No. _____

In the
Supreme Court of the United States

OREE ROBERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

PETER FLEURY
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR ST., ROOM 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the defendant bears the burden to establish that objected to information in the Presentence Report is materially untrue, or whether, instead, the government bears the burden of supporting such information, and whether this court should correct the circular position of the Fifth Circuit that holds that a conclusion in the PSR is itself evidence that supports the same conclusion in the PSR?

II. This Court should grant *certiorari* to resolve the apparent conflict between the Fifth Circuit and this Court's decision in *Chavez-Meza v. United States*, 138 S.Ct. 1959 (2018), as a well a split in circuit authority regarding the standard of review when a district court fails to address arguments of counsel in mitigation of sentencing.

PARTIES TO THE PROCEEDING

Petitioner is Oree Roberson, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CASES

STATUTES

RULES

MISCELLANEOUS

UNITED STATES SENTENCING GUIDELINES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Oree Roberson respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's sentencing decision was documented in a written judgment, reprinted as Appendix A. The opinion of the court of appeals was unreported, and is reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

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

> (a) **Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . .

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code,

> subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

1. Proceedings in the trial court

This is a criminal case on direct appeal. On July 12, 2019, Mr. Roberson was charged by information with one count of distribution of a controlled substance, to wit: methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(C). On July 19, 2017, Mr. Roberson pleaded guilty to that charge.

The presentence report, (hereinafter: PSR), found that Roberson had a base offense level of 28, based on the amount of actual methamphetamine, and that a two level enhancement applied based on a finding that Mr. Roberson possessed a firearm on February 27, 2017. The PSR applied a 3 level reduction for timely acceptance of responsibility, resulting in a total offense level of 27. The PSR found that Mr. Roberson's criminal history category was level VI resulting in a guidelines range of 130-162 months. The PSR advised the court could consider an upward departure of upward variance based on the defendant's criminal history.

The two level enhancement for the firearm was based on the following findings in the PSR:

- a confidential source asserted that Roberson was "known" to possess a firearm on his person and/or in his Honda during drug transactions;
- an undercover ATF agent stated that during a drug transaction with Mr. Roberson on February 7, 2017, Mr. Roberson embraced the agent and the

agent felt a bulge which he described as a "bulge of a firearm" protruding from Mr. Roberson's waste band;

- the agent advised that Mr. Roberson said that he would attempt to obtain a firearm to sell to the agent, but Mr. Roberson advised he was unable to obtain any firearm.

However, neither the confidential source nor the agent ever asserted that they ever saw a firearm on or near Mr. Roberson. There was no evidence as to the basis for the confidential source's statement that Mr. Roberson was "known" to carry a firearm, including the source of the "knowledge," the credibility of the source, or the the staleness of the "knowledge." When Mr. Roberson was arrested no firearm was present. Nor was there any explanation as to how a person could determine from an embrace that an object in a waste band was in fact a firearm. No firearm was recovered at any time. The government, whose burden it was to prove the enhancement, did not produce the agent as a witness.

Mr. Roberson's attorney objected "to the two-level enhancement in Paragraph 35, because the facts set forth in the PSR do not support a finding, by a preponderance of the evidence, that he possessed a firearm on February 7, 2017." Mr. Roberson's objection further stated:

> The only support for this enhancement is information from an unidentified source, whose reliability is unknown and who was not interviewed by the Probation Officer, that Mr. Roberson "was known to possess a firearm on his person and/or in his [car] during drug transactions," PSR ¶ 8, and the statement from an ATF agent that the agent felt a bulge when he embraced Mr. Roberson on February 7, 2017, *id.* ¶ 11. Neither the ATF agent nor the

> unidentified source state that they saw Mr. Roberson with a firearm on February 7, 2017, or at any other point. The bulge the ATF agent felt could have been any number of things. For example, if Mr. Roberson carried a small towel in his waist to dry sweat from his face, someone embracing Mr. Roberson would feel a bulge in his waistband. Without visual confirmation about the presence of a gun, the § 2D 1.1(b)(1) enhancement should not apply here.
>
> Moreover, the PSR tries to support the enhancement by citing a discussion between Mr. Roberson and an ATF agent about the potential sale of some firearms. See PSR ¶ 35. As the PSR notes, that transaction did not happen on February 7, 2017, or at any other point. *See id.;see also id.* ¶ 19. But a discussion about firearms is not enough to support the enhancement. Instead, for the enhancement to apply, the firearm needs to be present. U.S.S.G. § 2Dl.l(b)(l), Application Note 1 l(A) ("The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.").

