

No. _____

In the
Supreme Court of the United States

KALI LORD,
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

Is a district court's gross failure to explain an above-range sentence or to respond to arguments for a lesser sentence reversible on plain error?

Must challenges to the procedural reasonableness of a sentence be preserved by a separate "reasonableness" objection in district court?

PARTIES TO THE PROCEEDING

Petitioner is Kali Lord, defendant-appellant below.

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

TABLE OF CONTENTS

QUESTIONS PRESENTED.	i
PARTIES TO THE PROCEEDING.	ii
TABLE OF AUTHORITIES.	iv
OPINIONS BELOW.	1
JURISDICTION.	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	1
STATEMENT OF THE CASE.	4
REASONS FOR GRANTING THE PETITION.	6
CONCLUSION.	16

TABLE OF AUTHORITIES

Cases:

<u>Gall v. United States</u> , 552 U.S. 38 (2007).	7
<u>Puckett v. United States</u> , 129 S. Ct. 1423 (2009).	8
<u>Rita v. United States</u> , 551 U.S. 338 (2007).	6, 7, 13, 14
<u>In re Sealed Case</u> , 527 F.3d 188 (D.C. Cir. 2008).	7, 8, 9, 11
<u>United States v. Bistrup</u> , 449 F.3d 873 (8th Cir. 2006).	15
<u>United States v. Blackie</u> , 548 F.3d 395 (6th Cir. 2008).	7, 8, 11
<u>United States v. Booker</u> , 543 U.S. 220 (2005).	6
<u>United States v. Bras</u> , 483 F.3d 103 (D.C. Cir. 2007).	15
<u>United States v. Carter</u> , 489 F.3d 528 (2d Cir. 2007).	11
<u>United States v. Cunningham</u> , 429 F.3d 673 (7 th Cir. 2005).	14-15
<u>United States v. Dominguez Benitez</u> , 542 U.S. 74 (2004).	12
<u>United States v. Gilman</u> , 478 F.3d 440 (1st Cir. 2007).	15
<u>United States v. Gonzalez-Lopez</u> , 548 U.S. 140 (2006)	8
<u>United States v. Hall</u> , 610 F.3d 727 (D.C. Cir. 2010).	12
<u>United States v. Knows His Gun, III</u> , 438 F.3d 913 (9th Cir. 2006).	15
<u>United States v. Lewis</u> , 424 F.3d 239 (2d Cir. 2005).	7, 8, 9, 11
<u>United States v. Lynn</u> , 592 F.3d 572 (4 th Cir. 2010).	14
<u>United States v. Marcus</u> , 130 S. Ct. 2159 (2010).	12
<u>United States v. Mendoza</u> , 543 F.3d 1186 (10th Cir. 2008).	10
<u>United States v. Mondragon-Santiago</u> , 564 F.3d 357 (5th Cir. 2009).	9, 10

<u>United States v. Olano</u> , 507 U.S. 725 (1993).....	12, 15
<u>United States v. Penson</u> , 526 F.3d 331 (6th Cir. 2008).....	15
<u>United States v. Romero</u> , 491 F.3d 1173 (10th Cir. 2007).	15
<u>United States v. Taylor</u> , 487 U.S. 326 (1988).	6
<u>United States v. Vigil</u> , 301 Fed. Appx. 788, 790 (10th Cir. 2008).	10-11
<u>United States v. Villafuerte</u> , 502 F.3d 204 (2nd Cir. 2007).....	15
<u>United States v. Wallace</u> , 597 F.3d 794 (6th Cir. 2010).	11
<u>United States v. Whitelaw</u> , 580 F.3d 256 (5th Cir. 2009).....	9, 11, 13

STATUTES

18 U.S.C. § 3553(a).....	1, 6, 7, 11, 14, 15
28 U.S.C. § 1254(1).....	1

RULES

Fed. R. Crim. P. 32(i)(B).....	6
Fed. R. Crim. P. 51.	15

MISCELLANEOUS

Tronica, Christopher, <i>Troubling Trifles: United States v. Whitelaw Divines a Sentencing Court's Reasons for an Above Guidelines Sentence in the Fifth Circuit</i> , 84 Tul. L.R. 1317, 1333 (2010).....	11, 13
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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule of Criminal Procedure 51 provides:

(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. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

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

Petitioner Kali Lord pleaded guilty to unlawful possession of a firearm by felon, after police found guns and drugs in her house. *See* (ROA.59-61, 146-147).¹ She entered into a plea agreement, but did not waive appeal. *See* (ROA.132-138). A Presentence Report found a Guideline range of 46-57 months imprisonment. *See* (ROA.159).

