conflict.

For two reasons, this case is an excellent vehicle to resolve the conflict.

1. The question presented was preserved below, and there are no procedural hurdles to this Court's review. Mr. Smith sought rehearing en banc, expressly asking the Tenth Circuit to reconsider its use of plain-error review in light of the conflict in the Circuits on this issue. The Tenth Circuit granted the petition in part only to add a new citation (to *Craig*) that furthers the conflict on this issue. Pet. App. 3a. The conflict is thus ripe for review.

2. If this Court grants certiorari and holds that a party need not take exception

or object under these circumstances to preserve a § 3553(c) challenge, Mr. Smith would almost certainly be entitled to relief on remand. The record is clear that the Tenth Circuit affirmed Mr. Smith's above-range 25-year term of imprisonment only because it applied plain error review. Pet. App. 3a. In an unpublished decision that spans just three pages, the Tenth Circuit generously applied the harsh standard of plain error review to find the sentence imposed was procedurally reasonable. *Id.* In doing so, it affirmed Mr. Smith's 25-year sentence without meaningful appellate review, summarily concluding that the explanation for the sentence "was not plainly inadequate." *Id.*

There is no indication within the decision that, if the Tenth Circuit were to treat the issue preserved (as it should), that it would have affirmed the sentence. Instead, the Tenth Circuit recognizes that a district court "must provide adequate explanation for the sentence it eventually imposes." *United States v. Reyes-Alfonso*, 653 F.3d 1137, 1144 (10th Cir. 2011). In dong so (and in ultimately protecting defendants' due process rights), "sentencing court[s] must consider the seven § 3553(a) factors." *United States v. Lente*, 647 F.3d 1021, 1034 (10th Cir. 2011). Failure to address the §3553(a) factors is also "procedural error," as is the failure to address a defendant's mitigating arguments. *Id.* at 1035-37. Because the district court failed to explain how it took into account Mr. Smith's mitigating arguments (which the district court found had merit), and because the written statement of reasons wholly contradicts the district court's oral statements at the sentencing hearing, the district court's failure to explain the sentence is reversible error. Freed from its erroneous use of plain-error

review, the Tenth Circuit would be free to reverse the district court's above-range 25-year sentence and remand for resentencing.

CONCLUSION

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

Respectfully submitted,

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FILED
United States Court of Appeals
Tenth Circuit

July 6, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JACOB L. SMITH,

Defendant - Appellant.

No. 17-3086
(D.C. No. 2:16-CR-20022-JAR-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **LUCERO**, **BALDOCK**, and **HARTZ**, Circuit Judges.

Jacob Smith appeals following his convictions for bank robbery and discharging a firearm during and in relation to a crime of violence. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

Smith pled guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). Smith's Presentence Investigation Report

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

recommended a Guidelines range of 97 to 121 months for the first count to run consecutively with the mandatory 120 months for the second count. The government sought an upward variance of six offense levels and an upward departure of four additional levels. The defense sought a sentence on the lower end of the initial Guidelines range.

The district court granted the government's motion in part, upwardly varying and departing to impose a sentence of 180 months on the first count and 120 on the second. Smith now appeals.

II

Smith challenges his conviction under § 924(c)(1)(A), arguing that his bank robbery conviction does not qualify as a crime of violence. Since the initiation of Smith's appeal, we have held that bank robbery does so qualify under the elements clause of U.S.S.G. § 4B1.2(a)(1). United States v. McCranie, 889 F.3d 677, 679–81 (10th Cir. 2018). Because the elements clause of § 924 is identical to that contained in the Guidelines, compare U.S.S.G. § 4B1.2(a)(1), with § 924(c)(3)(A), we reach the same conclusion.

