No. _____

In the

Supreme Court of the United States

JOSHUA SEDILLO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Question Presented For Review

Is the Tenth Circuit precedent allowing a district court to say nothing when a reasonable request for a variance is made at sentencing consistent with this Court's rulings in *Gall* and *Rita*, which expect a district court to engage the merits of the request so that appellate courts have the information necessary to conduct a meaningful review?

Table of Contents

Table of Authorities

Table of Authorities (con't)

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Petition for Writ of Certiorari

Joshua Sedillo petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Joshua Sedillo*, Case No. 17-2173, affirming the district court's sentence, was not published.[1] The district court did not file a memorandum opinion to accompany its judgment.

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[1] App. 1a-13a. "App." refers to the attached appendix. "Vol." refers to the record on appeal which is contained in five volumes. Sedillo refers to the documents and pleadings in those volumes as Vol. I-V followed by the page number found on the bottom right of the page (e.g. Vol. II at 89). "PSR" refers to the presentence report submitted in Volume III, the sealed record. "Doc." refers to the number of the document on the district court criminal docket sheet in No. 16-CR-27032-MCA. "AOB" refers to appellant's (Sedillo's) opening brief.

Jurisdiction

On November 29, 2018, the Tenth Circuit affirmed the district court's sentence.[2] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Justice Sotomayor granted Sedillo's motion to extend the time to file the petition. According to this Court's order of February 11, 2019, the petition is timely if filed on or before March 28, 2019.

Pertinent Constitutional and Statutory Provisions

U.S. CONSTITUTION, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 3553(c)

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence – (1) is of a kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or (2) is not of a kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, ...

[2] App. 1a-13a.

Statement of the Case

A. The District Court proceedings.

1. Introduction

A cohort of federal agents and informants were dispatched to certain Albuquerque, New Mexico neighborhoods to buy drugs and guns. Sedillo was one of many vulnerable drug users lured into selling drugs to an undercover agent. He pleaded guilty to two counts of distributing methamphetamine. In his sentencing memorandum, Sedillo asked the court for a sentence below the recommended sentencing guideline imprisonment range. He argued that the agent solicited the initial sale and then suggested larger amounts to increase his liability. Sedillo detailed his sentencing manipulation argument again at the sentencing hearing. The court did not acknowledge the argument nor explain why it was not relevant to its deliberation. It imposed a prison term of 140 months, the low end of the guideline imprisonment range which it declared "fair and reasonable."

2. The undercover agent's interaction with Sedillo.

Agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and a retinue of paid informants targeted specific cities in which they tried to buy guns and drugs. Often the informants looked for drug users as they were easily persuaded to procure and sell drugs and then guns. Volume (Vol.) I at 20.

Here, a paid ATF informant told co-defendant Quezada he wanted to buy methamphetamine. PSR ¶ 7. When told the price, $800.00 for an ounce, the informant said it was too high. Quezada said the price would be $550 if he bought more than an ounce. A transaction was then set for the next day.

Because Quezada could not get the drugs, the informant called him repeatedly to set up another deal. PSR ¶¶ 8-9.

Six days after the initial meeting, Quezada gave Sedillo's number to an undercover agent. The agent called Sedillo who told him "they were working on getting the methamphetamine." PSR ¶ 9. Later the agent met Quezada and Sedillo. Sedillo gave the agent two plastic baggies with two ounces of methamphetamine and in return received $1800 from the agent. Two weeks later, the agent told Sedillo he wanted to buy more. PSR ¶ 10. He sent Sedillo numerous text messages and called him several times. Id. When they met, Sedillo gave him three ounces of methamphetamine and the agent again gave him $1800. Id. In total, the agent disbursed $3600 when the arrangement was for $2750.

At the second sale the agent told Sedillo he wanted to buy a gun and more drugs. PSR ¶ 11. Over a month later the two met again. The agent had arranged to have Sedillo arrested. He waited in a restaurant for Sedillo to arrive. When he did, the agent signaled other law enforcement officials to arrest Sedillo. The officials searched his car and found the drugs and gun the agent had ordered. Sedillo was charged only with the completed sales.

3. The presentence report and the parties' sentencing memoranda.

After Sedillo pleaded guilty to two counts of distributing 50 grams or more of a mixture and substance containing methamphetamine, the probation office prepared a presentence report (PSR). Vol. I at 8 (indictment); Vol. II at 8-23 (plea hearing).

Using the drugs sold to the agent as well as those found in Sedillo's car, the probation office said the offense level was 30. PSR ¶ 17 (citing United

States Sentencing Guidelines (U.S.S.G.) § 2D1.1(a)(5)). It added two levels for the gun. PSR ¶ 16. It then subtracted three levels because Sedillo had accepted responsibility for his misconduct and timely notified the court and the government that he would plead guilty. Id. at ¶¶ 24-25. The probation office placed him at offense level 29 and calculated his criminal history as Category V. Id. at ¶¶ 26, 34, 35. The resulting imprisonment range was 140 to 175 months. Id. at ¶ 63. After describing the ATF's involvement with Sedillo and detailing Sedillo's personal history, the probation office recommended a "downward variance outside the advisory guideline range." Id. at ¶ 83.

Sedillo agreed a variance down was warranted. In his sentencing memorandum he argued the degree of his liability had been manipulated by the agent. Doc. 76; Vol. I at 19. He explained that the paid informant and the agent arranged the transactions. Sedillo, a drug user, had not sought them out. Moreover, there was no evidence that Sedillo was an active seller before becoming involved with the informant and the agent. The delays in getting the agent what he wanted demonstrated that Quezada and Sedillo did not have a ready source of methamphetamine. After the first transaction, the agent had probable cause to arrest Sedillo, but he did not. He pursued Sedillo, expanding the misconduct on which his prison term would rest. In similar cases, Sedillo noted, other judges in the District of New Mexico were scrutinizing the tactics the ATF used here. He concluded by asking for an overpresentation of criminal history departure allowed by U.S.S.G. § 4A1.3.

For its part, the government outlined information from the presentence report, focusing on Sedillo's prior convictions. Still, it remarked that the

court "may conclude a variance should be granted, and if so, [it] defers to the Court's discretion." Vol. I at 36; Doc. 77.

After Sedillo pleaded guilty, the case was reassigned to Judge Robert Junell, a visiting judge from Midland, Texas. Doc. 86. Sedillo filed a sealed motion asking that his case be returned to Chief District Judge Armijo. Doc. 88. He said that he was one of 103 New Mexicans who had been arrested in ATF's surge on Albuquerque. He noted that Judge Armijo, like other Albuquerque district judges - but unlike Judge Junell - was involved in litigation challenging the ATF's conduct. Its agents and paid informants were being accused of malfeasance, entrapment and selective enforcement. Judge Armijo had heard testimony describing the behavior and methods of this traveling cadre. Another Albuquerque district judge ordered more discovery after finding the ATF's methods were likely to ensnare a higher percentage of minorities and which the ATF had done little to cure. Sedillo said at least three other district judges had given downward variances, in part, because of the agents' controversial and deliberate machinations. After reading the numerous pleadings and evaluating the witnesses, Judge Armijo was ideally suited to judge the merit of Sedillo's variance request. Her comprehensive vantage point could not be transferred to the visiting judge. Judge Armijo denied Sedillo's motion. Doc. 89.

4. The sentencing hearing.

Sedillo again delineated his downward variance request at the sentencing hearing. The government countered it was unwarranted because Sedillo "was already operating as a narcotics dealer" when the agents arranged to buy drugs from Quezada and him. Vol. II at 46. Sedillo's counsel disagreed. She said the government's remark was factually incorrect: "There is absolutely no

evidence whatsoever in this case that he was operating as a narcotics dealer." Id. at 51. She added, "whether he was a narcotics user and when someone came to him with a proposition of making money if he could find the narcotics to sell is certainly a different factual scenario." Id. at 51-52.

The court did not resolve this factual dispute. It also did not comment on the variance requests made by Sedillo and the probation office. Instead it said that it was "not departing from the recommended sentence" because Sedillo had five felony convictions. Vol. II at 52. His criminal history was "appropriately categorized" and therefore it would not "grant a downward departure pursuant to U.S. Sentencing Guideline 4A1.3." Id. at 52-53. The court said it "considered . . . the sentencing factors set forth in 18 United States Code Section 3553(a)" in "arriving at a reasonable sentence." Id. at 53. It then ordered Sedillo to serve a prison term of 140 months. Id.; Doc. 95.