The government responded to the objection, and argued that the evidence did suffice to support the finding that Mr. Roberson possessed a firearm on February 7, 2017, by reiterating that a confidential source had reported that Mr. Roberson was "known" to possess a firearm during drug transactions, and that based upon his experience the agent "believed" the bulge he felt to be a firearm.

An addendum the PSR was issued, and it persisted in its findings, albeit changing the confidential source's description from Mr. Roberson was "known" to carry a firearm during a drug transaction to Mr. Roberson "always" carried a gund during a drug transaction, despite the extreme unlikelihood of the confidential source knowing that unless he or she were part of every drug transaction involving Mr. Roberson, and were able to determine the existence of a firearm that was in all likelihood, concealed.

Mr. Roberson renewed his objection to the enhancement at sentencing. Despite the fact that the government offered no evidence in support of this enhancement at sentencing, the district court overruled the objection, finding there was not "any question . . . that the two level enhancement was appropriate . . ." for the reasons set out in the PSR and by the government. This ruling is the basis of the first issue.

On October 2, 2017, Mr. Roberson filed a Motion for Downward Variance. He argued: 1) "the Methamphetamine Guidelines erroneously equate increased drug purity with increased culpability, and (2) the Drug Trafficking Guidelines were not based on empirical evidence, but rather, statutory directives." He concluded: "These reasons support a four level downward variance adequately to reflect the seriousness of the offense and to avoid sentencing disparities among similarly-situated defendants. See 18 U.S.C. § 3553(a)(2)(A), (a)(6)."

The Motion was eight pages long and detailed the reasons behind the Motion. Mr. Roberson pointed out that the drastically heightened guideline ranges based on a test for actual methamphetamine are flawed because they are based on premise that higher purity equates to higher culpability. The flaw is that this premise is no longer true. Almost ALL methamphetamine is 90% pure. Mr. Roberson also pointed out that the result of the reliance on purity is irrational sentencing disparity. According to the Sentencing Commission, the purity of the methamphetamine is tested in only 36.8% of the cases. "Indeed," Mr. Roberson continued, "the lab report in this case increases Mr. Roberson's

initial Guidelines range from 92 to 115 months7 to 130 to 162 months." Mr. Roberson added that another district judge in the Fort Worth Division of the Northern District of Texas "has made it a practice to downwardly vary from the Guidelines based on the 'meaningless' differentiation the Guidelines create between methamphetamine mixture and methamphetamine actual." Mr. Roberson quoted the other district judge, Judge Terry R. Means, as follows:

> I intend to count meth and meth actual the same, because you're talking about the same exact ingredient. All of the methamphetamine being taken now is 90 something percent or 80 something percent. **There is no real rational basis for the differentiation any more**. So it will be my habit . . . to conclude that this differentiation is just as irrational or more than the crack and powder cocaine differentiation we had for years.

(emphasis added)

Finally, Mr. Roberson explained the guideline ranges for methamphetamine were crafted in response to Congressional directives and were not the result of the Sentencing Commission's careful study, and thus suffered the same flaws and resulted in the same irrational disparities as did the "crack" cocaine guideline ranges.

In response to this carefully crafted, obviously non-frivolous argument, the district court said nothing. Mr. Roberson re-urged his Motion for Downward Variance at the sentencing hearing. Still, the district court said nothing.

Mr. Roberson objected to the sentence as being both substantively and procedurally unreasonable.

2. The appeal

On direct appeal to the Fifth Circuit, Petitioner contended that the district court clearly erred in finding by a preponderance of the evidence that Mr. Roberson possessed a firearm based solely on a "bulge." He pointed out that the government must prove sentencing enhancements by a preponderance of the evidence. He pointed out that there was no record of anyone ever having seen Mr. Roberson with a firearm, that neither the confidential source nor the agent ever asserted that they ever saw a firearm on or near Mr. Roberson, and that there was no evidence as to the basis for the confidential source's statement that Mr. Roberson was "known" to carry a firearm including the source of the "knowledge," the credibility of the source, the basis of the "knowledge," or the the staleness of the "knowledge." Furthermore, when Mr. Roberson was arrested no firearm was present. Nor was there any explanation as to how a person could determine from an embrace that an object in a waste band was in fact a firearm. As is common knowledge, the most highly trained law enforcement officers routinely mistake innocuous items for firearms, even when the consequences are lethal. *See, e.g.,* Connor, Anabel, *Harmless Objects Police Officers Have Mistaken for Guns*, https://www.ranker.com/list/objects-mistaken -for -guns/anabel-conner, (detailing such items as a hairbrush or a bible as items mistaken for firearms by trained police), The Root Staff, *This Is Not a Gun: So, Officers, Stop Shooting Unarmed Black Men*, https://www.theroot.com/this-is-not-a-gun-so-officers-stop-shooting-

