No. 18-6237

IN THE SUPREME COURT OF THE UNITED STATES

JACOB L. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL N. LERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly reviewed for plain error petitioner's claim that the district court inadequately explained the sentence that it imposed, when petitioner failed to object in the district court to that explanation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 730 Fed. Appx. 710.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2018. The petition for a writ of certiorari was filed on October 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of 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). Pet. App. 1a. The district court sentenced petitioner to 300 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-4a.

1. In March 2016, petitioner and co-defendant Gary Jordan robbed at gunpoint the First National Bank in Stilwell, Kansas. Presentence Investigation Report (PSR) ¶ 11. During the robbery, petitioner pointed a handgun at the bank tellers while the tellers loaded cash into a backpack. PSR ¶ 16. As he left the bank, petitioner also pointed the handgun at bystanders in the parking lot. PSR ¶ 15. Petitioner and Jordan then fled in a car with another co-defendant, Danille Morris, and her 19-month-old daughter. PSR ¶¶ 11, 13. State and local police officers soon located the car and tried to stop it, but Jordan led them on a more than 20-mile chase over highways and local roads, at times at speeds over 100 miles per hour. PSR ¶¶ 18-23. During the chase, petitioner fired multiple shots at pursuing officers, one of which hit a patrol car, and fired multiple shots in the direction of a shopping center. PSR ¶¶ 20-22.

Jordan eventually crashed the car into a guardrail, which caused it to flip. PSR ¶ 23. After the car crashed, petitioner ran a short distance before surrendering to the pursuing officers. PSR ¶ 25. Officers then found multiple handguns, ammunition, and the money stolen from the bank in and around the crashed car. PSR ¶ 28.

2. A federal grand jury returned an indictment charging petitioner with 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). Superseding Indictment 1-2. Petitioner pleaded guilty to both counts, without a plea agreement. Pet. App. 1a; PSR ¶ 8.

Before sentencing, the Probation Office calculated an advisory Sentencing Guidelines range of 97 to 121 months of imprisonment for the armed-robbery count and a statutory minimum consecutive sentence of 120 months for the Section 924(c) count. Pet. App. 2a. The government requested an above-Guidelines total sentence of 382 months of imprisonment, noting that petitioner had fired at multiple law-enforcement officers, that he had endangered the life of Morris's child, and that Jordan (who had not fired a gun) had received 360 months of imprisonment. Gov't Sent. Mem. 10-13. Petitioner, meanwhile, sought a sentence of 217 months, at the bottom of the guidelines range. Pet. Sent. Mem. 10.

The district court held a sentencing hearing. Pet. App. 5a-31a. At the start of the hearing, the court explained that it had

considered the parties' written submissions and would "start by announcing the following proposed findings of fact and a tentative sentence." Id. at 5a. It would then "hear further from the parties." Ibid. The court laid out the advisory guidelines range on the armed-robbery count and announced that it would vary upward and impose a 180-month sentence for that count. Id. at 6a. Combined with the statutory minimum consecutive sentence of 120 months for the Section 924(c) count, the court announced that it would impose a total sentence of 300 months -- above the guidelines range, but below the sentence requested by the government. Id. at 5a-6a.

The district court explained that it was "required to impose a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing identified in" 18 U.S.C. 3553(a). Pet. App. 6a-7a. It then identified a number of factors that justified the imposition of a 300-month sentence here. Id. at 7a-13a. In particular, the court explained that an above-Guidelines sentence was warranted because petitioner's conduct was intentional, and not just reckless; because petitioner put several law-enforcement officers' lives at risk; and because, in addition to threatening the lives of the bank tellers and customers, petitioner's conduct threatened the lives of numerous civilians during the car chase. Id. at 7a-9a, 11a-13a. The court described petitioner's offense as "a very egregious and unusual bank robbery" and emphasized petitioner's "highly dangerous and highly violent

conduct." Id. at 8a-10a. The court observed that petitioner "not only put at risk the people who were inside the bank, the tellers and the customers, but * * * the conduct escalated." Id. at 11a.