Sedillo's counsel objected to the court's sentence. She said it was procedurally and substantively unreasonable. She detailed her reasons:

> I appreciate the visiting judge's status. Well, I think procedurally, a judge that is already familiar with this case and is familiar with the ATF cases and the ATF litigation is the appropriate judge to hear the case. It's impossible for me to reproduce for you the entire ATF sting litigation in a way that would make you understand how offensive the community -- by that, I mean the legal and actual community -- have found that operation, and I think that is relevant to the sentencing in Mr. Sedillo's case.
>
> Substantively, I think it's unreasonable. Even given the criminal history that both you and Ms. Brawley reviewed, given what the criminal history is, given the conduct of the government, a 140-month sentence, I think that it's substantively unreasonable legally; and also, I think, as a citizen, it's unreasonable that we will have to pay for almost 12 years of incarceration for a man who has never done more than two years in prison and whose crime literally was created by the government.

Vol. II at 58-60.

The court overruled Sedillo's objections. Vol. II at 60.

B. The Tenth Circuit proceedings.

On appeal to the Tenth Circuit, Sedillo argued that the court's sentence was procedurally and substantively unreasonable. He said because his request for a downward variance was not frivolous, the district court was obliged to acknowledge it, if not explain why it considered the request irrelevant to the proceedings. Having done neither, the court's sentence was procedurally unreasonable. Its sentence also was procedurally unsound because it did not follow the direction of 18 U.S.C. § 3553(c) and state its reasons for imposing a particular sentence. Finally, by following an unreasonable sentencing process, the district court crafted a substantively unreasonable sentence. The Tenth Circuit panel was not persuaded by any of these arguments.

During sentencing, the panel noted, the district court "briefly summarized" Sedillo's criminal history and commented that it was "appropriately categorized." App. 7a. Additionally, the district court remarked that Sedillo's "offense involved a good amount of drugs." *Id.* The panel found that "such a cursory statement does not serve as a glowing example of sentencing transparency." *Id.* And, it agreed with Sedillo that "the district court provided a vague, skeletal explanation of its sentence and failed to elaborate on its consideration of the § 3553(a) factors." App. 8a. Still, the panel concluded, "because the sentence was within the guidelines range, the court needed to provide only a 'general statement of its reasons,' not 'respond to every argument for leniency.'" App. 7a (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007). It added that Sedillo's substantial rights were not affected by the court's "cursory" and "vague" comments because the "guidelines range" was correctly calculated and the court "sentenced him at

the bottom of that range . . ." App. 9a. In spite of the flaws in the district court's procedure, the panel saw "no reason why a more detailed recitation and application of the § 3553(a) factors would have led to a lower sentence." *Id.*

The panel did not, because it could not, point to anywhere in the record where the court expressly acknowledged and addressed the variance request made by Sedillo and the probation office. Implicitly then, the panel conceded the district court did not engage defense counsel or the probation office in a discussion about the requested variance. The panel also did not attempt to reconcile its decision with 18 U.S.C. § 3553(c)'s directive that the district court explain why it did not credit a non-frivolous argument for a downward variance. It also said nothing about how given the district court's perfunctory statements regarding the guidelines and § 3553(a) it could meaningfully review its sentence for reasonableness. Instead it relied on its rule that a guideline sentence is presumptively reasonable and irrespective of the court's failings, Sedillo did not rebut that presumption by proving the sentence was "manifestly unreasonable." App. 9a.

Argument for Allowance of the Writ

I. This Court should affirmatively state that a district court is expected to address non-frivolous arguments and to, at least briefly, discuss its reasons for rejecting the arguments.

In *Gall* and *Rita*, this Court made it clear that a district court must sufficiently address the parties' arguments and provide an explanation for its sentence for a circuit court to engage in meaningful appellate review. *Gall v. United States*, 552 U.S. 38, 50 (2007); *Rita v. United States*, 551 U.S. 338, 350-51 (2007). That means the sentencing court has a duty to respond to any properly presented sentencing argument that has factual support and legal merit. *Gall*, 552 U.S. at 50; *Rita*, 551 U.S. at 356, 357. And if the court rejects an argument, it must explain why. *Id.* The Tenth Circuit has rejected these rulings and held instead that when a court imposes a within-Guidelines sentence, it must "'provide only a general statement of its reasons'" and "'need not respond to every argument for leniency that it rejects in arriving at a reasonable sentence.'" App. 6a (quoting *United States v. Sanchez-Leon*, 764 F.3d 1248, 1262 (10th Cir. 2014)).

Although in stating its sentence, the sentencing court here invoked 18 U.S.C. § 3553(a), it did not address the factors raised by Sedillo and failed to give any reason for rejecting his non-frivolous request for a variance. Ultimately, it never explained how a misguided and cursory analysis leading to a prison term of 140 months was correct, let alone reasonable, given the specific facts before it.

The district court also contravened 18 U.S.C. § 3553(c) when it failed to state a reason for its sentence. Section 3553(c) obligates a court to state a reason in every case. That requirement serves several important purposes, not the least of which is to enable a circuit court to meaningfully review the

lower court's sentence. After this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), section 3553(c) has become even more important. Now that sentencing courts have more discretion to impose sentences that need not conform to the sentencing guidelines, appellate courts reviewing sentences for reasonableness must know why a court chose what it did.

In this case, Sedillo presented a persuasive argument for a downward variance. He pointed out that sentencing manipulation is a recognized ground for lowering a prison term. Such a variance addresses the nature of the offense, a relevant statutory sentencing factor. Here, there was no evidence that Sedillo had ever sold drugs to anyone before being encouraged to do so by a paid informant and undercover agent. The agent overpaid for the drugs to keep Sedillo and his co-defendant involved. Sedillo argued the agent asked for larger amounts to magnify his culpability. He ordered a gun to fortify that objective. The probation office also recommended a downward variance. The district court made no effort to talk about these requests. An explanation for ignoring them or why they were not relevant is absent from the record. Consequently, it never reached its actual sentencing duty: to independently evaluate why its sentence was sufficient, but not greater than necessary, to achieve the § 3553(a) sentencing goals. The Tenth Circuit was left with no meaningful way to review the reasonableness of the district court's sentence.

And yet the panel reviewed the sentence anyway and found it both procedurally and substantively reasonable. It felt it could perform its appellate function in spite of the district court's "cursory . . . vague [and] skeletal explanation of its sentence" and its "fail[ure] to elaborate on its consideration of the § 3553(a) factors." App. 7a, 9a. Ultimately, Sedillo's

rights were not affected because he really was not entitled to more than what the court provided. Because the panel could cite to nothing in the record which patently demonstrated the district court meaningfully engaged with counsel and the probation office on the requested variance, the panel's decision compromised Sedillo's right to meaningful appellate review. Without proof of this discussion, as a matter of law, the panel was unable to determine the substantive reasonableness of the district court's sentence.

A. The Tenth Circuit precedent that lets district courts refrain from discussing reasonable requests for a variance compromises the due process right to meaningful appellate review.

Sedillo presented a factually supported and legally meritorious request for an alternative sentence. This Court's precedent demands an explanation of why it was denied. Put another way, the district court was legally and statutorily bound to discuss Sedillo's evidence and arguments and to clearly state its reasons for rejecting them. Not only does a factually barren and unreasoned decision impact Sedillo's ability to challenge it on appeal, but the court's lack of specificity also affects his ability to receive meaningful appellate review. Without knowing the court's reasons for its sentence, how can Sedillo argue it may have been based on an incorrect legal standard or analysis or that the court abused its discretion? *See Gall*, 552 U.S. at 51 (assuming court's decision is procedurally sound, appellate court then considers substantive reasonableness of sentence imposed under abuse of discretion standard).