unarmed-1790877288, (likewise detailing innocuous objects mistakenly found by trained police to be firearms). Indeed, no firearm was recovered when Mr. Roberson was arrested, nor at any time. The government, whose burden it was to prove the enhancement, did not produce the agent as a witness.

No gun was recovered, there is no evidence a gun was ever seen in Mr. Roberson's possession, and the source of the information that Mr. Roberson was "known" to carry a firearm was not revealed. The credibility of that source was not revealed nor was the staleness of that information revealed. In sum, the government failed to meet it burden by producing a preponderance of the evidence, and the district court clearly erred in finding there was a preponderance of evidence that Mr. Roberson possessed a firearm on February 7, 2017.

The Fifth Circuit held:

> Roberson did not show that the PSR lacked sufficient indicia of reliability or present any evidence to establish that the information in the PSR was "materially untrue." *See United States v. Nava*, 624 F.3d 226, 230-31 (5th Cir. 2010). In view of the information obtained from the confidential source and the undercover agent, the district court's finding that Roberson possessed a firearm was plausible in light of the record as a whole. *See United States v. Romans*, 823 F.3d 299, 317 (5th Cir. 2016).

Appx. B., p.2. The Fifth Circuit in *Nava* held that the conclusions in the presentence report are itself evidence upon which the district court can rely upon to support those very same conclusions. *Id.*

In this case, the Fifth Circuit also ruled that, because Mr. Roberson did not lodge an objection to the district court's for not giving reasons for denying the motion for downward variance, the issue was reviewed for plain error. Appx. B., p.2. The Fifth Circuit held that the explanations were adequate, or at least any inadequacy was not clear or obvious, and that Mr. Roberson had not met the dictates of plain error review, and thus the Fifth Circuit affirmed. Appx. B., p.3

REASONS FOR GRANTING THE PETITION

I. The circuits are divided as to who bears the burden regarding factual claims made in a presentence report after a timely objection by the defendant, and the Fifth Circuit's rule that the conclusions in the PSR are itself evidence to support those same conclusions should be rejected.

A. The Fifth Circuit:

The Fifth Circuit goes even further than placing a burden of production on the defendant. In the Fifth Circuit, if the Presentence Report has a conclusion, and the defendant objects to that conclusion and points out, as in this case, that the conclusion is not based on any credible evidence, and certainly that there is no credible evidence that would establish the conclusion by a preponderance of the evidence, he will still lose on appeal. The Fifth Circuit will affirm by finding that the PSR's conclusion IS the evidence that supports the conclusion and the defendant cannot prevail so long as there is some evidence in the record that makes the conclusion merely plausible. *See, e.g., Nava,* & Appx. B.

B. The courts are divided

A federal district court must impose a sentence no greater than necessary to achieve the goals in18 U.S.C. §3553(a)(2), after considering the other factors enumerated §3553(a), including the defendant's Guideline range. *See* 18 U.S.C. §3553(a)(2); *United States v. Booker*, 543 U.S. 220, 245-246 (2005). The selection of an appropriate federal sentence depends on accurate factual findings. Only by accurately determining the

facts can a district court determine the need for deterrence, incapacitation and just punishment, identify important factors regarding the offense and offender, and correctly calculate the defendant's Guideline range. Indeed, this Court has held that imposition of sentence upon clearly erroneous facts constitutes reversible procedural error. *See Gall v. United States*, 552 U.S. 38, 51 (2007)

At least three authorities combine to safeguard the accuracy of fact-finding at federal sentencing. Most fundamentally, the due process clause demands that evidence used at sentencing be reasonably reliable. *See United States v. Tucker*, 404 U.S. 443, 447 (1972). The Federal Guidelines likewise require that information used at sentencing exhibit "sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a). And Federal Rule of Criminal Procedure 32 offers a collection of procedural guarantees that together "provide[] for the focused, adversarial development" of the factual and legal record. These include: a presentence report (PSR) that calculates the defendant's Guideline range, identifies potential bases for departure from the Guidelines, and describes the defendant's criminal record, and assesses victim impact, (Fed. R. Crim. P. 32(d)); the timely disclosure of the PSR, (Fed. R. Crim. P. 32(e)); an opportunity to object to the PSR, (Fed. R. Crim. P. 32(f)); an opportunity to comment on the PSR orally at sentencing, (Fed. R. Crim. P. 32(i)(1)), and a ruling on "any disputed portion of the presentence

report or other controverted matter" that will affect the sentence, (Fed. Crim. P. 32(i)(3)).