III

Smith also argues that the district court failed to adequately explain its sentencing decision. The government contends that because Smith failed to object below, we should review only for plain error. See United States v. Ruiz-Terrazas, 477 F.3d 1196, 1199 (10th Cir. 2007). Smith counters that the district court did not give his counsel an opportunity to object. However, the district court did ask for

objections after tentatively announcing its sentencing decision. Further, attorneys are generally expected to object even if a court does not explicitly ask them if they would like to. United States v. Craig, 794 F.3d 1234, 1238 (10th Cir. 2015) ("It is a lawyer's job to object—by way of interruption, if the circumstances warrant—when the court is in the midst of committing an error."), overruled on other grounds in United States v. Bustamonte-Conchas, 850 F.3d 1130 (10th Cir. 2017). We thus review this issue for plain error. Smith "must demonstrate that there is (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Mann, 786 F.3d 1244, 1249 (10th Cir. 2015) (quotation omitted).

A sentencing court must "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). The explanation must be adequate "to allow for meaningful appellate review and to promote the perception of fair sentencing." Gall v. United States, 552 U.S. 38, 50 (2007). In the course of deciding to impose a significant upward variance and departure in this case, the district court noted the mitigating and aggravating factors the parties had cited, including Smith's age, the influence his co-defendants had over him, his history of mental health problems, and the dangerous nature of his conduct. The court then ruled that a sentence of 180 months for the first count and 120 months for the second would be appropriate, in light of these countervailing facts. We conclude this explanation was not plainly inadequate.

Smith additionally contends that the district court erred by failing to announce the adjusted Guidelines range before imposing his sentence. But this omission cannot be reasonably interpreted to have "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Mann, 786 F.3d at 1249. Finally, the court's written statement of reasons—which indicated that one of the reasons for the variance imposed was to avoid unwarranted sentencing disparities among defendants—is not in conflict with the district court's statement that it would not vary upward by a further two levels to bring Smith's sentence to his co-defendant's.

IV

AFFIRMED.

Entered for the Court

Carlos F. Lucero
Circuit Judge

THE COURT: All right. Ms. Ross, do you have any evidence to present?

MS. ROSS: No additional evidence besides what's already been submitted to the Court, Your Honor.

THE COURT: Okay. All right. Let's-- I've ruled on the objection to the presentence report. And I have taken into consideration the United States' sentencing memorandum and motion for upward variance and departure. That's Document 96. I do intend to grant an upward departure and variance.

I have taken into consideration Mr. Smith's submissions, including Document 98 and all of its attachments. That's the sentencing memorandum. And including the DVD, which incorporates a lot of that information. I've taken that into consideration and will not be granting the-- the variance and departure upward to the extent the government asks based on some considerations I've made with respect to Mr. Smith's individual circumstances, including his extensive history of mental illness.

So I'll start by announcing the following proposed findings of fact and a tentative sentence and then I'll hear further from the parties. The total offense level in this case is 29 and the criminal history category is II, which reflects Mr. Smith's

relatively minimal criminal history, but also reflects that he's young and hasn't had enough years of living to probably have a much more extensive criminal history.

The statute on Count 1 sets a maximum of 25 years and on Count 2 sets a mandatory minimum of at least 10 years consecutive to Count 1. The guideline range on Count 1 is 97 to 121 months and on Count 2 is 120 months. The Court intends to depart and vary upward and impose on Count 1 a sentence of 180 months, followed by a 120 consecutive month sentence for a controlling sentence of 300 months, in other words 25 years.

The Court intends to impose a three-year term of supervised release on each of Counts 1 and 2. The statute allows for a maximum of five years of supervised release on each of Counts 1 and 2, while the guidelines recommend somewhere between two and five years on each of these two charges. Probation is not authorized by statute or guidelines.

The Court does not intend to impose a fine. The maximum fine under the statute is $250,000 per count, while the guidelines recommend 40,000 to 400,000. Also, this sentence must include a $100 special assessment per count of conviction for a total of $200.

The Court is required to impose a sentence that is sufficient, but not greater than necessary, to

comply with the purposes of sentencing identified in the statute. In determining the particular sentence to be imposed, the Court has considered the United States Sentencing Guidelines, which promote uniformity in sentencing and assist the Court in determining an appropriate sentence by weighing the basic nature of the offense, as well as aggravating and mitigating factors. The Court has considered all of the submissions of the parties and the presentence investigation report.