Indeed, the panel's finding proves his right to meaningful appellate review was impaired by the district court's neglect. The panel found Sedillo's sentence was substantively reasonable because he had not shown the court's

sentence resulted from an abuse of its discretion. App.9a. When the record suggests a district court considered an inappropriate factor or refused to consider an appropriate one, an abuse of discretion is possible. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (explaining that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."). But how can Sedillo demonstrate an abuse of discretion when the district court never engaged his request, nor pointed to facts or law upon which it relied or which it rejected, or why? There simply is no record that the variance arguments made by Sedillo and the probation office were specifically addressed and a reasoned basis exists for the sentencing court's decisions. *See Rita*, 551 U.S. at 357 (where party presents nonfrivolous reasons for imposing different sentence court will explain why it has rejected those arguments). Only by knowing how the district court assessed the evidence could the panel determine whether the assessment was erroneous. Although it refused to admit it, the circuit court's ability to adequately review the court's decision was compromised. In other words, meaningful appellate review of the requested variance was categorically hindered by the absence of descriptive reasoning employed by the sentencing court. The district court's failures should not, as the panel ruled, redound against Sedillo.

A sentencing court is obligated by § 3553(c) to address non-frivolous reasons for imposing a different sentence. *Rita*, 551 U.S. at 356-57. When a party challenges the guideline imprisonment recommendation, it necessarily argues the guidelines do not reflect a sound judgment. In other words, the challenging party is rejecting the starting point of the sentencing deliberation and so sentencing should not be fixed to the guidelines. If the guidelines do

not account for anomalies in the events that set the guidelines then they have an outsized effect on the sentencing proceedings. And if the district court does not respond or fully explain a decision which rests primarily on the guidelines, it is unclear if a thoughtful evaluation of the non-frivolous argument affected the district court. Unless the court explains its reasons for not varying, how then can the parties or the appellate court know it has genuinely evaluated all the § 3553(a) factors and not simply presumed that the advisory guideline range is the minimally sufficient sentence that § 3553(a) requires? *See Gall*, 552 U.S. at 50 (a sentencing judge "may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented.") (internal citation omitted). This is the problem with Tenth Circuit precedent: it allows a sentencing court to refrain from engaging the merits of a reasonable variance request and without evidencing on the record that it has genuinely considered all the § 3553(a) factors, to presume that the advisory guideline range is reasonable and thus, the minimally sufficient sentence.

Section 3553(a)'s "sufficient but not greater than necessary" analysis is a more exacting task than a "reasonableness" determination. This is why the Court has directed sentencing courts to discuss material, non-frivolous arguments for a sentence outside the recommended guideline range. *See Gall*, 552 U.S. at 50, 52 (sentencing court must adequately explain chosen sentence to allow for meaningful appellate review as it has greater access to and familiarity with individual case and accused than the sentencing commission or appellate court). Here, the court's "cursory, vague and skeletal" comment is not adequate to show it gave any consideration to Sedillo's presentation on ATF practices. Sedillo described a pattern of luring

vulnerable drug users into repeatedly selling drugs to ATF informants and undercover agents. He argued that the court could offset the prison term because ATF had structured its "surge" operations to maximize potential sentences. In his pleadings, Sedillo offered evidence that revealed a pattern of deliberately choosing drug users as targets for repeat drug sales. Vol. I at 19-26; Supplemental Sealed Record on Appeal at 1-5. He predicated his argument on facts that proved it was the government who first proposed illegal activity. In addition, no evidence showed Sedillo had ever sold drugs before being approached by the ATF. As Sedillo explained, these facts support his contention that the ATF organized the drug sales to increase his culpability. Vol. I at 21-22 (citing *United States v. Beltran*, 571 F.3d 1013, 1019 (10th Cir. 2009)).[3] It is noteworthy that the probation office also thought a downward variance was warranted. Vol. II at 39. The court did not explain why Sedillo's evidence failed to merit a downward variance. In fact, it never acknowledged his request.

If the Tenth Circuit's precedent is not overruled, many more defendants will be deprived of due process at sentencing. The circuit's precedent that a district court can ignore a reasonable variance request if it imposes a within

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[3] *See also United States v. Torres*, 563 F.3d 731, 734-35 (8th Cir. 2009) (after *Booker*, district court may vary downward when government extends criminal investigation for sole purpose of increasing drug quantities for which accused is responsible) (cited with approval by *Beltran*); *United States v. Seary*, 233 F.3d 1096, 1099-1100 (8th Cir. 2000) (noting guidelines have a "terrifying capacity for escalation of a defendant's sentence as a result of government misconduct" and remanding because court did not consider sentencing entrapment when accused had never sold crack before being approached by government informant).

guidelines sentence foils this Court's instruction that a sentencing court "must make an individualized assessment based on the facts presented . . . [and] consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall*, 552 U.S. at 50, 52; *Rita*, 551 U.S. at 357. In the Tenth Circuit, if a district court recites that it has considered the § 3553(a) sentencing factors and that it finds the recommended guideline imprisonment range to be reasonable, its decision will be protected from appellate scrutiny. But this 'reasoning' could apply to any sentence, regardless of the offense, the person's personal background or his criminal history. And the district court can use the same statements whether the government or the defense requests a variance. This truncated process, which the Tenth Circuit invites, does not promote reasoned decision making or provide an adequate basis for appellate review. Here, those failings and their impact are demonstrated by contrasting Sedillo's extensive variance advocacy with the district court's inapt, yet sanctioned silence.

In his sentencing memorandum and at the hearing, Sedillo contended the agent prolonged the operation in order to deliberately stack the offenses and thereby enhance the degree of culpability. Sedillo repeatedly petitioned for a downward variance from the guideline imprisonment range to remedy the agent's manipulations. Doc. 76, 88. Three times he explained why the context in which the sales took place was important to developing an individualized sentence.

The first was in his motion to retain Chief Judge Armijo as the assigned judge. There, Sedillo noted she had overseen litigation challenging the surge operation and had detailed information about an ATF pattern of targeting

drug users for repeat sales. She also had a fundamental understanding of why the agency's tactics were troublesome. Her understanding was public. This background context should inform consideration of numerous § 3553(a) factors. Not only the nature and circumstances of the offense, but also what punishment is just and do the tactics protect the community from further crime. § 3553(a)(1), (2)(A),(C). Sedillo argued the context's importance would not resonate with a visiting judge from an extra-urban area in a different state. In denying Sedillo's motion, Judge Armijo expected the visiting judge to steep himself, as she had, in the context in which ATF informants and their handlers came to Albuquerque, targeted others, and created the drug and gun sales.

Sedillo, for his part, attempted to alert the visiting judge. In his sentencing memorandum, he again detailed the vexing aspects of the ATF's behavior. Doc. 76; Vol. I at 20-22. Sedillo's sentence depended on the context of the transactions. He asked the court to look beyond each sale and consider the interactions as a whole. Acts between federal informants, co-defendant Quezada, and Sedillo all took place within a practiced ATF context. ATF agents and informants infiltrated specific Albuquerque communities to buy drugs and guns. As a drug user, Sedillo simply was an opportune target as the agency had no prior information he was a narcotics broker. Information such as this is highly relevant to a sentencing manipulation analysis.

Sedillo explained to the visiting judge that the government was the first to propose illegal activity. Using a confidential informant, an undercover agent approached co-defendant Quezada for drugs. The informant, and then the undercover agent, encouraged Sedillo's involvement in the sale. No evidence showed Sedillo had ever sold drugs to anyone before being lured to do so by

the informant and the agent. By conspicuously overpaying Quezada and Sedillo for drugs, the agent kept them on the line. By asking for increasingly larger amounts, the agent structured the sales to maximize the eventual sentence. Ordering a gun enhanced that sentence.

No evidence showed Sedillo was preternaturally equipped to sell quantities of methamphetamine or a gun. Days, weeks, months would pass between solicitation and procurement. No arrest was made after the first transaction. No evidence suggests the agent was curious about Sedillo's supplier or made any inquiries. Only after their arrest for multiple transactions was that question put to Quezada. Sedillo argued the evidence demonstrated the agent's purchases were drawn out for the sole purpose of multiplying the sales to be charged. Sedillo said a modest variance could rectify his unnecessarily extended exploitation.

Finally, at the sentencing hearing, Sedillo reemphasized the same points. Vol. II at 28-34, 37-38.

