No. 18-_____

In the

Supreme Court of the United States

LUIS DAVID MORENO-PENA,
PETITIONERS,

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

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Whether challenges to the reasonableness of a sentence rooted in a court's failure to address arguments for leniency must be preserved by specific objection?

PARTIES TO THE PROCEEDING

Luis David Moreno-Pena is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Luis David Moreno-Pena, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of conviction and sentence was entered June 8, 2018, and is provided in the Appendix to the Petition. [Appendix A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Moreno-Pena,* 762 Fed. Appx. 184 (5th Cir. March 26, 2019)(unpublished), and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTION

The opinion and order of the United States Court of Appeals for the Fifth Circuit affirming the sentence were issued on March 29, 2019. [Appendix B]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 51 provides:

> **Rule 51. Preserving Claimed Error**
>
> (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.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Luis David Moreno-Pena unlawfully re-entered the country after having been removed. Record in the Court of Appeals at 29. He suffered arrest in December of 2016 for illegal re-entry. Record in the Court of Appeals at 124. He was accidentally released, and found again after an arrest for failing to identify himself to local police on September 10, 2017. Record in the Court of Appeals at 133. Yet he was not indicted until January 9, 2018, at the conclusion of his state term of imprisonment for failure to identify. Record in the Court of Appeals at 122. As a consequence of this delayed indictment, he will receive no credit for the period of incarceration after he was located (either time) by federal officials. *See* 18 U.S.C. §3585(b).

Petitioner pleaded guilty to illegal re-entry without a plea agreement. Record in the Court of Appeals at 28-29. After Probation settled on a recommended range of 51-63 months, *see* Record in the Court of Appeals at 154, he filed a Sentencing Memorandum, arguing that he should receive a below-range sentence, *see* Sentencing Memorandum, Supplemental Record in the Court of Appeals. In particular, he noted the absence of anticipated credit for his time in state custody, and the Commission's suggestion of a potential departure in this circumstance**.** Sentencing Memorandum, Supplemental Record in the Court of Appeals, at pp.5-6.

The court noted the existence of the Sentencing Memorandum, and flagged every issue in it save the absence of credit for state time. Record in the Court of

Appeals at 108-109. Stressing Petitioner's criminal history, it imposed an upward variance to 78 months imprisonment. Record in the Court of Appeals at 112-113. It did not mention the state credit issue. Record in the Court of Appeals at 112-113. Defense counsel objected to the sentence on the grounds that it was substantively unreasonable, which objection the court overruled. Record in the Court of Appeals at 114.

B. Proceedings in the Court of Appeals

On appeal, Petitioner argued that the district erred in failing to address an argument for leniency: that his effective term of imprisonment had been lengthened by uncreditable time spent in state custody after immigration had located him. Although he conceded that counsel had lodged no separate procedural reasonableness objection, he maintained that no such objection was necessary to preserve a district court's failure to explain the sentence.

The court of appeals held that an objection was in fact necessary, and summarily disposed of the claim without reaching the merits. [Appendix B, at 2]["Moreno-Pena does not undertake any plain error analysis and has therefore waived any argument that plain error occurred."]

REASONS FOR GRANTING THE PETITION

THERE IS A REASONABLE PROBABILITY OF A DIFFERENT RESULT IF THE PETITIONER PREVAILS IN *HOLGUIN-HERNANDEZ V. UNITED STATES*, NO. 18-7739, 2019 WL 429919, __S.CT.__, __U.S.__ (JUNE 3, 2019)(GRANTING CERTIORARI), AND THE COURT BELOW IS INSTRUCTED TO CONSIDER THE OUTCOME OF THAT DECISION.

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

This Court has emphasized that explanation of a defendant's sentence is an essential component of a system of advisory Guidelines. It stressed in *Rita v. United States*, 551 U.S. 338 (2007) that:

> The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal 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.)

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

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

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

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

Yet the court below has also held both that a defendant must make specific objection to preserve a substantive reasonableness claim, *see United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007), and that he or she must object specifically to the failure of the district court to address an argument for leniency, *see United States v. Mondragon-Santiago*, 564 F.3d 357, 364 (5th Cir. 2009). That was the sole ground for decision below – the court of appeals expressly disavowed any analysis of the merits. [Appendix B, at 2].

This Court will decide whether substantive reasonableness challenges require specific objection in *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL

429919, __S.CT.__, __U.S.__ (June 3, 2019)(granting certiorari). More specifically, the contention of petitioner/defendant in that case is that a defendant preserves claims of substantive reasonableness by presenting his or her grounds for a lesser sentence in district court. *See* Petition for Certiorari in *Holguin-Hernandez*, No. 18-7339, at 9 (Jan. 22, 2019)("When a defendant has made his sentencing request obvious to the district court, he has done what the contemporaneous-objection rule encourages him to do.")[1]. According to petitioner/defendant, the presentation of arguments for leniency to the district court provides that court all the information it needs to consider those arguments in the §3553(a) analysis. *See id.* at 11 ("To require a defendant to formally except to an imposed sentence as unreasonable does not put relevant information before the sentencing court").

Petitioner's claim is to like effect. Like Mr. Holguin-Hernandez, he contends that the presentation of arguments in mitigation triggers an independent duty under 18 U.S.C. §3553. *See* 18 U.S.C. §3553(c). In *Holguin-Hernandez*, the duty is to impose a substantively reasonable sentence; here the relevant duty is to reference those arguments. Both duties are clear from *Rita*, so it is difficult to see how Mr. Holguin-Herrera could prevail without causing the court below to reconsider its position as to the necessity of preserving claims related to a failure to respond to arguments in mitigation.

[1] *Available at https://www.supremecourt.gov/DocketPDF/18/18-7739/81300/20190122153932318_holguinWOCe.pdf*

In the event that this Court holds that such objections are not necessary, there is a reasonable probability of a different result. It is well-settled by *Rita* that a non-frivolous argument for a lesser sentence must be addressed specifically in a court's explanation for the sentence. *See Rita*, 551 U.S. at 356-357. In the present case, the defendant offered an argument for leniency that was clearly "non-frivolous." Counsel urged the court to consider the defendant's time in state custody after he had been found by immigration. Supplemental Record in the Court of Appeals, Sentencing Memorandum, at 6-7. This is a recognized ground for departure by the Sentencing Commission. *See* USSG §2L1.2, comment. (n. 6). And it is particularly compelling here, where immigration found the defendant not once, but twice, having accidentally released him the first time. Record in the Court of Appeals, at 124. In the present case, there was little reason to delay the indictment and the potential commencement of the federal sentence by way of a concurrent sentence. *See* USSG §5G1.3(d).

Yet the district court did not address this ground for a lesser sentence of imprisonment. Under the plain language of *Rita*, this was error, and the court of appeals did not say otherwise. It decided the case entirely based upon a standard of review that it will have grounds to reconsider in light of *Holguin-Hernandez*. Under these circumstances, it is appropriate to hold the instant petition, and if the petitioner prevails in *Holguin-Hernandez*, grant the instant petition, vacate the judgment below and remand for reconsideration. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

CONCLUSION

This Court should hold the instant Petition pending the outcome of *Holguin-Hernandez*, and then grant certiorari, vacate the judgment below and remand for reconsideration.

Respectfully submitted this 24th day of June, 2019,

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