Defense counsel filed a motion for a below-range sentence, describing her introduction to drug abuse at the age of 14. *See* (ROA.77-82). Most saliently, the motion argued that the defendant had been deeply affected by the recent birth of her daughter, and had new reason to behave lawfully. *See* (ROA.77-81). The motion discussed her progress in counseling, the support manifest in her family's letters to the judge, and her work history. *See* (ROA.81). It also argued that her baby's father was an unsuitable care-giver, but was likely to receive custody while she was in prison. *See* (ROA.80).

At sentencing, defense counsel reiterated these points, and recounted the substantiating interviews conducted by the Defender's investigator with CPS workers. *See* (ROA.127-128). The government declined to be heard, *see* (ROA.127-128), and by all appearances the court simply ignored all of this, *see* (ROA.129-130). It addressed none of the arguments raised by the defense and summarily imposed a sentence at the top of the Guideline range: 57 months. *See* (ROA.129-130). The sole commentary in explanation of the sentence was the court's standard statement:

¹ Citations to the record on appeal in the court of appeals are included in hopes that they are of use to the government in responding to the Petition or the Court in evaluating it.

I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.

(ROA.130).

After pronouncing sentence, and without giving the parties another chance to be heard, the court concluded the hearing by instructing them to “stand aside.” (ROA.131). These are the last words in the transcript. (ROA.131).

2. The appeal

Petitioner appealed, contending that the district court had committed procedural error by failing to explain the above range sentence or to reference or respond to Petitioner’s arguments for leniency. Although acknowledging that defense counsel had failed to object to the district court’s explanation, she nonetheless maintained that it was unnecessary to lodge a separate objection to the procedural reasonableness of a criminal sentence. She also contended that he should succeed even on plain error. Specifically, she contended for further review that incomplete explanation should be deemed to affect substantial rights because it deprived the courts of meaningful opportunities for review, represented structural error, and affected public perception of judicial proceedings.

The court of appeals explicitly applied the plain error doctrine, and rejected the argument on the grounds that she could not show an effect on her substantial rights. [Appendix A].

REASONS FOR GRANTING THE PETITION

- I. The opinion below, in common with the law of the Tenth Circuit, conflicts with the decisions of the Second, Sixth and District of Columbia Circuits on the question of whether a district court's failure to explain the sentence affects "substantial rights".**

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*, and in the supervised release context, where Guidelines have always been advisory, a district court's formal selection of a Guideline range will not fully explain its choice of sentence. This Court has thus twice emphasized that specific 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 decisionmaking 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.)

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 v. United States, 551 U.S. at 356-357.

It returned to the point in *Gall v. United States*, 552 U.S. 38 (2007), detailing the procedural requirements for a reasonable sentence:

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, ***or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range.***

Gall, 552 U.S. at 51 (emphasis added).

The D.C., Sixth, and Second Circuits have vigorously enforced these requirements on plain error. *See In re Sealed Case*, 527 F.3d 188, 190-193 (D.C. Cir. 2008); *United States v. Lewis*, 424 F.3d 239, 246-249 (2d Cir. 2005); *United States v. Blackie*, 548 F.3d 395, 402-404 (6th Cir. 2008). These Circuits have concluded that failures to explain impact substantial rights within the meaning of the plain error doctrine. *See Sealed Case*, 527 F.3d at 193; *Lewis*, 424 F.3d at 247-249; *Blackie*, 548 F.3d at 402-404. They proffered four arguments.