The district court's response was, as the panel commented, cursory. It noted just two case-specific factors: "it appears [Sedillo's] criminal history is appropriately categorized. In addition, the defendant's offense involved a good amount of drugs." Vol. II at 52-53. It never examined context or any facts or circumstances surrounding the ATF surge in Albuquerque. It never questioned agency interactions with Quezada and Sedillo. In turn, it failed to address Sedillo's principal sentencing argument that a variance was warranted to offset the agents' sentencing manipulation. Such a variance is firmly grounded in federal case law and permits a district court to vary downward based on § 3553(a) sentencing factors. *Beltran*, 571 F.3d at 1019; *Torres*, 563 F.3d at 734-35; *see also West v. United States*, 631 F.3d 563, 570

(1st Cir. 2011) (when government improperly enlarges scope or scale of crime to get longer sentence, court may reduce sentence as an equitable remedy to government overreach).

Sedillo's argument was not frivolous. Its bases were detailed twice in writing and again at the sentencing hearing. The argument was acknowledged by the government's sentencing memorandum in which it took no position on Sedillo's request. Doc. 77 at 8. The probation office independently suggested a downward variance. Even after the court gave its sentence, he was steadfast in arguing for a variance and claimed the request was relevant to sentencing deliberations but had been ignored. Vol. II at 58-60. As the sentencing hearing transcript demonstrates, the district court ignored Sedillo's appeal and did not explain why his evidence failed to merit a downward variance.

Appellate review for abuse of discretion exists to ensure that the district court's discretionary choice was not based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter*, 496 U.S. at 405. For appellate courts to be certain that a district court considered the relevant sentencing factors, did not consider any impermissible factors, and did not clearly err in weighing the relevant factors, the sentencing court must provide some reasoned basis on which appellate review can turn. Here, whether the court's sentencing decision was based on fact or made as a matter of law is unclear. If its decision was factually based, the court made no definite or clear findings on other aspects of Sedillo's history and characteristics. Instead it embraced a guideline sentence as if there were no extenuating circumstances. If grounded in law, what were the bases for its decision? Was evidence of Sedillo's struggles and their impact on the offense irrelevant?

Was evidence of the ATF's sentencing manipulation and its impact on the offense irrelevant? Did the district court believe it lacked authority to vary downward? If it did, its decision was legal error. *See Koon v. United States*, 518 U.S. 81, 106-07 (1996) (as guidelines do not place limit on factors that may warrant departure, court errs when concluding it may not consider particular factor). Regardless of its basis, the court's decision leaves a reviewer to wonder. Wondering does not constitute meaningful appellate review.

The Tenth Circuit panel's inability to point to a patently obvious statement by the court wherein it discussed the downward variance requested by Sedillo and recommended by the probation office, proves the court neglected its § 3553(c) responsibilities. In turn, the panel upended Sedillo's right to meaningful appellate review by finding that a prison term at the low end of the recommended imprisonment range excuses the court's procedural deficiencies. Without unbridled speculation, it is impossible to say what would have happened if the court had followed this Court's direction and § 3553(c): to address non-frivolous arguments and "explain why [it] has rejected those arguments," respectively. *Rita*, 551 U.S. at 357. The permissive stance taken by the Tenth Circuit does not adhere to the "sound judicial practice" this Court expects in order to preserve the accused's right to meaningful appellate review and the "public's trust in judicial institution." *Id.* at 355-56.

B. Tenth Circuit precedent permits a sentencing methodology that relies on a fundamental misunderstanding of a sentencing court's duties.

In emphasizing the reasonableness of the guidelines, the district court made clear only that the recommended range likely shaped its sentence. The panel contends nevertheless, that because it sentenced Sedillo to the low end of the recommended imprisonment range and Sedillo could not show that prison term was manifestly unreasonable, the court's procedural errors did not affect his substantial rights. App. 5a, 7a. The panel's circular reasoning is unsettling. Accordingly, a district court may single out the advisory guideline imprisonment range as the presumptively reasonable range, and then force the accused to rebut that presumption at sentencing, yet ignore or not engage a challenge to that range made in a credible variance request. The panel's logic effectively returns the Guidelines to their pre-*Booker* mandatory status. In other words, the panel held the sentencing court was not obligated to expressly address Sedillo's variance request and the probation office's recommendation for one, but then found the court's within guideline sentence reasonable because Sedillo failed to show it was not. Both courts acted as if Sedillo had not even advocated for a variance. Simply applying a guideline sentence and declaring it "reasonable," as both courts did here, defies the Court's expectation that a sentencing court thoughtfully consider the statutory sentencing factors for each individual so that the appellate court may meaningfully review its sentence.

The district court's own words prove it did not make plain that its sentence rested on anything but the 'reasonable' guideline range: "Pursuant to the Sentencing Reform Act of 1984, which I have considered in an advisory capacity, and the sentencing factors set forth in 18 United States Code

Section 3553(a), which I have considered in arriving at a reasonable sentence, I do find the guideline range in this case to be fair and reasonable." Vol. II at 52-53. Using the words 'Section 3553(a)' in a sentence is not an explanation, let alone a justification. The only thing understood in its statement is that the court found the guideline range "fair and reasonable." Nothing suggests the court's sentence did not rest on the guidelines alone, but considered whether the guideline sentence actually conforms, in the circumstances, to the statutory factors. Moreover, saying nothing about the possible downward variance and imposing a guideline sentence tends to show the court's sentence rested on the guidelines alone. It is a methodology of which the Tenth Circuit approves but which conflicts with this Court's rulings.

Nelson v. United States, 555 U.S. 350 (2009), to which Sedillo referred the panel in his opening brief, illustrates this point. *See* AOB at 19. Like the case here, the district court in *Nelson* said the "Guideline sentence is the reasonable sentence." *Id.* at 351. It too added that reasonableness is presumed unless "a good reason in the statutory sentencing factors" indicates otherwise. *Id.* at 350-51. In finding this sentencing procedure flawed, this Court stressed that its cases "do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable." *Id.* at 352. Furthermore, there is no "legal presumption that the Guidelines sentence should apply." "Instead, the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors . . . ." *Id.* at 351. In other words, not only is there no presumption of reasonableness, but application of the guidelines is not mandatory. Here, as in *Nelson*, "it is plain from the comments of the sentencing judge that he did apply a presumption

of reasonableness to [the] Guidelines range." *Id.* at 352. Such a presumption "constitutes error." *Id.* In response, the Tenth Circuit panel is silent. See App. 5a-9a.

Unfortunately, the panel's silence is an endorsement of the district court's flawed procedure. This Court has made it clear that § 3553(c) requires the sentencing court to "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." *Rita*, 551 U.S. at 356; *see also id.* at 351 (district court must subject accused's "sentence to adversarial testing," including consideration of arguments that "the Guidelines sentence fails properly to reflect § 3553(a) considerations."). Without even demonstrating it considered less lengthy terms as Sedillo requested and the probation office recommended, Tenth Circuit precedent let the court presuppose that the Guideline imprisonment range was reasonable and necessarily should apply. This Court's precedent says otherwise; absent a careful and considered application of the sentencing factors to all of the facts before it, a sentencing court's abbreviated reasoning which unduly hews to the guideline imprisonment range is substantively deficient and attendantly unreasonable. This Court should grant certiorari in this case, vacate the Tenth Circuit's judgment and remand to the Tenth Circuit for reconsideration in light of *Gall*, *Rita* and *Nelson*.

Conclusion

Sedillo asks this Court to grant this Petition and review and reverse the Tenth Circuit's decision.

Respectfully submitted,

STEPHEN P. MCCUE
Federal Public Defender

DATED: March 28, 2019

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Appendix

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Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Joshua SEDILLO, Defendant-Appellant.
No. 17-2173

|
Filed November 29, 2018

Synopsis
Background: Defendant was convicted in the United States District Court, District of New Mexico, of two counts of distributing methamphetamine. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] trial court did not plainly err by failing to explain its reasons for denying drug defendant's request for a downward sentencing variance;

[2] trial court did not plainly err by failing to resolve the parties' disagreement about whether drug defendant had sold drugs in the past before sentencing defendant;

[3] defendant's sentence was not procedurally unreasonable;

[4] defendant's sentence was not substantively unreasonable; but

[5] orally pronounced sentence, which required drug defendant to pay child support as a condition of his supervised release, was unconstitutionally vague.