The Court's sentence, which represents on Count 1 a sentence higher than the guideline range of 97 to 120 months, I reached as follows: I agreed with the government in its motion that Mr. Smith's sentence should be-- should be departed upward on the basis of two levels under Guideline 3C1.2 to represent that his conduct was quite intentional and not just reckless, when we consider it was a 20 or 30-mile chase and multiple instances of him shooting a weapon directly at law enforcement officers. And if not directly at them, at public spaces where-- where people, civilians were also at great risk.

Also, this sentence reflects a two-level departure upward for the number of people. This wasn't an incident-- instance where Mr. Smith just shot at one or two law enforcement officers in a car or outside of a

car. He did receive a six-level enhancement to reflect that. But when I consider the very many law enforcement officers that he shot at in the course of this chase from multiple police departments and multiple people and placed their lives in danger, we saw some of that on the video clips when the officers were trying to put a stop stick out and all of that. But I think a six-level enhancement should also receive another two-level departure upward because of the number of law enforcement officers' lives who were placed at risk.

And then finally, the sentence reflects a two-level variance upward to-- I said that wrong before. It's a two-level on the basis of 3A1.2(c)(1) based on the number-- the number of many law enforcement officers. So two levels upward for intentional conduct, two levels upward, which is really I think a variance on 3A1.2(c)(1). And then also, I thought it's appropriate to depart still another two levels upward for the number of other people placed at risk.

This was a very egregious and unusual bank robbery in the sense that it wasn't just the tellers and the customers in the bank who were placed at risk. And that is, of course, very troubling and very-- of great concern and why bank robberies are violent-- considered violent crimes and a real risk to the community.

But, again, because of the chase and the gunfire, there are these people that were subjected to the risk that were shopping. And this was midday. This was, as I recall, midday, lunchtime, early afternoon. And this gunfire, these gunshots were in residential neighborhoods, they were near Leawood Elementary and Leawood Middle School, they were near Town Center, a huge population area with people coming and going that time of day. And so I thought another two-level upward departure on that basis was warranted as well.

So in determining the particular sentence to be imposed, the Court is required to impose a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing identified in the statute. In determining the particular sentence to be imposed, the Court has considered the sentencing guidelines, which promote uniformity in sentencing and assist the Court in determining an appropriate sentence by weighing the basic nature of the offense, as well as aggravating and mitigating factors.

The Court recognizes also that there were three defendants in this case and they all engaged in highly dangerous and egregious conduct. The government has argued that Mr. Smith should receive a higher sentence than Mr. Jordan because Mr. Smith was the one

that was shooting. And obviously that is much more egregious conduct than driving the car.

But the Court is also mindful that Mr. Jordan is a career criminal. Mr. Jordan is substantially older than Mr. Smith or Ms. Morris. Mr. Jordan provided the weapons to Mr. Smith. And that based on Mr. Smith's background and his youth, the Court thinks that Mr. Jordan had great influence on Mr. Smith. And but for Mr. Jordan, this particular crime probably would not have occurred, at least not in the manner that it did.

So the Court wants to impose a sentence that reflects the highly dangerous and highly violent conduct that Mr. Smith has engaged in, but at the same time to recognize that Mr. Smith has a long history of mental illness, was under the influence of a highly dangerous man in Mr. Jordan. And so for that reason, the Court thinks it appropriate that Mr. Smith receive, while a great sentence, not a sentence quite as high as his co-defendant Gary Jordan.

The Court has under 18 U.S.C. Section 3553(a) considered all of the circumstances and the nature of this offense and the history and characteristics of the defendant, as it must. Extremely dangerous conduct associated with the actions of all of

the defendants in this case. All of the actions were within the scope of concerted criminal activity.