The district court nevertheless announced that it would not impose a sentence as high as that recommended by the government. Pet. App. 9a-10a. It noted that petitioner had a long history of mental illness and that he was influenced by his co-defendant Jordan, reasoning that it would be "appropriate that [petitioner] receive, while a great sentence, not a sentence quite as high as his co-defendant Gary Jordan." Id. at 10a. After again describing the circumstances of the crime that justified an above-guidelines sentence, id. at 11a-13a, the court reiterated that it planned to impose a sentence of 300 months of imprisonment, to be followed by three years of supervised release, id. at 13a. The court then described other details of the sentence, including the waiver of a fine, a final order of forfeiture, and the conditions of supervision. Id. at 14a-15a.

The district court then asked if there were "objections * * * to the sentence as tentatively announced." Pet. App. 15a. The government did not object. Ibid. Petitioner's counsel responded, "[j]ust our objections as they relate to the sentencing memorandum," namely, to the upward "departures as tentatively announced." Ibid. Counsel did not object to the adequacy of the district court's explanation for the sentence. She instead stated

that she "appreciate[d] the Court's consideration" of the sentencing factors, including "Jordan's role and influence in these crimes." Id. at 17a. Petitioner's counsel also stated that she believed "the Court would be able to meet its sentencing objectives if the Court imposed a sentence that the defense requested" but that she "underst[ood] all of the factors that the Court has taken into consideration" and "appreciate[d] the Court's consideration." Id. at 19a.

After petitioner's allocution, the district court "determine[d] that the presentence investigation report as" modified by the court's previously stated findings was accurate, and it "order[ed] those findings incorporated." Pet. App. 28a-29a. The court sentenced petitioner, as it had previously indicated, to 180 months of imprisonment on the armed-robbery count and 120 months of imprisonment on the Section 924(c) count, to be served consecutively and to be followed by a three-year term of supervised release. Id. at 29a.

4. a. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-4a.

As relevant here, petitioner contended that the district court failed to provide an adequate explanation for its sentencing decision. Pet. App. 2a. The court of appeals observed that petitioner did not make that objection in the district court, even though the district court "ask[ed] for objections after tentatively announcing its sentencing decision." Id. at 2a-3a.

The court thus reviewed petitioner's procedural challenge for plain error. Id. at 3a.

The court of appeals determined that the district court's explanation "was not plainly inadequate." Pet. App. 3a. The court of appeals observed that the district court had "noted the mitigating and aggravating factors the parties had cited" and had found that an above-Guidelines sentence (but not the higher sentence that the government had requested) was appropriate in light of petitioner's "age, the influence his co-defendants had over him, his history of mental health problems, and the dangerous nature of his conduct." Ibid.

b. Petitioner moved for rehearing en banc. See Pet. App. 32a. The court of appeals granted panel rehearing "in part and for the limited purpose of adding a new citation to the decision." Ibid. The panel added the following language to its revised 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).

Id. at 3a.

ARGUMENT

Petitioner contends (Pet. 1-24) that the court of appeals erred in applying plain-error review to his claim that the district

court did not adequately explain its sentencing decision, notwithstanding his failure to object in the district court to that explanation. Petitioner's contention lacks merit. And although some disagreement exists in the courts of appeals about what suffices to preserve a sentencing challenge for appeal, that division is not as widespread as petitioner suggests, and this Court has repeatedly declined to review the question presented. In any event, this case would be a poor vehicle for considering that question because the district court expressly offered petitioner's counsel an opportunity to object and because the court's explanation for its sentence was adequate under any standard of review.

1. a. In order to preserve a claim for appellate review, a defendant must object to an allegedly erroneous district court ruling at the time the ruling "is made or sought," and must inform the district court "of the action the [defendant] wishes the court to take, or the [defendant's] objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). A claim that is not preserved in that manner is subject to review only for plain error. Fed. R. Crim. P. 52(b). Because petitioner did not inform the district court that he believed the court's explanation was inadequate under 18 U.S.C. 3553(c), the court of appeals correctly reviewed for plain error petitioner's belated claim that the district court failed to adequately explain its sentencing decision.