First, a district court's failure to explain the sentence deprives the defendant of meaningful appellate review. *See Sealed Case*, 527 F.3d at 193; *Blackie*, 548 F.3d at 403; *See Lewis*, 424 F.3d at 247. This phase of a criminal proceeding is necessary to ensure that the defendant's sentence is reasonable, and that it was not imposed for inappropriate reasons. The deprivation of this right is accordingly "substantial."

Second, a failure of explanation impacts the public's right to remain informed of the course of judicial proceedings, and negatively affects public perception of federal sentencing. *See Sealed Case*, 527 F.3d at 193; *Blackie*, 548 F.3d at 403; *Lewis*, 424 F.3d at 248. A narrow focus on the length of the sentence ignores the impact of such errors on the sentencing process generally.

Third, the district court's failure to explain the sentence may be fairly analogized to "structural errors," where prejudice may be presumed. *See Lewis*, 424 F.3d at 248-249. The defining characteristic of such errors is that prejudice is almost impossible to assess in a particular case (*see United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n.4 (2006)), or that the error "affects the entire adjudicatory framework" of the proceeding under review (*Puckett v. United States*, 129 S.Ct. 1423, 1432 (2009)). Such is the case with failures to explain – the district court's error makes it impossible to determine whether a lesser sentence might be available in the absence of some infirm reasoning. Further, because the absence of explanation shields the district court's reasoning from public or appellate scrutiny, its entire decision-making process is devoid of a basic structural safeguard. And because any effect on the length of the sentence would be speculative in every case, defining "substantial rights"

exclusively in those terms would render the explanation requirement a virtual dead letter. *See Lewis*, 424 F.3d at 248-249.

Fourth, the requirements of plain error are appropriately relaxed in the review of sentencing errors because reversal in these circumstances requires only remand for resentencing, rather than retrial. *See Sealed Case*, 527 F.3d at 193; *Lewis*, 424 F.3d at 248. The plain error rule thus does not serve to protect judicial economy with the same force.

The approach of these Circuits contrasts sharply and explicitly with that of the court below, and of the Tenth Circuit. In *United States v. Whitelaw*, 580 F.3d 256 (5th Cir. 2009), the court below found plain error in a district court's failure to explain the defendant's sentence. *See Whitelaw*, 580 F.3d at 261-262. But it declined to reverse, finding no demonstrable effect on the defendant's substantial rights. *See Whitelaw*, 580 F.3d at 263-264. In so doing, the court held that the plain error doctrine requires the defendant to show "more than an equal probability of prejudice," which it defined as an effect on the sentence. *Whitelaw*, 580 F.3d at 262-263.

Notably, the court below has explicitly disagreed with the opinions of the D.C. and Second Circuits on the question of substantial rights. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 364 (5th Cir. 2009). The Fifth Circuit thus directly rejected the contention that sentencing error triggers a "relaxed standard" of plain error review. *See Mondragon-Santiago*, 564 F.3d at 364. It also explicitly rejected the contention of the Second and D.C. Circuits that the defendant's substantial rights include the right to meaningful appellate review, finding the matter "foreclosed" by Circuit precedent as to within Guidelines sentences. *See id.* at 365.

The Fifth Circuit has contrasted the opinions of the Second and D.C. Circuits with that of the Tenth Circuit in *United States v. Mendoza*, 543 F.3d 1186 (10th Cir. 2008). *See Mondragon-Santiago*, 564 F.3d at 365, n.6. The Tenth Circuit in *Mendoza* found plain error in a district court’s failure to meet both written and verbal explanation requirements for the imposition of a federal sentence. *See Mendoza*, 543 F.3d at 1194. Yet it declined to reverse, finding no arguable effect on the ultimate length of the sentence. *See id.* at 1194-1195. It found that it had no authority to presume prejudice, though it acknowledged that it would be difficult to enforce the written explanation requirement within the confines of its view of substantial rights. *See id.*