Affirmed and remanded.

West Headnotes (6)

[1] Criminal Law

110Criminal Law

Defendant failed to preserve for review his claims that the district court failed to resolve a purported dispute over his history of drug distribution, or to expressly apply statutory sentencing factors, and thus, his procedural-reasonableness claims would be reviewed for plain error; on appeal defendant's complaint was that court did not adequately explain why it acted as it did, and to preserve that complaint for appeal, defendant needed to alert the court that its explanation was inadequate, which ordinarily would require an objection after the court rendered sentence. 18 U.S.C.A. § 3553(a).

Cases that cite this headnote

[2] Criminal Law

110Criminal Law

Trial court did not plainly err by failing to explain its reasons for denying drug defendant's request for a downward sentencing variance; the court briefly summarized defendant's criminal history, provided a general statement of its reasons, and sentenced defendant at the bottom of his guidelines range. 18 U.S.C.A. § 3553(a).

Cases that cite this headnote

[3] Criminal Law

110Criminal Law

Trial court did not plainly err by failing to resolve the parties' disagreement about whether drug defendant had sold drugs in the past before sentencing defendant; defendant did not cast doubt on any of the underlying facts in the presentence investigation report (PSR), including any implication that he had sold drugs in the past, as required to create a controverted matter for purposes of invoking sentencing court's obligation to rule on a factual dispute. Fed. R. Crim. P. 32(i)(3)(B).

Cases that cite this headnote

[4] Criminal Law

110Criminal Law

Any plain error by the trial court in failing to expressly apply the statutory factors it considered in imposing sentence on drug defendant at the bottom of his guidelines range did not affect defendant's substantial rights, and thus, the sentence was not procedurally unreasonable; any error would not have affected the outcome, when the guidelines range was correctly calculated and defendant was sentenced at the bottom of the range. 18 U.S.C.A. § 3553(a).

Cases that cite this headnote

[5] Sentencing and Punishment

350HSentencing and Punishment

Drug defendant's low-end sentence of 140 months for distributing methamphetamine was not substantively unreasonable; defendant did not adequately explain how a low-end sentence was arbitrary, capricious, whimsical, or manifestly unreasonable. 18 U.S.C.A. § 3553(a).

Cases that cite this headnote

[6] Sentencing and Punishment

350HSentencing and Punishment

Orally pronounced sentence, which required drug defendant to pay child support as a condition of his supervised release, was unconstitutionally vague; the order did not specify for which children defendant was required to pay support, how much he should pay, or for how long.

Cases that cite this headnote

(D.C. No. 1:16-CR-02703-MCA-1) (D. N. Mexico)

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Margaret Ann Katze, Office of the Federal Public Defender, District of New Mexico, Albuquerque, NM, for Defendant-Appellant

Before LUCERO, EBEL, and PHILLIPS, Circuit Judges.

ORDER AND JUDGMENT*

Gregory A. Phillips, Circuit Judge

*1 After Joshua Sedillo pleaded guilty to two counts of distributing methamphetamine, the district court sentenced him to 140 months in prison, followed by a five-year term of supervised release with alternative conditions: either marry the mother of his children or establish an account to pay child support. Sedillo now appeals, arguing that his 140-month sentence is both procedurally and substantively unreasonable and that the order of supervision exceeds the court's authority and violates his substantive-due-process rights. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm Sedillo's sentence, but remand for the court to clarify its supervised release order.

BACKGROUND

In 2016, with the help of confidential informants, agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) organized a large-scale sting operation in Albuquerque, New Mexico to buy guns and drugs, resulting in over 100 arrests. Among those arrested was Sedillo, who sold a combined total of about five ounces of methamphetamine to an undercover ATF agent in two separate sales.[1] The agents arranged a third sale, this time for more drugs and a firearm. When Sedillo arrived with the requested goods, the agents arrested him. In his vehicle, officers discovered a .40 caliber handgun and ammunition, 125 grams of methamphetamine, and twenty grams of heroin.

Sedillo pleaded guilty to two counts of distribution of fifty grams or more of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(viii). The probation office then prepared a presentence investigation report (PSR), which recommended a total offense level of 29.[2] This, combined with his category V criminal history, led to an advisory guidelines range of 140 to 175 months. Based on Sedillo's background, the probation office advised that a variance below that range "may be warranted."

Sedillo then moved for a downward variance. In support, he argued that his life hardships and disadvantages—which included growing up in a family of heroin users and losing his father during high school—warranted a shorter sentence. Sedillo further argued that ATF had designed its sting operation to entice drug *users* like him into becoming drug *dealers* by paying more than street value for the drugs. He noted that instead of arresting him after the first sale or using him to find a supplier, ATF had arranged two more sales with him, "ratcheting up the drug amount, and in turn, the sentencing guidelines."[3] The Government opposed Sedillo's variance motion,

arguing that Sedillo's sporadic employment created a strong inference that he did, in fact, have a history of drug dealing, because he must have "supplemented his meager income" with drug-dealing earnings. R. vol. 1 at 29–36.

*2 Before sentencing, Sedillo's case was reassigned to a visiting judge from Midland, Texas. Sedillo filed a motion under seal requesting that the case be reassigned back to the original judge, citing her familiarity with ATF's controversial sting operation.[4] In a summary order, the original judge denied the motion, leaving it to the visiting judge to preside over Sedillo's sentencing.

At the sentencing hearing, the court asked whether Sedillo had any objections to the PSR, and he responded that he had incorporated some "informal objections" into his variance motion, but explained that "they're not specific objections that [he] filed with the Court."[5] R. vol. 2 at 27. Seeking clarity, the court asked, "So do you have any objections to the report?" *Id.* Sedillo answered no. The court then heard arguments on Sedillo's variance motion. Sedillo reiterated the arguments from his downward-variance memorandum, relying on his family struggles and ATF's manipulating his drug weight with repeated methamphetamine purchases from him. To that end, he highlighted several federal cases arising from the same sting operation in which the court had granted substantial downward variances. In sum, he argued that a nearly twelve-year sentence was unreasonable for someone with no history of drug dealing, whom the ATF had lured into making easy cash. Questioning this premise, the court interjected to ask, "So when [Sedillo] was arrested in El Paso County, Texas [in 2013] for possession of 50 to 2,000 pounds of marijuana, that was just for personal use?" *Id.* at 30–31. Sedillo responded that he had been convicted of possession in that case, not distribution.

Sedillo also read a letter to the court, in which he acknowledged his mistakes, recounted his longtime struggles with addiction and poverty, and promised to rehabilitate himself in prison. He emphasized that he is a father of four—one "stepchild" and one biological child from a previous relationship, and two biological children with his current fiancée—and that, upon regaining his freedom, he intends to make music and start an outreach program for children who grew up in similar circumstances.

After Sedillo finished reading his letter, the court asked, "Now, you've never married any of the women you have babies with, have you?" R. vol. 2 at 43. Sedillo acknowledged that he had not, saying that he didn't love the mother of his first-born child, but that he planned to marry his current fiancée, the mother of his younger two children. *Id.* The court then asked, "Do you pay child support for your first child?" *Id.* at 44. Sedillo responded that he did not, but that despite being incarcerated for much of the child's life, he did "what he could for her while [he] was out." *Id.*

Ultimately, the court denied Sedillo's motion for a downward variance and sentenced him to 140 months of imprisonment, the bottom of the advisory guidelines range. Specifically, the court found:

> *3 The defendant has five felony convictions between 2007 and 2013, resulting in a criminal history category of V. The felony convictions are related to drug possession, possession of a firearm, and robbery. The defendant's convictions occurred in close proximity to each other and within ten years of the instant offense. After reviewing the defendant's criminal history, it appears his criminal history category is appropriately categorized. In addition, the defendant's offense involved a good amount of drugs. And therefore, the Court is not going to grant a downward departure pursuant to [U.S.S.G. § 4A1.3]. I'm not departing from the recommended sentence. Pursuant to the Sentencing Reform Act of 1984, which I have considered in an advisory capacity, and the sentencing factors set forth in [18 U.S.C. § 3553(a)], which I have considered in arriving at a reasonable sentence, I do find the guideline range in this case to be fair and reasonable.