In United States v. Vonn, 535 U.S. 55 (2002), this Court applied plain-error review to a claim that a trial court had failed to conduct an adequate guilty-plea colloquy. The Court explained that "the point of the plain-error rule" is "always" that "the defendant who just sits there when a mistake can be fixed" cannot "wait to see" whether he is satisfied with the judgment, and, if not, complain to the court of appeals. Id. at 73. Instead, a defendant must raise a contemporaneous objection, which ensures that "the district court can often correct or avoid the mistake." Puckett v. United States, 556 U.S. 129, 134 (2009); see Vonn, 535 U.S. at 72 (noting the benefits of "concentrat[ing] * * * litigation in the trial courts, where genuine mistakes can be corrected easily").

The reasons for requiring a contemporaneous objection under Federal Rule of Criminal Procedure 51(b) apply with full force to claims like petitioner's. Contrary to petitioner's suggestion (Pet. 19-20), a district court that is alerted to the possibility that a defendant views its explanation as insufficient may well supplement that explanation. Even a court that believes its existing explanation already suffices may choose to add more detail to satisfy an inquiring defendant or to obviate the need for an appeal and potential remand. A deficient explanation is thus precisely the sort of error that can be, and should be, corrected by the district court in the first instance. Indeed, in United States v. Booker, 543 U.S. 220 (2005), this Court confirmed that

the courts of appeals would continue to apply "ordinary prudential doctrines, * * * [such as] whether the issue was raised below and whether it fails the 'plain-error' test," when reviewing an advisory Guidelines sentence for reasonableness. Id. at 268.

b. Petitioner nevertheless contends (Pet. 17) that the court of appeals' application of plain-error review conflicts with Rule 51(a) of the Federal Rules of Criminal Procedure. That contention lacks merit.

Rule 51(a) provides that "[e]xceptions to rulings or orders of the court are unnecessary." Fed. R. Crim. P. 51(a). As petitioner notes (Pet. 17), the Seventh Circuit has stated that "the rules do not require a litigant to complain about a judicial choice after it has been made," because "[s]uch a complaint is properly called, not an objection, but an exception." United States v. Bartlett, 567 F.3d 901, 910 (2009), cert. denied, 558 U.S. 1147 (2000). But as the Seventh Circuit has also made clear, "Rule 51(a) applies to issues that were raised before a judicial ruling," obviating any need to raise them again after the ruling. United States v. Brown, 662 F.3d 457, 461 n.1 (2011), judgment vacated, 567 U.S. 949 (2012); see Bartlett, 567 F.3d at 910 (explaining that "what Rule 51(a) says" is that "when an issue is argued before the judicial ruling, counsel need not take an exception once the court's decision has been announced"). Rule 51(a) thus does not excuse a defendant, like petitioner here, who fails to raise an issue at all.

To the contrary, Rule 51(b) instructs that a party "preserve[s] a claim of error by informing the court -- when the court's ruling is made or sought -- of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b) (emphasis added). Thus, as the Seventh Circuit has explained, where a "litigant did not have an opportunity to argue the point earlier," Rule 51(b) "requires a protest immediately after the ruling." Bartlett, 567 F.3d at 910. Rule 51 thus required petitioner to object at some point.

Petitioner asserts (Pet. 20) that his situation falls within the exception in Rule 51(b) that, "[i]f 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." Fed. R. Crim. P. 51(b). But Rule 51(b) does not, as petitioner suggests (Pet. 20-21), require a court to affirmatively invite a defendant to object when the district court makes a ruling in open court. See United States v. Hunter, 809 F.3d 677, 682 (D.C. Cir.), cert. denied, 136 S. Ct. 2495 (2016). Instead, it applies when a defendant is practically unable to object -- for example, when an issue arises "for the first time in [the court's] final written judgment," United States v. Bull, 214 F.3d 1275, 1278 (11th Cir.), cert. denied, 531 U.S. 1056 (2000), or when a "court cut[s] defense counsel's argument short, [and] preclude[s] further argument," United States v. Fernandez-Garay, 788 F.3d 1, 4 (1st Cir. 2015).