B. The conflict of authority merits this Court’s attention

The conflict between the circuits on the question of substantial rights in “failure to explain” cases is direct, entrenched, balanced, and acknowledged. Courts on both sides of the issue have applied their own positions consistently, and regard challenges to those positions as foreclosed. *See Mondragon-Santiago*, 564 F.3d at 364-365 (“We are aware that other circuits have relaxed this requirement in the sentencing context, but this circuit has not followed suit. ... We are compelled to follow *Mares*: to show substantial prejudice, the defendant must prove that the error affected the sentencing outcome.”); *id.* at 365 (“Mondragon-Santiago argues that the district court's error affected his substantial rights because it makes meaningful appellate review impossible. We note that at least two of our sister circuits have adopted this argument when reviewing sentences outside of the Guidelines range. Nonetheless, our circuit precedents foreclose this argument so far as within-Guidelines sentences are concerned.”)(internal citations omitted); *United States v.*

Vigil, 301 Fed. Appx. 788, 790 (10th Cir. 2008)(“Since Vigil has not asserted the impairment of any individual interest, he surely cannot show the impairment of a substantial right necessary to establish plain error.”); *United States v. Carter*, 489 F.3d 528, 540 (2d Cir. 2007)(“Accordingly, as in *Lewis*, the District Court's error constitutes plain error, and the case must be remanded for resentencing”); *United States v. Wallace*, 597 F.3d 794, 807 (6th Cir. 2010)(“Therefore, we follow the logic of *Blackie* and find that § 3553(c) generally implicates a ‘substantial right.’ The right at issue is the right to meaningful appellate review.”).

The conflict involves more than one court on either side, and has been explicitly acknowledged, both by the court below, and by scholarly commentary. See *Whitelaw*, 580 F.3d at 262 (“This court rejected the relaxed approach to plain error review taken by the Second Circuit [*sic*] in *In re Sealed Case*, 527 F.3d 188 (D.C. Cir. 2008); and by the Second Circuit in *United States v. Lewis*, 424 F.3d 239, 248 (2d Cir. 2005)(‘[I]n the sentencing context there are circumstances that permit us to relax the otherwise rigorous standards of plain error review to correct sentencing errors.’ (internal quotation marks and citation omitted)”); Tronica, Christopher, *Troubling Trifles: United States v. Whitelaw Divines a Sentencing Court's Reasons for an Above Guidelines Sentence in the Fifth Circuit*, 84 Tul. L.R. 1317, 1333 (2010)(describing the cases discussed above as “an emerging line of contradictory precedent”). And it is potentially implicated in every federal criminal case.

The conflict is worthy of review, also, because it is multi-faceted, not narrow. Insofar as it addresses the possibility of a relaxed standard of plain error review in sentencing cases, the disagreement reaches well beyond the narrow context of “failure to explain” cases. *Cf.*

United States v. Hall, 610 F.3d 727, 744 (D.C. Cir. 2010)(holding in context of a Guideline error that “[t]his court applies a less exacting plain error prejudice requirement in the sentencing context....”) The conflict reaches the broader question of whether sentencing appeals should occasion a relaxed standard of plain error review, a matter of concern in every case of Guideline or other procedural error.

The position of the court below also directly conflicts with that of this Court in *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 n.9 (2004). As this Court stated in *United States v. Marcus*, 560 U.S. 258 (2010) “[t]he third criterion” of this Court’s plain error jurisprudence

specifies that a “plain error” must “affec[t]” the appellant’s “substantial rights.” In the ordinary case, to meet this standard an error must be “prejudicial,” which means that there must be a reasonable probability that the error affected the outcome of the trial.

Marcus, 560 U.S. at 262 (quoting *See United States v. Olano*, 507 U.S. 725, 734-735 (1993)).

But this Court has further explained that the “reasonable probability” standard is distinct from, and less demanding than, a preponderance or more-likely-than-not standard. For example, in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), this Court explicitly stated that “[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different.” *Dominguez-Benitez*, 542 U.S. at 83, n.9.

Finally, as one commentator has observed, the position of the court below should be of concern because it undermines both the public’s confidence in the fairness of judicial

proceedings, and the ability of the Sentencing Commission to undertake continuous revision of the Guidelines:

Aside from merely prejudicing Alan Whitelaw, this emerging line of contradictory precedent has the potential to impact the entire sentencing cycle negatively. The Commission “monitors when courts depart from the Guidelines and ... analyzes their stated reasons ... so ... the Commission, over time, will be able to refine the Guidelines to specify more precisely when departures should and should not be permitted.” In the noted case, the sentencing court imposed the government-recommended sentence, which was more than three times the maximum sentence under the Guidelines. Even assuming that Whitelaw's sentence is justified, the lack of any explicit reasoning for the sentence deprives the Commission of the chance to analyze the departure and revise the Guidelines accordingly.