Several circuits, including the court below, have interpreted these authorities to impose on the defendant a burden of production. *See United States v. Ramirez*, 367 F.3d 274, 277 (5th Cir. 2004); *United States v. Conn*, 657 F.3d 280, 285 (5th Cir. 2011); *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Lang*, 333 F.3d 678, 681-682 (6th Cir. 2003); *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006). In these circuits, a district court may adopt the factual findings of PSR "without further inquiry" absent competent rebuttal evidence offered by the defendant. *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012); *see also Prochner*, 417 F.3d at 66; *Lang*, 333 F.3d at 681-682; *Mustread*, 42 F.3d at 1102; *Rodriguez-Delma*, 456 F.3d at 1253.

Defendants in these jurisdictions cannot compel the government to introduce evidence in support of the PSR's findings merely by objecting to them – defendants must instead introduce evidence of their own. *See Ramirez*, 367 F.3d at 277 (holding that "[t]he defendant bears the burden of demonstrating that the information relied upon by the district court in sentencing is materially untrue")(citing *United States v. Davis*, 76 F.3d 82, 84 (5th Cir. 1996)); *Prochner*, 417 F.3d at 66 (holding that "[e]ven

where a defendant objects to facts in a PSR, the district court is entitled to rely on the objected-to facts if the defendant's objections 'are merely rhetorical and unsupported by countervailing proof'") (quoting *United States v. Cyr*, 337 F.3d 96, 100 (1st Cir. 2003) (further quotations omitted), and citing *United States v. Grant*, 114 F.3d 323, 328 (1st Cir. 1997)); *Lang*, 333 F.3d at 681-682 ("agree(ing) with the reasoning of the Seventh Circuit that [a] defendant cannot show that a PSR is inaccurate by simply denying the PSR's truth," and further holding that, "[i]nstead, beyond such a bare denial, he must produce some evidence that calls the reliability or correctness of the alleged facts into question")(citing *Mustread*, 42 F.3d at 1102, and *United States v. Wiant*, 314 F.3d 826, 832 (6th Cir. 2003)); *Mustread*, 42 F.3d at 1102 (citing *United States v. Coonce*, 961 F.2d 1268, 1280-81 (7th Cir. 1992), and *United States v. Isirov*, 986 F.2d 183, 186 (7th Cir. 1993)); *Rodriguez-Delma*, 456 F.3d at 1253 (holding that the "defendant's rebuttal evidence must demonstrate that information in PSR is materially untrue, inaccurate or unreliable").

This rule appears to be an application of Rule 32, which requires the district court to engage in fact-finding only when a matter is "[]disputed" or "controverted." Fed. Crim. P. 32(i)(3)). The Sixth and Tenth Circuits have reasoned that a mere objection does not render a

factual finding "disputed" or "controverted." *See Lang*, 333 F.3d at 681-682; *Rodriguez-Delma*, 456 F.3d at 1254.

But the Second, Fourth, and Eighth Circuits have rejected this reasoning. The Second and Fourth Circuits hold that the burden of production falls on the government to support a PSR when the defendant objects to a factual finding. *See United States v. Riddle*, 2015 U.S. App. LEXIS 2826, at *5-6 (2d Cir. N.Y. Feb. 26, 2015)(unpublished); *United States v. Revels*, 455 F.3d 448, 451 (4th Cir. 2006). Thus the Second Circuit has required the district court to convene an evidentiary hearing upon the defendant's allegation of a factual inaccuracy in the PSR. *See Riddle*, 2015 U.S. App. LEXIS 2826, at *5-6.