Petitioner had ample opportunity to object to the district court's explanation at the sentencing hearing, and simply failed to do so.

In any event, the district court in this case did affirmatively invite petitioner to object to any aspect of the court's sentence or sentencing explanation. The court made clear that it would explain its tentative sentence and then "hear further from the parties." Pet. App. 5a. After explaining its rationale for the sentence, see id. at 5a-15a, the court specifically asked if there were "objections by the defendant to the sentence as tentatively announced." Id. at 15a. Petitioner's counsel then objected "[j]ust" to the sentence that the court announced, but not to the court's explanation for that sentence, which she instead "appreciate[d]." Ibid. Although petitioner contends that "what is important is the 'final' sentence," not the "tentative" sentence, the only thing that made the district court's sentence tentative was the fact that the court expressly provided the defendant the subsequent opportunity to object -- the very opportunity petitioner says he was denied. Pet. 21 (citation omitted). Indeed, petitioner's counsel apparently recognized as much, as she objected to the length of the sentence but not to its procedural reasonableness. See Pet. App. 15a.

c. Finally, petitioner notes (Pet. 17-18) that, where a defendant argued for a sentence different from the one imposed by the court, he need not object to the substantive reasonableness of that sentence to preserve the issue for appeal. Petitioner

contends (Pet. 18) that "no plausible reason" exists for applying that rule "only to the length of the imposed sentence," and not to the adequacy of the court's explanation for that sentence.

That argument fails to "appreciate the difference between a challenge to the substantive reasonableness of the sentence and a challenge to its procedural reasonableness." United States v. Flores-Mejia, 759 F.3d 253, 256 (3d Cir. 2014) (en banc). When a defendant argues for a given sentence and the district court imposes a different sentence, the defendant has already put the court on notice of his objection to the length of the sentence and so -- in accord with Rule 51(a) -- need not repeat that objection after the court announces the sentence. In contrast, a defendant necessarily has not objected to the adequacy of the court's explanation of the sentence before that explanation is provided. See id. at 257. Thus, under Rule 51(b), the defendant must lodge such an objection after the court provides the explanation in order to inform the court of the objection, allow the court potentially to address it, and preserve it for appellate review.

2. Petitioner contends (Pet. 11-15) that the court of appeals' application of plain-error review to his claim of procedural sentencing error conflicts with decisions of other courts of appeals. Although some disagreement exists in the courts of appeals about whether an unpreserved challenge to the adequacy of a district court's sentencing explanation is reviewed for plain

error, that disagreement is narrower than petitioner suggests and does not warrant this Court's review.

a. A clear majority of the courts of appeals agree that plain-error review applies when a defendant fails to object to the district court's failure to explain a sentence. See Flores-Mejia, 759 F.3d at 256 (3d Cir.); United States v. Rice, 699 F.3d 1043, 1049 (8th Cir. 2012); United States v. Rangel, 697 F.3d 795, 805 (9th Cir. 2012), cert. denied, 568 U.S. 1162 (2012); United States v. Corona-Gonzalez, 628 F.3d 336, 340 (7th Cir. 2010); United States v. Wilson, 605 F.3d 985, 1033-1034 (D.C. Cir.) (per curiam), cert. denied, 562 U.S. 1116, and 562 U.S. 1117 (2010); United States v. Mondragon-Santiago, 564 F.3d 357, 361 (5th Cir. 2009), cert. denied, 558 U.S. 871 (2009); United States v. Mangual-Garcia, 505 F.3d 1, 15 (1st Cir. 2007), cert. denied, 553 U.S. 1019 (2008); United States v. Vonner, 516 F.3d 382, 385-386 (6th Cir.) (en banc), cert. denied, 555 U.S. 816 (2008); United States v. Villafuerte, 502 F.3d 204, 211 (2d Cir. 2007).

Petitioner incorrectly attempts to carve off four circuits from that clear majority. He contends (Pet. 14) that the Sixth, Seventh, and D.C. Circuits stand apart from the others by holding that a procedural-error claim is preserved whenever the district court failed to provide the parties a specific opportunity to object to the adequacy of its explanation. He further contends (ibid.) that the Ninth Circuit similarly "inquires" into whether a party had the opportunity to object as part of determining

whether a claim is preserved in the absence of such an opportunity. Those contentions are incorrect, and those courts of appeals adhere to the general rule that an objection is required.