These defendants, and Mr. Smith and Mr. Jordan in particular, robbed at gunpoint the First National Bank in Stilwell, Kansas. After exiting the bank, one of the robbers - who appeared to be Mr. Smith because he's the one that approached the rear passenger door of the getaway vehicle - pointed a handgun at two bank customers in the parking lot.

So he not only put at risk the people who were inside the bank, the tellers and the customers, but as they were exiting the bank, the-- the conduct escalated. And again, that's something that I took into consideration in determining a two-level variance or departure was necessary based on the number of people involved.

Gary Jordan then led officers on an extended high-speed pursuit, Jordan being at the wheel, reaching speeds in excess of 100 miles an hour through congested traffic areas. It's really a miracle that no one was killed in a car accident in that part of the chase, if not hit by gunfire for that matter.

Jacob Smith fired multiple rounds at officers during the pursuit and at multiple officers during the pursuit. Again, this happened in

high-traffic areas. And he, in fact, struck a police car on the driver's side, not far in front of where Leawood, Kansas police officer Ron Halsey was seated. Again, it's a miracle that no law enforcement officer was killed or gravely injured.

Ultimately, Gary Jordan crashed the vehicle into a guardrail in Missouri near the Grandview Triangle, causing the vehicle to roll over. All of these actions occurred with co-defendant Morris' 19-month-old child in the back seat of the vehicle. It is a miracle that this poor little 19-month-old child, who was subjected to this horrific incident, was not hurt or killed during the course of this robbery.

It's amazing actually, given how many shots were fired, that law enforcement didn't just obliterate that car with gunfire. And had they, probably none of us would be here today because Mr. Smith and Ms. Morris and Mr. Jordan and that baby probably would've been killed.

This defendant willfully fired multiple rounds towards at least three pursuing law enforcement officers. This Court observes that the round that struck the police car was occupied by Officers Halsey and Christopher Rues. It just as easily could've struck

and killed either officer as, in fact, it did strike behind the front wheel well area.

Similarly, any of the defendant's multiple unaccounted for rounds could've easily struck and killed innocent bystanders or other law enforcement officers. Defendant Smith fired away in complete disregard for the lives of others. Mr. Jordan did the same, handing Mr. Smith his-- his weapon when Mr. Smith's bullets were expended.

After considering all of these factors, the Court again believes an upward departure and/or variance is warranted to account for the multiple lives, the intentional conduct, and the willfully placing all of these lives in jeopardy by the defendant's actions. Thus, the Court intends to sentence the defendant to a term of 180 months imprisonment on Count 1 and 120 months imprisonment on Count 2, to be served consecutively to Count 1, for a controlling sentence of 300 months, which is 25 years.

This imprisonment term is to be followed by a three-year term of supervised release on each count, to be served concurrently.

The Court believes that such a sentence is sufficient, but not greater than necessary, to reflect the seriousness of the offense, to promote respect for

the law, and to provide just punishment for the offense. Further, the sentence should afford adequate deterrence to criminal conduct and protect the public from further crimes of the defendant.

The term of supervised release, in addition to the imprisonment sentence, will allow the defendant the opportunity to receive correctional treatment in an effective manner and assist with community reintegration.

In light of Mr. Smith's inability to pay a fine, the Court intends to waive the fine amount. A $100 special assessment per count for a total of $200 is required pursuant to 18 U.S.C. Section 3013.

The Court intends to order that the preliminary order of forfeiture becomes final as to this defendant.

The Court intends to impose the mandatory and special conditions of supervision set forth in Part D of the presentence report. The mandatory conditions for drug testing and DNA collection are imposed pursuant to 18 U.S.C. Section 3583(d). Substance abuse treatment and mental health treatment conditions are deemed warranted in light of Mr. Smith's personal background. A special condition allowing for searches based upon reasonable suspicion is deemed warranted based on the

nature of the instant offense.

Mr. Smith has been in custody since the time of his arrest and he is not deemed a good candidate for voluntary surrender.

Are there objections by the government to the sentence as tentatively announced?