And in the Fourth Circuit, the government must support the PSR by producing evidence whenever the defendant lodges a proper objection to it, at least if the matter has not been conceded by the defendant's admission at some other phase of the proceeding. *See Gilliam*, 987 F.2d at 1013. District courts in that jurisdiction are free to adopt the findings of the PSR without evidentiary inquiry only when the defendant "fails to the properly object" to them. *Revels*, 455 F.3d at 451 (citing *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990), *United States v. Williams*, 152 F.3d 294, 301 (4th Cir. 1998), and *United States v. Gilliam*, 987 F.2d 1009, 1013-14 (4th Cir. 1993)). This is a construction of Rule 32, which

allows the court to summarily adopt only an "undisputed portion of the presentence report as a finding of fact." *Id*. (quoting Fed. R. Crim. P. 32(i)(3)(A)).

The Eighth Circuit has likewise interpreted Rule 32(i) to require an explicit ruling when the defendant objects to the PSR. *United States v. Bledsoe*, 445 F.3d 1069, 1073 (8th Cir. 2006). Although it does not appear to impose an explicit burden of production on the government, it clearly disagrees with the reasoning of the Sixth and Tenth Circuits insofar as they construe Rule 32(i) to permit the summary adoption of the PSR in the face of an objection. *See Bledsoe*, 445 F.3d at 1073.

In short, the federal circuits are sharply divided as to who bears the burden of production on factual assertions in a PSR following an objection by the defendant. The First, Fifth, Sixth, Seventh, and Tenth Circuits place this burden on the defense. The Second and Fourth Circuits place the burden on the government.

C. The conflict merits review.

This Court should resolve the conflict between the circuits as to the the proper burden of production or persuasion following an objection to the PSR, and the proper standard of review on appeal. The issue is endemic and fundamental to federal sentencing. Virtually every federal criminal case has a potential sentencing dispute, and it matters a great

deal who is required to muster evidence, as this very case demonstrates. Here, a man was subjected to a higher sentence on the basis of information which was not even sourced. An unnamed confidential informant simply stated Mr. Roberson was "known" to carry a firearm. The basis of that "knowledge," the age of that "knowledge," nor any other factor that would give credibility to the "knowledge," was not divulged despite objection. The defendant would have no possible way to contest such a vague statement from an unnamed accuser. The district court nonetheless increased the defendant's Guideline range on this basis, based on nothing more than the PSR.

In short, the rule applied below carries the potential for grave injustice in a large number of cases. Placing a burden of prodction or proof on the defense creates a risk of wrongfully extending term of imprisonment on the basis of an inaccurate factual finding. And the wrongful extension of a term of imprisonment is an "equitable consideration[] of great weight." *United States v. Johnson*, 529 U.S. 53, 60 (2000).

D. The present case is an apt vehicle to address the conflict.

This is the appropriate case to determine which party bears the burden of proof on disputed findings in a PSR following an objection. Here, the defendant received a two level enhancement for possessing a firearm. No firearm was ever recovered. There was no evidence a firearm

was ever seen. There was merely the word of an unnamed informant that Mr. Roberson was known to carry a firearm, and a bulge. Under the Fifth Circuit's rule, the Petitioner could not win because the conclusion in the PSR that he had a firearm is itself evidence that supported the conclusion that he had a firearm. The petitioner had the burden in the Fifth Circuit to prove he did not have a firearm, and the finding that he did have a firearm was upheld because the record made that finding plausible. The Fifth Circuit's approach is simply not right, and this Court should correct it.

II. This Court should grant *certiorari* to resolve the apparent conflict between the Fifth Circuit and this Court's decision in *Chavez-Meza v. United States*, 138 S.Ct. 1959 (2018), as a well a split in circuit authority regarding the standard of review when a district court fails to address arguments of counsel in mitigation of sentencing.

Prior to *United States v. Booker*, 543 U.S. 220 (2005), federal sentences were in most cases determined by application of sentencing Guidelines. *See* 18 U.S.C. §3553(b)(1). In most cases, then, the rationale for the district court's selection of sentence was elucidated by its formal rulings on Guideline objections. *See* Fed. R. Crim. P. 32(i)(B). *Booker*, however, rendered the Guidelines advisory, and substituted the open-ended factors of 18 U.S.C. §3553(a). *See Booker*, 543 U.S. at 259. It follows that after *Booker*, a district court's formal selection of a Guideline range will not fully explain its choice of sentence. This Court has emphasized that explanation of a defendant's sentence is an essential component of a system of advisory Guidelines.