Tronica, 84 Tul. L.R. at 1333.

C. This case presents an appropriate vehicle.

The outcome in the present case turns on the defendant's burden of showing substantial rights, and in the standards for discretionary remand of plain error. The district court's explanation was clearly inadequate. The district court made no reference to any of the arguments for leniency proffered by the defense. Because the court grossly failed in its duty to explain the sentence and consider arguments for leniency, it plainly deviated from a legal rule.

When a district court imposes sentence within a Guideline range, “doing so will not necessarily require lengthy explanation.” *Rita*, 551 U.S. at 356-357. Yet a more complete justification for the sentence is necessary in two circumstances: “(1) ‘where the defendant or prosecutor presents non-frivolous reasons for imposing a different sentence’ and (2) ‘[w]here the judge imposes a sentence outside the Guidelines.’” *Whitelaw*, 580 F.3d at 261 (quoting *Rita*, 551 U.S. at 356-357).

Here, the defense proffered non-frivolous reasons for a lesser sentence: Petitioner's new child, stable work history, letters of support from the family, and progress in counseling. The standard for the adequacy of an explanation in such a case is whether the sentencing judge has "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 decisionmaking authority." *Rita*, 551 U.S. at 356. The total failure of the district court to address these issues before imposing a sentence well in excess of the advisory range fails this test.

II. The courts of appeals are divided as to whether a defendant must lodge a separate objection to the district court's failure to respond to arguments for leniency.

A. The conclusion of the court below implicates an entrenched division of circuit authority.

Federal Rule of Criminal Procedure 51 requires the party seeking relief on appeal to "inform[] 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." Fed. R. Crim. P. 51(b). As the Fourth Circuit has persuasively reasoned, presenting a ground for lesser sentence informs the court that the party would like it addressed. *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.").

Similarly, the Seventh Circuit has vacated without the use of plain error where the district court simply passed over compelling mitigation arguments in silence. *See United*

States v. Cunningham, 429 F.3d 673, 675-680 (7th Cir. 2005)(Posner, J.). And the D.C. Circuit has likewise declined to apply plain error to a defendant's failure to consider the §3553(a) factors. *See United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007).

But the court below applied plain error review to Petitioner's claim of procedural reasonableness because it found no specific objection to this aspect of the sentence. *See* [Appendix A]. It is joined in this approach by the First, Second, Sixth, Eighth, Ninth, and Tenth Circuits, all of which require a separate objection to a court's failure to explain the sentence. *See United States v. Gilman*, 478 F.3d 440, 447 (1st Cir. 2007); *United States v. Villafuerte*, 502 F.3d 204, 208-09 (2nd Cir. 2007); *United States v. Penson*, 526 F.3d 331, 337 (6th Cir. 2008); *United States v. Bistrup*, 449 F.3d 873, 883-84 (8th Cir. 2006), *United States v. Knows His Gun, III*, 438 F.3d 913, 918 (9th Cir. 2006), and *United States v. Romero*, 491 F.3d 1173, 1176-77 (10th Cir. 2007).

B. This case presents an appropriate vehicle.

Petitioner has never been afforded procedural reasonableness review of his sentence without the erroneous barrier of plain error review. Substantial justice would thus be accomplished even if the Court merely remanded for review under the correct standard. In the absence of plain error review, moreover, the district court's imposition of sentence would be reversed as procedurally unreasonable. The district court offered no response to claims in mitigation, and very little affirmative explanation of the sentence in any case. It is the plain error rule that requires clear error and that shifts the burden of showing an effect on substantial rights to the defendant rather than the government. *See Olano*, 507 U.S. at 734. In the absence of this rule, there would therefore be no barrier to reversal.

CONCLUSION

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

Respectfully submitted,

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