MR. OAKLEY: No, Your Honor.

THE COURT: Are there objections by the defendant to the sentence as tentatively announced?

MS. ROSS: Yes, Your Honor. Just our objections as they relate to the sentencing memorandum, we objected-- or we asked the Court not to impose the upward departures that government had posed to the Court. So we would object to those departures as tentatively announced.

THE COURT: All right. So for the record, your objection to the presentence report on the carjacking enhancement is preserved for appeal, as-- if there is a right of appeal on that, which I think there is. Well, I don't know the terms of the plea agreement. Was there a plea--

MS. ROSS: There's no plea agreement.

THE COURT: There's no plea agreement. So your objection to the presentence report is preserved for appeal, as is your objection to the Court's

announced upward departure and variance.

MS. ROSS: Thank you, Your Honor.

THE COURT: All right. Before I impose final sentence, are there any requests or allocution by you, Ms. Ross? And if Mr. Smith would like to address the Court directly in his own behalf, he can do so at this time.

Mr. Oakley, there are no victims that want to address the Court; is that correct?

MR. OAKLEY: That's correct.

THE COURT: Okay. Ms. Ross.

MS. ROSS: Yes, Your Honor. May we approach the podium?

THE COURT: Yes.

MS. ROSS: Your Honor, Jacob Smith stands before you today having pled guilty to the crimes that he has committed, having taken full responsibility for those crimes and prepared to accept the punishment that the Court intends to impose.

The Court is privy to the conditions of Mr. Smith's childhood and the circumstances leading up to the bank robbery. To the extent that defense counsel is aware of them, I'm quite sure Mr. Smith has experienced many things in his lifetime. And what we tried to do was just highlight the most important things so that the

Court could be aware of those and have an idea of what his mental state was at the time that he committed these heinous crimes and also what may have impacted his decision-making abilities at that time.

We appreciate the Court's consideration of the sentencing video, the memorandum, and the comparison that the Court made to Mr. Smith's co-defendant and Mr. Jordan's role and influence in these crimes.

Mr. Smith would like to address the Court, and he's going to do so here in just a minute. There are a couple of things that I think the Court will notice after hearing from Mr. Smith. The first is that Mr. Smith is sincerely remorseful for his crimes. He is very sorry about the effect his actions will have likely for a lifetime on the people who were in that bank, the cops that were involved in the high-speed chase, the child who was in the vehicle, the woman who was carjacked, on his family members and the people that he loves the most and the people who have supported him throughout his life and who will continue to support him, despite his prison sentence.

The other thing I'd like the Court to take note of is Mr. Smith's age. And not just his age, his mentality. And I mean that in two ways. When you speak to him, you will hear some things about his plans for

the future. And despite his crimes and despite his past experiences and despite the fact that he will be in jail, prison for the next two decades, if not more, his outlook on life and his perspective of his potential and what he can give to the world even after these circumstances is one that is positive.

The Court mentioned that his relatively low criminal history is a reflection of his age, and it is in the sense that obviously he's only 19 years old now and he was 18 years old at the time the crime was committed. And I-- I'd like to say that his age also contributes to the type of outlook he has on life. He understands that he has possibilities and he can change this thing around, even though he's going to be in jail for a long time. And that's something that he intends to do.

So whether the Court granted defense's request for a sentence around 18 years or for the government's request for a sentence of 30-plus years, his outlook is the same, which is he wants to use this opportunity to do something positive; to learn a trade, to go to school, to do something that will put him in a better position than he is now so that he can be successful in the community upon his return.

And I believe the Court's sentencing

objectives-- the Court would be able to meet its sentencing objectives if the Court imposed a sentence that the defense requested. However, we understand all of the factors that the Court has taken into consideration. And as I stated before, we appreciate the Court's consideration. And at this time, Mr. Smith would like to make a statement.