Id. The court then ordered that, within sixty days of his release from custody, Sedillo "shall either marry the mother of [his] children, or ... establish an account for the payment of child support for [his] minor children with the proper [state] agency." *Id.* at 55. The court styled its written judgment

differently, however, ordering Sedillo to either "comply with child support requirements or marry the mother of his children within 60 days of being released from custody." R. vol. 1 at 76.

Sedillo objected to the reasonableness of his sentence and the legality of the marry-or-pay-support condition of supervised release. As to the sentence, he argued that it was procedurally unreasonable—because the visiting judge was not familiar with the ongoing litigation about the alleged impropriety of ATF's sting operation—and substantively unreasonable—because he had "never done more than two years in prison" and his crime "literally was created by the government." R. vol. 2 at 58–59. As to the conditions of supervised release, Sedillo argued that the court did not have the authority to order someone to marry another person. *Id.* at 59. The court responded that marrying the mother of his children was but one of two options, and that, if he did not like that option, "he [wa]s required under law to [pay child support] in the state of New Mexico." *Id.* Sedillo countered that, even assuming he were liable for child support, "there are state procedures that [c]ould be pursued and wages could be garnished. This isn't the place to litigate the child support." *Id.* at 60. The court overruled his objection. *Id.* Sedillo now appeals.

DISCUSSION

Sedillo appeals his sentence, arguing that it's both procedurally and substantively unreasonable. He also appeals the court's supervised-release order, contending that it exceeds the court's authority and violates his substantive-due-process rights. But before turning to the merits, we must determine the standard of review applicable to each issue.

I. Standard of Review

The parties agree that we review Sedillo's challenges to the substantive reasonableness of the sentence and the conditions of his supervised-release order for an abuse of discretion. But the parties disagree about which standard of review governs his procedural-reasonableness claims.

When a defendant has preserved his procedural- or substantive-reasonableness claims in the trial court, we generally review them under the abuse-of-discretion standard. *United States v. Sanchez-Leon*, 764 F.3d 1248, 1262 (10th Cir. 2014). In doing so, "we review de novo the district court's legal conclusions regarding the [g]uidelines and review its factual findings for clear error." *Id.* (internal quotations omitted). If the defendant failed to preserve those claims, we review for plain error. *United States v. Romero*, 491 F.3d 1173, 1178 (10th Cir. 2007). To preserve a procedural-reasonableness challenge to the sentence, a party must "contemporaneous[ly]" raise it. *Id.* at 1177. Doing so "alert[s] the district court and opposing counsel, so that [the] potential error can be corrected, obviating any need for an appeal." *Id.* (internal quotations omitted).

*4 Sedillo's procedural-reasonableness claims identify three purported errors by the district court: (1) "not acknowledging a reasonable request for a downward variance and not explaining why it considered the request irrelevant to the proceedings"; (2) "violating [Rule 32 of the Federal Rules of Criminal Procedure] by not resolving the parties' disagreement over whether Sedillo was selling narcotics before the undercover agent asked"; and (3) "not adhering to 18 U.S.C. § 3553(c) [by not] stating its reasons for imposing a particular sentence."[6] Sedillo's Opening Br. at 1–2.

The Government contends that plain-error review should apply because Sedillo failed to raise these issues after the court pronounced its sentence. Sedillo counters that abuse-of-discretion review applies because he raised them in his downward-variance motion

and had no duty to re-raise the same objections after receiving the sentence. Here is what Sedillo said post-sentence:

> Well, I think procedurally, a judge that is already familiar with this case and is familiar with the ATF cases and the ATF litigation is the appropriate judge to hear the case. It's impossible for me to reproduce for you the entire ATF sting litigation in a way that would make you understand how offensive the community—by that, I mean the legal and actual community—have found that operation, and I think that is relevant to the sentencing in Mr. Sedillo's case.

R. vol. 2 at 58. His use of the word "procedurally" notwithstanding, we agree with the Government that Sedillo did not sufficiently preserve his procedural reasonableness claim with this objection.

[1] The crux of Sedillo's procedural-reasonableness claim is that the district court failed to *explain the reasons* for his sentence, not that the court ultimately rejected his arguments for a downward variance. As we explained in a similar case:

> Defendant's complaint on appeal is not that the court rejected his arguments but that the court did not adequately *explain* why it acted as it did. To preserve that complaint for appeal, Defendant needed to alert the court that its explanation was inadequate, which ordinarily would require an objection after the court had rendered sentence. The court could then cure any error by offering the necessary explanation.

United States v. Gantt, 679 F.3d 1240, 1247 (10th Cir. 2012). After the court announced its sentence, Sedillo could have objected to its failure to address his arguments supporting leniency, its failure to resolve the purported dispute over Sedillo's history of drug distribution, or its failure to expressly apply the § 3553(a) factors. *See id.* Had Sedillo lodged a contemporaneous objection, the court could have immediately remedied the errors, "obviating any need for an appeal" on these issues. *See Romero*, 491 F.3d at 1177. But Sedillo's only specific objection was to the court's unfamiliarity with the ATF litigation. And this objection did not adequately preserve the procedural-reasonableness claims he raises on appeal.

*5 Sedillo's reliance on *United States v. Lopez-Avila*, 665 F.3d 1216 (10th Cir. 2011) is misplaced. In that case, the defendant moved for a downward variance because of sentencing disparities between jurisdictions that use a "fast-track" program and those that do not.[7] *Id.* at 1217. The court denied the motion on grounds that "it could not consider [such] disparities" when deciding the sentence. *Id.* On appeal, the Government argued that plain-error review applied "because [the defendant] did not renew his argument for a downward variance after the judge had pronounced sentence."*Id.* at 1217–18. We rejected this argument because "the [district] judge was familiar with the argument" and addressed it, and "requir[ing] defense counsel to perform a superfluous and futile gesture [of re-raising the objection] would take the time of the district courts for this meaningless charade." *Id.* In other words, *Lopez-Avila* differs from Sedillo's case because there the defendant appealed the district court's substantive decision, not the method by which the court arrived at its substantive decision. A contemporaneous objection would have served no purpose in *Lopez-Avila*; the district court would have simply restated its conclusion. By contrast, a contemporaneous objection here would have given the court an opportunity to explain its reasoning. *See id.*; *see also United States v. Vargas-Ortega*, 736 Fed.Appx. 761, 762-63 (10th Cir. 2018) ("[W]e have not required a contemporaneous objection when the defendant is appealing the district court's categorical refusal to consider an argument previously made in a motion for a downward variance [because doing so] would simply require a defendant to repeat what had already been stated in the motion.").

In sum, because Sedillo failed to adequately preserve his procedural-reasonableness claims, we review them for plain error.

II. Sedillo's Sentence is Procedurally and Substantively Reasonable

"When reviewing a sentencing challenge, we evaluate sentences imposed by the district court for reasonableness," which "has both substanti[ve] and procedural components." *United States v. Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007) (internal quotations omitted). "Procedural reasonableness involves using the proper method to calculate the sentence." *Id.* "Substantive reasonableness involves whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *Id.*

A. Procedural Reasonableness

As explained above, plain-error review applies to Sedillo's procedural-reasonableness claims. "We find plain error only when there is (1) error, (2) that is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Romero*, 491 F.3d at 1178. Sedillo bears the burden to prove each element. *Id.* After reviewing the record and the relevant law, we conclude that he has not met this burden.

1. The district court did not plainly err by failing to explain its reasons for denying Sedillo's request for a downward variance.

[2]Sedillo first argues that the district court erred by giving only "a truncated explanation" of "why [his] variance argument was not relevant to its sentencing deliberation." Sedillo's Opening Br. at 18–19. District courts have a duty "to adequately explain the chosen sentence." *Sanchez-Leon*, 764 F.3d at 1262 (internal quotations omitted). To fulfill this obligation, the sentencing court "should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising his [or her] own legal decisionmaking authority." *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007)). But when, as here, the court imposes a within-guidelines sentence, "it must provide only a general statement of its reasons, and need not explicitly refer to either the § 3553(a) factors or respond to every argument for leniency that it rejects in arriving at a reasonable sentence." *Id.* (internal quotations omitted).

