

No. _____

In the
Supreme Court of the United States

FELICIANO SOTO-LUGO,
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

Must challenges to the district court's failure to respond to a defendant's non-frivolous grounds for leniency be preserved by a separate "reasonableness" objection in district court?

PARTIES TO THE PROCEEDING

Petitioner is Feliciano Soto-Lugo, defendant-appellant below.

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Feliciano Soto-Lugo 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 28, 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 Feliciano Soto-Lugo was indicted on one count of illegally re-entering the country. *See* (ROA.6).¹ He pleaded guilty without waiving appeal. *See* (ROA.28). The Presentence Report (PSR) found a Guideline sentencing range of 46-57 months imprisonment. *See* (ROA.100).

At sentencing, defense counsel urged the district court to consider the defendant's early arrival in the United States, and reduced risk of re-entry in light of the advanced age of his children. *See* (ROA.76-78). The court imposed a sentence in the middle of the Guidelines, 51 months. *See* (ROA.80). It noted the defendant's criminal history, but did not specifically explain why the defendant's ties to the United States did not merit a lesser term of imprisonment. *See* (ROA.80).

2. The appeal

Petitioner appealed, contending that the district court had committed procedural error by failing 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, he nonetheless maintained that it was unnecessary to lodge a separate objection to the district court's failure to respond to arguments for leniency.

¹Citations 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.

The court of appeals explicitly applied the plain error doctrine, and found no “clear or obvious error with respect to the adequacy of the reasons for the sentence imposed.” [Appendix A].

REASONS FOR GRANTING THE PETITION

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. It is error for a district court to pass over a non-frivolous ground for leniency in silence.

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 thus twice emphasized that specific explanation of a defendant's sentence is an essential component of a system of advisory Guidelines.

It noted in *Gall v. United States*, 552 U.S. 38 (2007), that adequate explanation is essential to the procedural reasonableness of a 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).

Earlier, in *Rita v. United States*, 551 U.S. 338 (2007), it stressed that part of the duty to explain a sentence is to respond to non-frivolous grounds for a sentence outside the range:

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, 551 U.S. at 356-357 (emphasis added).

B. The circuits are divided as to the actions a party must take to preserve error in this context.

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).

C. 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 the defendant's claims in mitigation – his ties to the United States – which are recognized by the Sentencing Commission as compelling reasons for a below Guideline sentence. *See* USSG 2L1.2, comment. (n. 8). 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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