No. _____

In the
Supreme Court of the United States

_____

TOMMY RAY HULL, JR.,
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

_____

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QUESTIONS PRESENTED

I. 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 Tommy Ray Hull, Jr., defendant-appellant below.

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tommy Ray Hull, Jr. 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 September 20, 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 March 24, 2017, Mr. Hull began his term of supervised release. A Petition for Offender Under Supervision was filed on November 2, 2017. The Petition alleged that Mr. Hull, violated the terms of his release by using marijuana one time and failing to report to his probation officer on two occasions. On November 13, 2017, The United States Attorney's Office filed a Motion to Revoke Supervised Release with the same allegations. The Petition concluded the guideline range for the violations was 8-14 months.

On December 1, 2017, the district court conducted a hearing on the Motion and Petition. Mr. Hull pled true to the allegations. The government presented no evidence or even argument as to the appropriate disposition. The defense proffered, with regard to the allegation that Mr. Hull failed to meet the probation officer, that Mr. Hull resided in Snyder and had to drive from Snyder to Abilene to report, but he also was responsible for picking up his girlfriend's children. On the occasions that he was asked to report Mr. Hull did drive to Abilene to see the probation officer, but ultimately needed to leave the probation officer to fulfill his commitment to the children.

Further, Mr. Hull had been released after his arrest on the Petition but prior to the hearing during which time he harvested the cotton on the farm owned by his girlfriend. These assertions were not disputed. Mr. Hull's attorney then requested a sentence within the policy (guideline) range given the circumstances including the single use of marijuana.

The district court found the allegations in the Motion to be true. The district court then sentenced above the guideline range without mentioning any reasons nor any of the appropriate § 3553 factors other than the sentence addressed the issues of deterrence and protection of the public. The court did not explain how or why the public needed protecting from the defendant for smoking marijuana once and missing two probation meetings. The only statements the court made as to why it would sentence a person to 18 months for a single use of marijuana and two missed meetings with probation are as follows:

> I find that we have a Grade C violation, with a Criminal History Category of VI.
>
> I'm going to sentence the defendant to the custody of the Unite States Bureau of Prisons for a term of 18 months. I believe this addresses the issues of adequate deterrence and protection of the public.
>
> No further supervised release will be ordered.

2. The appeal

On direct appeal to the Fifth Circuit, Petitioner contended that the sentence was substantively and procedurally unreasonable. He further argued that the record fails to reflect any proper factor that would have justified a sentence of 18 months for smoking marijuana one time and missing two meetings with the probation officer in order to meet responsibilities to children. Much less does the record justify a variance from the guideline range. Petitioner argued that the sentence was procedurally unreasonable as the district court did not explain its reasoning for sentencing above the guideline range, nor that it had considered the applicable 18 U.S.C. § 3553 factors other than deterrence or protection of the public, nor even how protection of public was addressed by a sentence of 18 months for smoking marijuana one time.

In this case, the Fifth Circuit also ruled that, because Mr. Roberson did not lodge an objection to the district court for not giving reasons for denying the motion for downward variance, the issue was reviewed for plain error. Appx. B., pp. 1-2. 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 Likewise, the Fifth Circuit reviewed the substantive reasonableness issue under the plain error standard. Appx. B., pp. 1-2.

REASONS FOR GRANTING THE PETITION

I. This Court should grant *certiorari* to resolve both a split in circuit authority regarding the standard of review when a district court fails to address arguments of counsel in mitigation of sentencing, and 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.

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.

This Court should grant certiorari also to resolve the split in the circuits over the standard of review regarding substantive reasonableness review in the absence of an explicit objection to substantive reasonableness. Plain error review in this context makes not sense. The point of requiring objections in the district court level is to ensure that the district court is aware of and can rule on the issue in the first instance. When a defendant asks for a lower sentence the defendant has made the court aware of the issue. Nothing is

gained by the requirement that the defendant say magic words like "I object to the substantive reasonableness of the sentence," after the defendant has argued that point by asking for a lower sentence.

Not surprisingly then, other circuits do not agree with the Fifth Circuit, as the Fifth Circuit itself acknowledges. *See, United States v. Peltier*, 505 F.3d at 391-92, citing *United States v. Castro-Juarez*, 425 F.3d 430, 433-34 (7th Cir. 2005). As stated by the Seventh Circuit:

> 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.

Castro-Juarez, 425 F.3d at 434.

Accordingly, this Court should grant certiorari to resolve this split in the circuits.

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 December 19, 2018

/s/ Peter Fleury
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