Here, the district court briefly summarized Sedillo's criminal history and stated, "After reviewing the defendant's criminal history, it appears [Sedillo's] criminal history category is appropriately categorized. In addition, the defendant's offense involved a good amount of drugs." R. vol. 2 at 52–53. To be sure, such a cursory statement does not serve as a glowing example of sentencing transparency. But because the sentence was within the guidelines range, the court needed to provide only a "general statement of its reasons," not "respond to every argument for leniency." *See Sanchez-Leon*, 764 F.3d at 1262. Because the district court provided a general statement of its reasons and sentenced Sedillo at the bottom of his guidelines range, Sedillo has failed to establish any error, much less a plain error that affects "substantial rights" or "the fairness, integrity, or public reputation of judicial proceedings." *See Romero*, 491 F.3d at 1178.

2. The district court did not plainly err by failing to resolve the parties' disagreement about whether Sedillo had sold drugs in the past.

*6 [3]Sedillo next challenges the district court's failure to resolve the dispute about whether Sedillo had a history of drug dealing. "[F]or any disputed portion of the [PSR] or other controverted matter," the sentencing court must "rule on the dispute or determine

that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B). "[A] sentencing court does not satisfy its Rule 32 obligation by 'simply adopting the [PSR] as its finding.' " *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006) (quoting *United States v. Guzman*, 318 F.3d 1191, 1198 (10th Cir.2003)). Based on our review of the record, the district court did not err by failing to make a finding about Sedillo's history of drug dealing.

First, it's not clear that Sedillo's purported drug-dealing history was even a "controverted matter" under Rule 32. Sedillo's PSR neither stated nor implied that he sold drugs before his arrest in this case. Rather, Sedillo raised the issue in his sentencing memorandum in support of a downward variance, and the Government responded that his spotty employment history suggested that he supplemented his income with drug dealing. Even assuming that the PSR implies that Sedillo had sold drugs in the past, "a defendant does not 'dispute' a PSR's recitation of facts underlying his arrests unless he presents 'information to cast doubt on' the facts." *United States v. Warren*, 737 F.3d 1278, 1285–86 (10th Cir. 2013) (quoting *United States v. Yates,* 22 F.3d 981, 989 (10th Cir.1994)). "If a PSR is *not* disputed in this fashion, it is well established that a district court is free to rely on the PSR at sentencing." *Id.* Nowhere in the record does Sedillo "cast doubt on" any of the underlying facts in his PSR. As such, he failed to create a "controverted matter" for purposes of Rule 32. *See id.*

Second, even if a Rule 32 dispute did exist here, "the district court arguably determined that a ruling [about Sedillo's purported drug-dealing history] was unnecessary" because "[Sedillo's] convicted conduct, standing alone," was enough to justify a sentence at the bottom of the guidelines range. *Id.* Nothing in the record suggests that the district court would have imposed a lower sentence had it made an express finding about Sedillo's drug-dealing history. If anything, the court's questioning during the hearing indicates that it would have resolved the dispute in the Government's favor. *See* R. vol. 2 at 30–31 ("So when [Sedillo] was arrested in El Paso County, Texas for possession of 50 to 2,000 pounds of marijuana, that was just for personal use?"). As a result, Sedillo has failed to establish plain error on this basis.[8] *See Romero*, 491 F.3d at 1178.

3. The district court did not plainly err by failing to expressly apply the 18 U.S.C. § 3553(a) factors.

[4]Sedillo also asserts that the district court erred by failing to apply the § 3553(a) factors in reaching its sentence. "[E]very sentence that a district court ultimately imposes must reflect its determination of what is reasonable in light of the same § 3553(a) factors, whether that sentence is within or outside the [g]uidelines range." *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1114 (10th Cir. 2006) (citing *United States v. Booker*, 543 U.S. 220, 249–59, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)). "Although we have never required a district court to recite any 'magic words' to show that it has fulfilled its obligation to be mindful of the factors Congress has instructed it to consider in § 3553(a), we have nevertheless required the court to give reasons for imposing a particular sentence." *United States v. Hall*, 473 F.3d 1295, 1314 (10th Cir. 2007) (quoting *Sanchez-Juarez*, 446 F.3d at 1115–16). Relevant here, when "a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence and has expressly requested such a sentence, we must be able to discern from the record that the sentencing judge did not rest on the guidelines alone, but ... considered whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors." *Sanchez-Juarez*, 446 F.3d at 1115–17 (internal quotations omitted). Otherwise, we are left " 'in a zone of speculation' on appellate review." *Id.* at 1116 (10th Cir. 2006) (quoting *United States v. Rose*, 185 F.3d 1108, 1112 (10th Cir. 1999)).

*7 Turning to the specifics here, we agree with Sedillo that the district court provided a vague, skeletal explanation of its sentence and failed to elaborate on its consideration of the § 3553(a) factors. Even though a "decision to impose a sentence at the low end of the [g]uidelines range may fairly be read as a functional rejection of" the defendant's § 3553(a) arguments, the district court must do more than "cit[e] [the defendant's] offense conduct" and "not[e] that it ha[s] reviewed the PSR's factual findings and considered the [g]uidelines applications." *Sanchez-Juarez*, 446 F.3d at 1115. Nonetheless, even if we assumed that the district court erred and that the error was plain, we would still affirm Sedillo's sentence because he has not met his burden to prove that the alleged error affected his substantial rights—that is, that it "affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Here, Sedillo has failed to "explain why, on the facts of this particular case, a more detailed reasoning process might have led the court to select a [lower] sentence." *See United States v. Mendoza*, 543 F.3d 1186, 1194 (10th Cir. 2008). Because no evidence suggests that Sedillo's guidelines range was incorrectly calculated, and because the district court sentenced him at the bottom of that range, we see no reason why a more detailed recitation and application of the § 3553(a) factors would have led to a lower sentence. As a result, Sedillo has failed to establish that his sentence is procedurally unreasonable. *See id.*

B. Substantive Reasonableness

[5]Sedillo next argues that his sentence was substantively unreasonable. "A sentence is substantively unreasonable if 'the length of [the] sentence was excessive given all the circumstances of the case in light of the factors set forth in [18 U.S.C.] § 3553(a).' " *United States v. Naramor*, 726 F.3d 1160, 1171 (10th Cir. 2013) (quoting *Gantt*, 679 F.3d at 1249). These factors are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed ...;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant ...;
>
> (5) any pertinent policy statement ...
>
> (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.

18 U.S.C. § 3553(a). Because Sedillo preserved this issue, we review the district court's ruling for abuse of discretion, "deem[ing] a sentence unreasonable only if it is arbitrary, capricious, whimsical, or manifestly unreasonable." *Gantt*, 679 F.3d at 1249.

Sedillo argues that "[b]y following an unreasonable sentencing process, the district court crafted a substantively unreasonable sentence." Sedillo's Opening Br. at 33. More specifically, he maintains that the district court failed to explain why 140 months is sufficient, but not greater than necessary "to ensure just punishment and adequate deterrence." *Id.* at 34 (citing *Conlan*, 500 F.3d at 1169). In essence, Sedillo recycles his procedural-reasonableness arguments. *See id.* at 32–35. Because Sedillo does not adequately explain why his low-end sentence is "arbitrary, capricious, whimsical, or manifestly unreasonable," we find no abuse of discretion. *See Gantt*, 679 F.3d at 1249.

III. Sedillo's Supervised Release Conditions are Unconstitutionally Vague

[6]Last, Sedillo argues that the "get married or pay child support" condition of his supervised release should be stricken as unconstitutionally vague. "We review for abuse of discretion a special condition of supervised release to which timely objection was made; that is, we reverse only if it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." *United States v. Martinez-Torres*, 795 F.3d 1233, 1236 (10th Cir. 2015) (internal quotations omitted).