THE DEFENDANT: I want to start with a sincere apology to the bank tellers and their families and all of the officers-- officers that were on duty at the time and their families. I understand now that the officers might-- may have had families and their family could've had to see their-- see them in the ER or worse. I am truly so, so, so sorry. And I-- and I'm so sorry for that poor baby. And-- and my family and-- and I let them down and I keep hurting them. I'm so sorry they have to see me like this and that I'm going to miss out on a lot, but it's for the best.

And I'm so sorry to my co-defendants and their families and all that they're going through. I really am. I had a lot of time to think about all of this and a lot of praying and a lot of-- and a lot more praying and time to come. I accept full responsibility for my actions and I accept what's coming.

I won't make any excuses on my behalf. I'm

sure you have heard a lot of excuses. A lot of-- a lot of excuses. I only want to try and let you get to know me for who I am and what I've been through and not for what I did. You have heard-- you have heard about all the traumatic experiences I've been through and all the abuse. And there is a lot more darker things I have been through and seen. I can't even explain what I went through mentally.

And I was so lost and confused. I lost myself and I was not expected anywhere-- I was not accepted anywhere or wanted by anyone for the longest. And I had a bad problem of finding friends that say they're-- say they were-- say they was my friends and-- and they say that they cared, but they only used me and wanted to bring-- wanted to be a part of-- wanted only bad for me. I wanted to be a part of something and I got involved with some bad people, and I really regret it.

And they-- and they-- and led me down a-- a dark path. They saw that I want-- I would do anything to seek their approval and they used that to-- used that against me. And I-- I want to get out, I really do. And I-- I wanted to get out, I really did. I was just scared, mainly for my family's sake. I tried to get out, but it was already too late.

Before all this-- before all this and apart-- apart from all the abuse, I was a good kid. I was that kid that always hold-- hold doors for people, always wanted to help. I can walk in a room and see that everyone would be upset or just having a bad day, and I used to be that kid that put a smile on someone's face that-- like that. Any moment.

I just make mistakes a lot. Some really big ones. I really want to do better. I really do. And be better. So I-- I will use this time you give me, no matter how long, no matter what you give me, the high end or low end, I'll use it to my advantage. I want to get my GED, then take college courses and try to learn different trades. And I have already learned some Spanish. I learned a lot of Spanish since I've been down. I want to learn more languages. I want to keep feeding my-- my brain and feed my spiritual side.

I want to do all this so when I get out, I can start a youth program that will help kids like me that is on the verge of a bad path, especially-- explain to them my life story and show them a better way in the outcome of they-- if they don't. Show them that this road can only go two roads, dead or worse-- I mean, here or worse.

(Defense counsel and defendant confer).

THE DEFENDANT: The-- the program is going to be a long-term program. I had a lot of time to think about this. I don't want kids to end up like me and go through what I had to go through. You know, my dad used to tell me a hard head makes a soft butt, you know. And there's going to be kids that's a little hard-headed and I don't want them to have to learn the hard way, like I have to learn right now.

Each kid will be assigned a big brother or a big sister of their choice. And it will be long-term. They would be assigned to them for as long as they would like. You know, they can graduate college and still have them. They could have family, kids, married, and still have that big brother by their side or big sister by their side. It's-- it's-- and I want-- I want to get these kids-- I want to show them that there's more than the-- just the streets and there-- there is a way out. You don't got to be scared. I want to help them find the-- the trades that they want to do in their life and their dream. And I want to help them to pursue it. I want to help them follow through with it and not give up.

And there's no way any of the people that-- that will do this with me, that run with me, no one is ever going to give up on these kids, and they're going

to know that there is-- there is support and there is a better way. And I will-- I'll arrange a study hall for the kids and-- and tutor classes if they're having a hard time in school like-- like I used to.

I-- I couldn't read. I-- I had problems with-- with math and other things in school, other subjects. And I always got sidetracked and distracted. But now I-- I read five chapter books since I've been here. That is an amazing improvement on myself. I learned how to read so good, it brings me tears because I just know that like there's some really good books.