Only the Sixth Circuit automatically considers a claim preserved when a district court does not invite objections after announcing a sentence -- and it has done so through a "new procedural rule" imposed on district courts as an "exercise of [its] supervisory powers over the district courts," not an interpretation of the Federal Rules of Criminal Procedure. United States v. Bostic, 371 F.3d 865, 872 (2004). As this Court has explained, such variation among the courts of appeals' procedural practices does not warrant this Court's review. See, e.g., Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993). And in any event, the district court in this case complied with the Sixth Circuit's procedural rule because it expressly asked whether petitioner had any objections to his sentence. See p. 12, supra.

Although the Seventh, Ninth, and D.C. Circuits have encouraged district courts to provide specific opportunities for objection, they have not adopted the rule that petitioner advances. The D.C. Circuit has stated that the "best procedure" would be to provide such an opportunity, but recognizes that "plain error review ordinarily applies" so "long as there is a fair opportunity to register an objection." Hunter, 809 F.3d at 683 (citation and quotation marks omitted). The Seventh Circuit likewise "encourage[s] sentencing courts to inquire of defense counsel

whether they are satisfied that the court has addressed their main arguments in mitigation," United States v. Garcia-Segura, 717 F.3d 566, 569, cert. denied, 571 U.S. 1035 (2013), but has engaged in plain-error review without such an inquiry, see Corona-Gonzalez, 628 F.3d at 340. The Ninth Circuit has in one case observed that the defendant had an opportunity to raise any objections, see United States v. Vanderwerfhorst, 576 F.3d 929, 934 (2009), but it, too, has not limited plain-error review to cases in which objections were invited, see Rangel, 697 F.3d at 800. And petitioner identifies no decision of any of those courts that declines to apply plain-error review where, as here, the district court did invite objections.

b. As petitioner correctly notes (Pet. 13-14), the Fourth and Eleventh Circuits have not required a contemporaneous objection to preserve a claim that the district court provided an inadequate explanation of its sentence. But any disagreement does not warrant this Court's review.

The Eleventh Circuit has stated that the "question of whether a district court complied with 18 U.S.C. § 3553(c)(1) is reviewed de novo, even if the defendant did not object below." United States v. Bonilla, 463 F.3d 1176, 1181 (2006) (citing United States v. Williams, 438 F.3d 1272, 1274 (11th Cir.) (per curiam), cert. denied, 549 U.S. 891 (2006)). But both Bonilla and Williams were decided before this Court laid out the distinct procedural and substantive components of reasonableness review in Gall v. United

States, 552 U.S. 38 (2007), and Rita v. United States, 551 U.S. 338 (2007). Moreover, Williams relied on pre-Booker circuit precedent inconsistent with Booker's instruction that courts should apply "ordinary prudential doctrines," 543 U.S. at 268, including plain error, when reviewing sentences. In light of this Court's elaboration of reasonableness review, the court of appeals could still revisit its decisions and bring its practice in line with the majority of the circuits.

The Fourth Circuit's decision in United States v. Lynn, 592 F.3d 572 (2010), treated a claim of procedural error as preserved without a separate objection. See id. at 578 ("By drawing arguments from § 3553 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."). But this Court has repeatedly declined to review that issue following the decision in Lynn. See, e.g., Rangel v. United States, 568 U.S. 1182 (2012) (No. 12-8088); Reyes v. United States, 568 U.S. 1030 (2012) (No. 12-5032); Villarreal-Pena v. United States, 565 U.S. 1236 (2012) (No. 11-7084); Satchell v. United States, 565 U.S. 1204 (2012) (No. 11-6811); McClain v. United States, 565 U.S. 1159 (2012) (No. 11-5738); Alcorn v. United States, 565 U.S. 1159 (2012) (No. 11-5024); Mora-Tarula v. United States, 565 U.S. 1156 (2012) (No. 10-11209); Williams v. United States, 565 U.S. 931 (2011) (No. 10-9941); Hoffman-Portillo v.

United States, 565 U.S. 918 (2011) (No. 11-5656); Wilson v. United States, 562 U.S. 1116 (2010) (No. 10-7456); Vonner v. United States, 555 U.S. 816 (2008) (No. 07-1391). Petitioner identifies no reason for a different result here.

3. In any event, even if the question presented warranted review, this case would be a poor vehicle in which to address it.

First, to the extent petitioner would urge the adoption of a rule under which plain-error review is inapplicable unless the district court provides an express opportunity for an objection, see Pet. 11, such a rule would afford him no relief. As previously explained, the district court expressly offered petitioner the opportunity to object, and in response petitioner objected only to the length of the sentence and not to the adequacy of the court's explanation. See p. 12, supra; see also Pet. App. 5a, 15a. Indeed, petitioner's counsel acknowledged that, based on the court's explanation, she "underst[ood] all of the factors that the Court ha[d] taken into consideration" and she "appreciate[d] the Court's consideration" of those factors. Pet. App. 17a, 19a. This Court should not consider petitioner's arguments about the need for an opportunity to object when the record so clearly indicates that such an opportunity was provided to him.

Second, this Court's resolution of the question presented would not affect the outcome of this case because the district court's explanation of petitioner's sentence was adequate under any standard of review. After announcing the sentence that it

planned to impose, the district court described at length how it "reached" that sentence. Pet. App. 7a. Citing the Guidelines and Section 3553, the court explained that it would depart upward to account for (1) petitioner's intentional conduct; (2) the number of victims or potential victims, particularly the many civilians placed at risk by the daytime car chase in residential neighborhoods; and (3) the number of law-enforcement officers at whom petitioner fired during the chase. Id. at 7a-10a. Those considerations led the court to determine that "[t]his was a very egregious and unusual bank robbery" for which an above-Guidelines sentence was appropriate. Id. at 8a.

The district court also explained why it nevertheless would not give petitioner a sentence as high as the government had recommended. Pet. App. 9a-10a. The government had argued that petitioner should receive a sentence higher than his co-defendant Jordan because petitioner "was the one that was shooting." Ibid. But the court determined that petitioner should receive a lower sentence than Jordan because Jordan was a career criminal, was much older than petitioner, provided the weapons that petitioner used, and exercised great influence over petitioner. Id. at 10a. The court further noted that petitioner "has a long history of mental illness" and "was under the influence of a highly dangerous man in Mr. Jordan." Ibid. For those reasons, the court explained, petitioner should "receive, while a great sentence, not a sentence quite as high as his co-defendant Gary Jordan." Ibid.

The district court then reiterated the "[e]xtremely dangerous conduct associated with the actions of all of the defendants in this case," including petitioner. Pet. App. 10a-11a. Specifically, the court recounted that petitioner had robbed a bank at gunpoint and had pointed a gun at two customers in the parking lot, further escalating the situation. Id. at 11a. The court noted that it was a "miracle that no one was killed in a car accident" during the 100-mile-an-hour chase through congested traffic areas, ibid., and that it was likewise a "miracle" that Morris's "19-month-old child, who was subjected to this horrific incident, was not hurt or killed during the course of this robbery," id. at 12a. The court also emphasized that petitioner had "willfully fired multiple rounds towards at least three pursuing law enforcement officers," striking one patrol car, ibid.; that he had "fired away in complete disregard for the lives of others," using a second weapon after he exhausted the bullets from the first, id. at 13a; and that he could have "easily struck and killed innocent bystanders or other law enforcement officers," ibid. The court concluded that, "[a]fter 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." Ibid.

That balanced explanation, accounting for both aggravating and mitigating circumstances, more than suffices to "allow for

meaningful appellate review" of the district court's sentence. Gall, 552 U.S. at 50. Petitioner cannot demonstrate that any other court of appeals would have deemed that explanation inadequate under any standard of review. As a result, the application of plain-error review was not outcome-determinative in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL N. LERMAN
Attorney

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