"District courts have broad discretion to impose special conditions of supervised release." *United States v. Bear*, 769 F.3d 1221, 1226 (10th Cir. 2014). But the Fifth Amendment's Due Process Clause requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," *see Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), and this requirement applies with equal force in the context of supervised-release conditions, *see United States v. Mike*, 632 F.3d 686, 694 (10th Cir. 2011). In *Mike*, for example, we found a supervised-release condition impermissibly vague because a "probation officer could reasonably believe that the computer monitoring conditions appl[ied] not only to computers that [the defendant] own[ed], but also to those owned by others, including [the defendant's] employer." *Id.*

*8 Unsurprisingly, the Government concedes that courts cannot require one person to marry another. We agree that any supervised-release condition requiring a defendant to marry would be unenforceable. But because the district court posed the conditions as alternatives, the Government contends that we can sever the marriage-condition portion of the order if we find the child-support condition enforceable. Sedillo, in turn, argues that, even if the conditions are severable, the child-support condition is unconstitutionally vague because no court has ordered him to pay child support. Before determining whether the child-support condition is unconstitutionally vague, however, we must resolve whether the oral pronouncement alone is controlling, or whether we may also look to the written judgment for guidance.

"An orally pronounced sentence controls over a [written] judgment and commitment order when the two conflict." *United States v. Villano*, 816 F.2d 1448, 1450 (10th Cir. 1987) (en banc). "[O]nly if the orally pronounced sentence is ambiguous may a reviewing court examine a subsequent written order to assist in interpreting the oral sentence." *United States v. Barwig*, 568 F.3d 852, 855 (10th Cir. 2009). Here, the district court's oral pronouncement requires Sedillo to "either marry the mother of [his] children, *or ... establish an account for the payment of child support for* [*his*] *minor children with the proper agency here in the state of New Mexico*." R. vol. 2 at 55 (emphasis added).

The Government argues that this pronouncement is ambiguous because no court has ordered Sedillo to pay child support, leaving open whom he should pay and how much. To clear up this purported ambiguity, it urges us to look to the written judgment, which states that Sedillo must "comply with child support requirements or marry the mother of his children within 60 days of being released from custody." R. vol. 1 at 76. As the Government sees it, the district court simply meant to order Sedillo to comply with any future child-support orders. *Id.* Sedillo, on the other hand, contends that the oral pronouncement is unambiguous, because the court ordered him to "establish an account" to pay child support. This unambiguity, he argues, prevents us from considering the written judgment.

We agree with Sedillo that the oral pronouncement controls because it is unambiguous. The district court ordered him to affirmatively "establish an account for the

payment" of child support. R. vol. 2 at 55. As is our prerogative, we take judicial notice that New Mexico's child-support-enforcement agency allows parents to create an online account[9] or initiate wage-withholding or automatic withdrawals from their bank accounts.[10] Because someone can "establish an account for the payment of child support" in New Mexico, the oral pronouncement is unambiguous, and we cannot consider the written order.[11] *See* *Barwig*, 568 F.3d at 855; *Villano*, 816 F.2d at 1450.

Having settled on the orally pronounced condition as the operative one, we agree with Sedillo that the alternative condition to pay child-support is unconstitutionally vague. The oral pronouncement requires Sedillo to "establish an account for the payment of child support for [his] minor children with the proper agency here in the state of New Mexico." R. vol. 2 at 55. But for which minor children? All of them? And how much shall he pay? For how long? Must Sedillo pay child support before a court has adjudicated him as the putative or biological father of a child? A person of ordinary intelligence would not understand how to comply with this supervised-release condition, so the district court abused its discretion in ordering it, and we vacate this portion of the order. *See* *Grayned*, 408 U.S. at 108, 92 S.Ct. 2294; *Mike*, 632 F.3d at 694.

CONCLUSION

*9 Consistent with the foregoing, we strike the portion of the order requiring Sedillo to "marry the mother of his children" and remand for the district court to clarify the child-support portion of its order. On remand, the district court may require Sedillo either to comply with any forthcoming child-support orders, or to "support his dependents and meet other family responsibilities," *see* 18 U.S.C. § 3563(b)(1); U.S.S.G. § 5D1.3(d)(1); *United States v. Muñoz*, 812 F.3d 809, 818–19 (10th Cir. 2016) ("[T]he condition is naturally understood to require only financial support that [the defendant] is able to provide."). In all other respects, we affirm Sedillo's sentence.

All Citations

--- Fed.Appx. ----, 2018 WL 6264224

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 The methamphetamine in the first sale was 97% pure, while that of the second sale was 88% pure.

2 The PSR calculated his base offense level as 30 under U.S.S.G. § 2D1.1(a)(5), because of the purity and amount of the methamphetamine and 19 grams of heroin included within relevant conduct. The PSR added two levels because the offense involved a firearm, but subtracted three levels because Sedillo had timely accepted responsibility under U.S.S.G. § 3E1.1(a), (b).

3 Sedillo cited multiple court rulings finding evidence that ATF's sting operation disproportionately targeted minorities. *See e.g.*, *United States v. Casanova*, No. CR 16-2917, doc. 57 at *4 (D.N.M. filed June 30, 2016) (order granting discovery) ("[T]he statistical evidence provided by Defendant constitutes reliable demographic information demonstrating that the operation resulted in a much higher percentage of African-American defendants than the usual rate of occurrence, in [this district], of drug and firearm arrests among that group. The Court further finds that the methods used by ATF in conducting this operation were likely to lead to a higher percentage of minority defendants, but that ATF declined to make use of any policies or training designed to counteract that effect.").

4 The original judge, Chief Judge Armijo, recently granted, in part, a "Motion to Compel Discovery Pertaining to Claim of Selective Enforcement" in a different case arising from the same sting. *See* *United States v. Jackson*, No. 16-CR-2362 MCA, 2018 WL 748372, doc. 73 (D.N.M. Feb. 7, 2018).

5 Sedillo made just one formal objection to the PSR, complaining that it overrepresented his 2009 robbery conviction, because, although he took property from the victim by force, he neither used a weapon nor injured the victim.

6 Although not listed in his "statement of the issues," Sedillo also asserts in the body of his brief that the district court applied an incorrect legal standard. Sedillo's Opening Br. at 15–17. Specifically, he claims that the court erroneously "singl[ed] out the advisory guideline range as the presumptively reasonable range," effectively forcing him "to rebut that presumption at sentencing." *Id*. at 16. Sedillo is generally correct that district courts err when they presume that a sentence within the guidelines is reasonable. *See* *United States v. Conlan*, 500 F.3d 1167, 1168–69 (10th Cir. 2007). But unlike in *Conlan*, where the district court stated that "the guideline recommendations ... are presumptively reasonable," *id.*, the district court here applied no such presumption. Rather, the court stated, "I do find the guideline range in this case to be fair and reasonable." R. vol. 2 at 52–53.

7 "Fast-track" agreements allow prosecutors to "ask[ ] a defendant to waive indictment, trial, and an appeal" in exchange for recommending a downward departure from the guidelines range. *United States v. Ruiz*, 536 U.S. 622, 625, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002).

8 Sedillo leans heavily on *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1116 (10th Cir. 2008), but that case differs in two key respects. Unlike here, the district court "refus[ed] to permit the parties to introduce testimony on th[e] disputed issue," and failed to explain its refusal. 522 F.3d at 1116. Additionally, the sentence in that case was well outside the advisory-guidelines range. *Id.* at 1109.

9 New Mexico Human Services Department, *Child Support Services Application*, https://elink.hsd.state.nm.us/cLink/Default.aspx (last visited Nov. 16, 2018).

10 New Mexico Human Services Department, *Making Payments*, http://www.hsd.state.nm.us/LookingForAssistance/making-pyaments.aspx (last visited Nov. 16, 2018).

11 Even if the oral pronouncement were ambiguous, the written judgment would only add to the ambiguity. Presumably, if Sedillo satisfied the "marry the mother of his children" condition, he would not be required to comply with the child-support condition. But which mother must he marry? He has children with two women. And suppose Sedillo marries Mother #2, and a state court subsequently orders him to pay child support to Mother #1. Would the federal order of supervised release require him to pay child support to Mother #1?

End of Document

No. _____

In the

Supreme Court of the United States

JOSHUA SEDILLO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Certificate of Service

I, Margaret A. Katze, hereby certify that on March 28, 2019, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

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DATED: March 28, 2019

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