Anyways, I want-- I want to also get the kids to-- to have a-- like a side job or something, like a-- some small labor so they can learn responsibilities. And they'll get paid for it as well. And if they want to, there will be a-- a church like after-- after-- youth church and stuff, you know, pray and-- and Bible study and-- and all that for them.

And I-- I really want to learn-- learn some more trades myself so that that-- that program can help kids and-- and I can show them what I've been through. And also I'll find people that's on the same mentality as I am now, as a eye-opener on life and a point of view, and find motivated speakers to come speak to the kids as well. And I truly believe that I'm the best one

to do this because I've been there, I've done that. I'm living it right now and I'm going through these fires.

And I-- I know that no matter what the outcome is, whatever time you give me, it's-- it's the time that God sees fit for me to work on myself and work on my relationship with him. And I-- I have accepted it and I really truly am sorry to everyone that was involved in this.

That lady that got, you know, her car jacked and-- and the bank tellers, the officers, I mean, they-- they were only trying to get a paycheck, you know, and-- and, you know, and help others and-- and do better and I-- and their family. I couldn't imagine hearing my brother or my dad ended up in a hospital or dead because somebody wanted to shoot them. And I could've done that to them.

And I'm so-- I honestly think that God didn't just protect them from me though, I think that God protected me from myself, because I don't think I could've lived with that honestly. I really don't think I could live with that.

This is what I needed, an eye-opener. It sucks that I have to be so hard-headed, but that this is for the best. And thank you-- thank you for letting me speak on my behalf.

THE COURT: All right. Thank you, Mr. Smith. You can go sit down.

Is there any request, though, that you want to make, Ms. Ross, about designation or anything like that?

MS. ROSS: I do, Your Honor. I just request that Mr. Smith be sent to FCI El Reno. It's a BOP institution in El Reno, Oklahoma.

THE COURT: All right. All right. I will make that recommendation. I know that El Reno for one thing has a lot of trade programs available, and that will be good for Mr. Smith.

MS. ROSS: Yes, Your Honor.

THE COURT: Mr. Smith, you've obviously grown up a lot since this happened and you've had a lot of time for reflection. And that's not that unusual when people are held in custody pending the charges and all of that, and they get really kind of clear of mind, free of drugs, free of alcohol, time to really spend reflecting on who they are and who they were meant to be and who they want to be. And it sounds like you really have gone through a lot of that process.

You know, this is a difficult sentence to impose because you are young and you've had a lot of challenges and I've tried to come up with a sentence

that recognized that. At the same time, what you did, just as you know, placed so many people in risk of their lives and was such a dangerous thing and such a horrendous crime against the entire community, as you recognize. So I have to weigh all of those things.

Here's one thing-- and I really appreciate that you have put this much time and thought into how you would like to give back to the community once you're back in the community. You're not receiving a life sentence, you're going to go away for a long time, but as you recognize, that's a time that you can really use constructively and, you know, continue to strengthen your reading skills and get your GED, and then read and read and read and read.

And I'm so happy to hear that despite having some problems with reading, you're getting better and you're able to read lengthy books. Because the best way any of us learn is to read and teach ourselves. I mean, school is just-- school really is just meant to prepare us to teach ourselves for the rest of our lives, whether it's how to fix a faucet at home when it bursts or, you know, how to do a lot of other things, just practical things, as well as things that help us get jobs and do different things in life.

So I'm glad to know that you're already on

that path and encourage you to continue on that path. But you're going to come back out in the community and I'm really happy to hear that you are giving thought to how you want to give back to the community.

But here's what I want you to understand; that when you go into a prison, you're also entering a community. It's-- it's a life. It's a life with a lot of rules and regulations and restrictions, but it is a life and you can make the best of it. And one of the-- I think the first challenges you're going to have, wherever you go, because right now you're just at CCA or county jail, but wherever you go, is finding the right people to associate with.