It stressed in *Rita v. United States*, 551 U.S. 338 (2007) that:

> The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority. *See, e.g., United States v. Taylor*, 487 U.S. 326, 336-337, 108 S. Ct. 2413, 101 L. Ed. 2d 297 (1988). Nonetheless, when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a) --that is, argues

> that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way--or argues for departure, the judge normally need say no more. Cf. § 3553(c)(2) (2000 ed., Supp. IV). (Although, often at sentencing a judge will speak at length to a defendant, and this practice may indeed serve a salutary purpose.)

Rita v. United States, 551 U.S. 338, 356-357 (2007).

Indeed, it noted two particular circumstances where more extensive explanation for the sentence will be required. Such explanation is necessary when the sentence falls outside the Guideline range, or when the court rejects non-frivolous arguments for a sentence outside the range:

> Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments. Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.

Rita, 551 U.S. at 356-357.

Chavez-Meza v. United States, 138 S.Ct. 1959 (2018), applied the requirement of sentence explanation to reductions under 18 U.S.C. §3582(c). In *Chavez-Meza*, the district court reduced a drug defendant's sentence to the middle of his reduced Guidelines, following a retroactive Guideline Amendment. *See Chavez-Meza*, 138 S.Ct. at 1964. The court did so on a pre-printed form, which Chavez-Meza argued to be inadequate. *See id.* This Court held that reviewing courts could look to the explanation provided at the original sentencing to determine the basis for the sentence ultimately imposed. *See id.*

at 1965. Finding that original explanation adequate, this Court affirmed the sentence. *See id.*

Two aspects of the opinion, however, offer potential benefit to Petitioner here. First, this Court offered plenary review of the defendant's failure-to-explain claim, even though there is no evidence that Chavez-Meza ever objected to the procedural reasonableness of the sentence. *See id.; see also United States v. Chavez-Meza*, 854 F.3d 655 (10th Cir. 2017); Brief for the Petitioner in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709088, at *3-6 (Filed March 26, 2018)(detailing the case's factual background); Brief for the Respondent in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709089, at *2-8 (Filed March 28, 2018)(same). In the case at bar, the Fifth Circuit held that such claims could be reviewed only for plain error in the absence of explicit objection. *See* [Appx. B, at p.2]. That position is refuted by this Court's treatment of the claim in *Chavez-Mez*a, which comports with well reasoned decisions of the Fourth and Seventh Circuits. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010) ("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."); *United States v. Cunningham*, 429 F.3d 673, 675-680 (7th Cir. 2005)(Posner, J.) (offering plenary review, and relief, to a district court's failure to address a defendant's arguments in mitigation).

Notably, the court below did not state that the result would be the same under plenary review.

Second, this Court in *Chavez-Meza* explained that courts of appeal may order limited remands to obtain fuller explanation of the sentence "even when there is little evidence in the record affirmatively showing that the sentencing judge failed to consider the § 3553(a) factors." *Chavez-Meza*, 138 S.Ct. at 1965. The court below has never used this procedure to rectify a potential deficiency in the explanation for the sentence. Rather, it has simply held that an incomplete explanation must be affirmed when the defendant cannot meet all four prongs of the plain error standard on the record below. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 361-365 (5th Cir. 2009). This is accordingly a new tool in failure-to-explain cases, which became available after the decision below.

This Court has held that more extensive explanation may be necessary when the parties offer non-frivolous reasons for a sentence outside the range. That proposition was reaffirmed in *Chavez-Meza* itself. *See Chavez-Meza*, 138 S.Ct. at 1965 (citing *Rita*, 551 U.S. at 357). The reasons offered by Petitioner in district court were hardly frivolous. Yet the district court did not address the arguments for a lesser sentence of imprisonment. In the absence of a plain error standard – dispensed with by *Chavez-Meza* – Petitioner was reasonably likely to prevail. And even if the standard of review in *Chavez-Meza* may be ignored,

the district court's treatment of the issue was sparse enough to justify the limited remand authorized in *Chavez-Meza*.

In any event, certiorari should be granted to resolve the split in the circuits and the conflict with the holding by this Court in *Chavez-Mesa,* so the proper standard of appellate review can be determined for the failure of the district court to address mitigation arguments on behalf of the defendant at sentencing.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant *certiorari* and reverse the judgment below, so that the case may be remanded to the district court for resentencing. He prays alternatively for such relief as to which he may be justly entitled.

Respectfully submitted this 29th day of November, 2018.

/s/ Peter Fleury
PETER FLEURY
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR ST., ROOM 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753