Because just as you really want to turn your life around and do better and-- and build a constructive, happy, healthy life for yourself, there are other people in prison that are like that. And those are the people you want to connect with. Not the people like Gary Jordan, not the people that, you know, you connected with in the gang that you were in. I mean, those people, whether they're inside prison or outside of prison, are going to pull you down. They're going to hurt you. They're going to continue to help you damage yourself. And that's not who you want to be, that's not who you are.

So you're smart. You take kind of a measure when you go into the prison and figure out, okay, who are the people in here trying to do something for themselves, who are the people that want to come out of this thing and be a better person and get whatever they can get while they're here in terms of skills and education. And find those people. And some of them are going to be the older inmates, because sometimes it takes people into their 50s or 60s before they get smart like you've gotten smart about wanting to turn their lives around. All right?

So be very savvy and be very smart and figure out who to associate with, all right? Not a bunch of hotheads, not a bunch of people that are just in there to continue to commit crimes even within the Bureau of Prisons, because there's people that are going to be in there like that, too.

So I want you to stay focused on all the things you've talked to me about and all the things you read in your letter. But I also want you to be focused on how are you going to make this the best experience. And a lot of it has to do with who your peers are in prison, all right?

All right. The Court determines that the presentence investigation report as corrected or

modified by the Court and the previously-stated findings accurate and orders those findings incorporated in the following sentence:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Jacob Smith, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months on Count 1 and 120 months on Count 2, to be served consecutively to Count 1. I will recommend designation to El Reno, Oklahoma, because of the vocational training programs available that will really help Mr. Smith.

Upon release from confinement, Mr. Smith shall be placed on supervised release for a term of three years on each of Counts 1 and 2, to be served concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, Mr. Smith shall report in person to the probation office in the district in which he is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with the standard conditions that have been adopted by this Court, as well as the mandatory and special conditions of supervision previously stated by the Court.

Mr. Smith is ordered to pay to the United States a special assessment of $100 per count for a total of $200 through the clerk of the U.S. District Court. Payments on the assessment are to begin immediately and may be paid while in the Bureau of Prisons custody. The Court waives a fine in this case based on Mr. Smith's inability to pay.

Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, the Court orders that the preliminary order of forfeiture is now final as to Mr. Smith.

Mr. Smith is advised that it is your right to appeal the conviction and sentence. You can lose your right to appeal if you do not timely file a notice of appeal in the district court. Rule 4(b) of the Federal Rules of Appellate Procedure gives you fourteen days after the entry of judgment-- and the entry of judgment will probably be today, so it gives you up until 14 days after today to file a notice of appeal.

If you request, the Clerk of the Court shall immediately prepare and file a notice of appeal on your behalf. And if you are unable to pay the cost of an appeal, you have the right to apply for leave to appeal in forma pauperis.

All right. Mr. Oakley, I show that the

underlying two-count indictment is subject to dismissal. Was there an original indictment and then a superseding?

MR. OAKLEY: Yes, Your Honor, that is correct.

THE COURT: All right. So the original indictment is subject to dismissal and will be dismissed at this time.

MR. OAKLEY: Yes.

THE COURT: I'll remand Mr. Smith to the custody of the U.S. Marshals Service pending designation by the Federal Bureau of Prisons. And I wish you the best, Mr. Smith.

(11:04 a.m., proceedings recessed).

FILED
United States Court of Appeals
Tenth Circuit

July 6, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JACOB L. SMITH,

Defendant - Appellant.

No. 17-3086
(D.C. No. 2:16-CR-20022-JAR-1)
(D. Kan.)

ORDER

Before **LUCERO**, **BALDOCK**, and **HARTZ**, Circuit Judges.

This matter is before the court on the appellant's *Petition for Rehearing En Banc*. Upon consideration, panel rehearing is granted in part and for the limited purpose of adding a new citation to the decision. Panel rehearing is otherwise denied. A copy of the revised and amended Order & Judgment is attached to this order and shall be filed effective today's date.

The *Petition* was also circulated to all of the judges of the court who are in regular active service. As no judge on the panel or the en banc court requested that a poll be called, the request for en banc reconsideration is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk