No. 18-9791

IN THE SUPREME COURT OF THE UNITED STATES

LUIS DAVID MORENO-PENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reviewed for plain error petitioner's claim that the district court inadequately explained the sentence that it imposed, when petitioner failed to object in the district court to that explanation.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Moreno-Pena, No. 18-CR-3 (May 25, 2018)

United States Court of Appeals (5th Cir.):

United States v. Moreno-Pena, No. 18-10685 (Mar. 26, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is not published in the Federal Reporter but is reprinted at 762 Fed. Appx. 184.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2019. The petition for a writ of certiorari was filed on June 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of illegal reentry after having been removed from the United States, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. A1. The district court sentenced him to 78 months of imprisonment, to be followed by three years of supervised release. Id. at A2. The court of appeals affirmed. Id. at B1-B2.

1. Petitioner, a citizen and national of Mexico, first entered the United States in 2001. Presentence Investigation Report (PSR) ¶ 10. In 2003, he was convicted in state court of driving while intoxicated and of possessing a controlled substance. PSR ¶¶ 11, 44, 45. An immigration judge ordered him removed from the United States, and he was removed in October 2003. PSR ¶ 12. The following month, petitioner illegally returned to the United States. PSR ¶¶ 12-13. U.S. Border Patrol agents found him five days later and again removed him from the United States. PSR ¶ 13.

At some point thereafter, petitioner once again illegally reentered the United States, and between 2007 and 2010 he was convicted in state court of driving while intoxicated, assault, assault causing bodily injury, and failure to identify himself. PSR ¶¶ 14, 46-50. In 2011, following a state conviction for sexual assault, petitioner was transferred to federal custody, charged with and convicted of illegal reentry, and sentenced to 42 months

of imprisonment and three years of supervised release. PSR ¶¶ 15-16, 51-52. At the completion of his sentence of imprisonment in March 2014, he was removed from the United States for the third time. PSR ¶ 17.

In December 2016, police officers in Fort Worth, Texas, learned that petitioner had reentered the United States and was trafficking controlled substances. PSR ¶ 18. They arrested him but accidentally released him from custody three days later, and he absconded. PSR ¶ 19. Petitioner was next arrested in September 2017, when he used a false name during a traffic stop. PSR ¶¶ 21, 53. He was convicted of failure to identify himself and sentenced to 64 days of confinement. Ibid. When petitioner was released from state custody in January 2018, the district court that had presided over his 2011 illegal-reentry conviction revoked his supervised release and ordered a term of imprisonment of 18 months. PSR ¶ 22.

2. In January 2018, a federal grand jury charged petitioner with illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1), based on his most recent reentry. C.A. ROA 8-9; Pet. App. A1. Petitioner pleaded guilty. C.A. ROA 30; Pet. App. A1.

The Probation Office's presentence report recommended a total offense level of 17 and a criminal history category of VI, resulting in an advisory Sentencing Guidelines range of 51 to 63 months of imprisonment. Addendum to PSR ¶¶ 41, 89. It also

recommended an above-Guidelines sentence because petitioner had failed to register as a sex offender when he reentered the United States, as required in light of his 2011 sexual-assault conviction. PSR ¶ 103. Petitioner filed a sentencing memorandum requesting a below-Guidelines sentence. D. Ct. Doc. 27, at 4-6 (Apr. 23, 2018). As relevant here, petitioner noted that he had spent four months in state custody -- from September 2017 to January 2018 -- following his most recent apprehension. Id. at 4-5.

The district court adopted the presentence report's factual findings and Guidelines calculations and acknowledged petitioner's request for a below-Guidelines sentence. Sent. Tr. 2-3. Defense counsel then reiterated the arguments in the sentencing memorandum, including the request that "the Court consider * * * the time [petitioner] spent in state and immigration custody." Id. at 4. The court also heard from petitioner and petitioner's mother. Id. at 4-6.

The district court rejected petitioner's request for a below-Guidelines sentence and imposed an above-Guidelines sentence of 78 months. Sent. Tr. 6. The court reasoned that the sentence was "necessary * * * in part[] based upon the [petitioner's] criminal history" and because petitioner "ha[d] been deported at least three times * * * and he continue[d] to return." Ibid. The court further explained:

> While in this country [petitioner] has engaged in a large number of criminal offenses. Within this extensive criminal history are violent crimes. One against the mother of his

> children. One where he hit the injured party with a brick and tried to run him over because that injured party had told his parents about [petitioner's] bragging about a robbery. And he committed a sexual assault. It also appears from the materials presented to me that upon his latest return he failed to register as required.
>
> Based upon all of these factors, I believe this sentence will serve to protect the public from further crimes of [petitioner], provide just punishment, and afford adequate deterren[ce]. I also believe, based upon his previous removals and reentries, that a term of supervised release of 3 years is necessary in this case.

Id. at 6-7.

Defense counsel objected "only" that the sentence imposed was "substantive[ly] unreasonable[]." Sent. Tr. 8. The district court overruled the objection "for the reasons that [it had] stated" in imposing the sentence. Ibid.

3. The court of appeals affirmed in an unpublished per curiam decision.

On appeal, petitioner contended for the first time that his sentence was "procedurally unreasonable" because the district court "did not address" his argument for a variance based on the time that he spent in state custody after his September 2017 arrest. Pet. C.A. Br. 5, 7-8 (emphasis omitted). Petitioner acknowledged that he had "not object[ed] on this basis" at sentencing, but he did not attempt to show plain error. Id. at 5. He contended instead that this Court's decision in Chavez-Meza v. United States, 138 S. Ct. 1959 (2018), had "abrogated" any contemporaneous-objection requirement for claims of inadequate

sentencing explanation and that "[d]e novo review is now appropriate." Pet. C.A. Br. 5-6 (emphasis omitted).

The court of appeals rejected petitioner's contention. Pet. App. B1-B2. "[A]dher[ing] to * * * established [circuit] precedent" governing unpreserved claims that a district court inadequately explained its sentencing decision, the court found that plain-error review applied. Id. at B2 (citing United States v. Mondragon-Santiago, 564 F.3d 357, 364 (5th Cir.), cert. denied, 558 U.S. 871 (2009)). And because petitioner had not "undertake[n] any plain error analysis," the court determined that he had "waived any argument that plain error occurred." Ibid.

ARGUMENT

Petitioner contends (Pet. 5-8) that the court of appeals erred in applying plain-error review to his claim that the district court did not adequately explain its sentencing decision, when he failed to object in the district court to that explanation. He requests (Pet. 9) that this Court hold his petition for a writ of certiorari pending its disposition of Holguin-Hernandez v. United States, cert. granted, No. 18-7739 (oral argument scheduled for Dec. 10, 2019). That request is unsound. The court of appeals correctly applied plain-error review to petitioner's forfeited inadequate-explanation claim, and this petition does not present the same question pending before the Court in Holguin-Hernandez. In addition, petitioner would not benefit from a favorable ruling on the standard-of-review question he identifies in his petition

because the district court's explanation for its sentence was adequate under any standard of review.

1. The court of appeals correctly determined that petitioner's forfeited inadequate-explanation claim was subject to plain-error review.

Timely objections are central to the "focused, adversarial resolution" of sentencing disputes. Burns v. United States, 501 U.S. 129, 137 (1991). In order to preserve a claim for appellate review, a defendant must object to an allegedly erroneous district court ruling at the time the ruling "is made or sought," and must inform the district court "of the action the [defendant] wishes the court to take, or the [defendant's] objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). A claim that is not preserved in that manner is subject to review only for plain error. Fed. R. Crim. P. 52(b).

In United States v. Vonn, 535 U.S. 55 (2002), this Court applied plain-error review to a claim that a trial court had failed to conduct an adequate guilty-plea colloquy. The Court explained that "the point of the plain-error rule" is "always" that "the defendant who just sits there when a mistake can be fixed" cannot "wait to see" whether he is satisfied with the judgment and then identify the mistake in the first instance to the court of appeals if he is not. Id. at 73. Instead, a defendant must raise a contemporaneous objection, which ensures that "the district court can often correct or avoid the mistake." Puckett v. United States,

556 U.S. 129, 134 (2009); see Vonn, 535 U.S. at 72 (noting the benefits of "concentrat[ing] * * * litigation in the trial courts, where genuine mistakes can be corrected easily").

The reasons for requiring a contemporaneous objection under Federal Rule of Criminal Procedure 51(b) apply with full force to claims like petitioner's. Contrary to petitioner's suggestion (Pet. 7), a district court that is alerted to the possibility that a defendant views its explanation as insufficient may well supplement that explanation. Even a court that believes its existing explanation already suffices may choose to add more detail to satisfy an inquiring defendant or to obviate the need for an appeal and potential remand. A deficient explanation is thus precisely the sort of error that can be, and should be, corrected by the district court in the first instance. Indeed, in United States v. Booker, 543 U.S. 220 (2005), which rendered the Guidelines advisory and described the appropriate standard of appellate review in that regime, this Court confirmed that the courts of appeals would continue to apply "ordinary prudential doctrines, * * * [such as] whether the issue was raised below and whether it fails the 'plain-error' test," when reviewing an advisory Guidelines sentence for reasonableness. Id. at 268; cf. Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016) (when a defendant fails to object to a district court's guidelines calculation, "appellate review of the error is governed by Federal Rule of Criminal Procedure 52(b)"); Rosales-Mireles v. United

States, 138 S. Ct. 1897, 1904-1905 (2018) (applying plain-error review to miscalculation of guidelines range).

Nothing in this Court's decision in Chavez-Meza v. United States, 138 S. Ct. 1959 (2018), undermines that analysis. In Chavez-Meza, this Court determined that a district court's explanation for a sentence reduction under 18 U.S.C. 3582(c)(2) was adequate. 138 S. Ct. at 1967-1968. The Court did not address the question of whether a criminal defendant at an initial sentencing who fails to object to the adequacy of a sentencing explanation has nevertheless adequately preserved such an objection for appellate review. Rather, it assumed "purely for argument's sake" that "district courts have equivalent duties when initially sentencing a defendant and when later modifying that sentence," and held that the explanation provided by the district court sufficed. 138 S. Ct. at 1965; see Dillon v. United States, 560 U.S. 817, 825 (2010) (explaining that Section 3582(c)(2) "does not authorize a sentencing or resentencing proceeding"). Unlike in petitioner's case, the district court in Chavez-Meza did not hold a hearing before entering an order modifying the defendant's sentence under 18 U.S.C. 3582(c)(2). See 138 S. Ct. at 1965. The circumstances of Chavez-Meza thus arguably fell within the exception in Rule 51(b) that, "[i]f 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," Fed. R. Crim. P. 51(b). In any event, the government did not argue that the

defendant in Chavez-Meza had forfeited his claim. Petitioner, in contrast, appeared before the district court, and his failure to object to the relevant aspect of the court's sentence, see Sent. Tr. 8, remains subject to Rule 51(b)'s ordinary requirement of a contemporaneous objection.

2. Contrary to petitioner's assertion (Pet. 6-8), this Court's decision in Holguin-Hernandez is unlikely to warrant reconsideration of the Fifth Circuit's application of plain-error review to unpreserved inadequate-explanation claims.

In Holguin-Hernandez, this Court granted certiorari to consider whether, to preserve a claim that his sentence is substantively unreasonable, a criminal defendant who requests a shorter term of imprisonment must also object to the reasonableness of a longer term after it is ordered. Gov't Br. at I, Holguin-Hernandez, supra (No. 18-7739). As explained in the government's brief in Holguin-Hernandez, a criminal defendant who has advocated for a shorter term of imprisonment at sentencing has timely "inform[ed] the court * * * of the action the party wishes the court to take," Fed. R. Crim. P. 51(b), with respect to the court's obligation to select a "sufficient, but not greater than necessary" punishment for the offense, 18 U.S.C. 3553(a). See Gov't Br. at 21-23, Holguin-Hernandez, supra (No. 18-7739). Such a defendant has therefore done all that Rule 51 requires to preserve the claim that a longer term of imprisonment is substantively unreasonable,

and he need not repeat his objection if a longer sentence is imposed. See id. at 15, 20-32.

Petitioner, however, does not challenge the Fifth Circuit's application of plain-error review to a substantive-reasonableness claim. Petitioner expressly objected to the substantive reasonableness of his sentence, which was the "only" objection he raised before the district court, Sent. Tr. 8, but then asserted a procedural-reasonableness claim -- an objection to the adequacy of the explanation for his sentence -- on appeal, see Pet. App. 1-2. And the arguments asserted by the petitioner in Holguin-Hernandez lend no support to petitioner's contention (Pet. 7) that a generalized argument in favor of a shorter term of imprisonment preserves a claim that the sentence, even if substantively reasonable, was inadequately explained.

As discussed above, a request for a lesser sentence does not in itself provide the district court with "the opportunity to consider and resolve" the adequacy of the court's explanation for the prison term it ultimately imposes. Puckett, 556 U.S. at 134; see pp. 7-9, supra. Consistent with that view, the petitioner in Holguin-Hernandez has acknowledged that "procedural reasonableness is different from substantive reasonableness" and that "[w]hen a defendant has not asked the district court to take a certain procedural step, it might be necessary to object after the district court engages in a purported procedural irregularity to preserve such a claim for appeal." Pet. Br. at 20-21, Holguin-Hernandez,

supra (No. 18-7739). Because no party in Holguin-Hernandez urges a position that lends support to petitioner's view, it is unlikely that this Court's decision in Holguin-Hernandez will affect the proper disposition of this case.

3. In addition, petitioner would not benefit from a favorable ruling on the standard-of-review question he identifies in his petition, because the district court's explanation of petitioner's sentence was adequate under any standard of review.

After announcing petitioner's sentence, the district court explained at length why it "believe[d]" that a 78-month term of imprisonment was "necessary." Sent. Tr. 6. The court noted that petitioner had a "criminal history number VI," that he "has been deported at least three times," and that "he continues to return." Ibid. The court further observed that petitioner had "engaged in a large number of criminal offenses," including "violent crimes." Ibid. In one instance, he assaulted "the mother of his children." Ibid. In another, he struck the victim "with a brick" and then "tried to run him over," simply because the victim had "told his parents" that petitioner had "bragg[ed] about a robbery." Ibid. Petitioner also "committed a sexual assault" but failed to register as a sex offender. Ibid. "Based upon all of these factors," the court concluded, a 78-month sentence was necessary to "protect the public from further crimes of [petitioner], provide just punishment, and afford adequate deterrents." Id. at 7. The court's extensive explanation amply suffices to "allow for

meaningful appellate review" of the district court's sentence. Gall v. United States, 552 U.S. 38, 50 (2007).

Petitioner's claim (Pet. 7) that the district court erred by not addressing the time he spent in state custody after being apprehended in September 2007 lacks merit. In Rita v. United States, 551 U.S. 338 (2007), the Court determined that a sentencing court's explanation was "legally sufficient" when it rejected the defendant's arguments for a below-Guidelines sentence -- based on his poor health, military service, and vulnerability in prison -- by stating that a sentence at the bottom end of the Guidelines range was "appropriate." Id. at 344-345, 358 (citation omitted). Because the matter was "conceptually simple" and "the record ma[de] clear that the * * * judge considered the evidence and arguments," this Court concluded that the sentencing court was not required "to write more extensively." Id. at 359.

In this case, as in Rita, petitioner's sentencing arguments for leniency were "conceptually simple," 551 U.S. at 359, and the record makes clear that the sentencing judge considered those arguments. See Sent. Tr. 3 ("I have reviewed your Motion for Variance related to your arguments there dealing with his acceptance of responsibility, his plan to Mexico, cultural assimilation here, and your request for an appropriate sentence to be below 51 months."). Petitioner therefore cannot demonstrate that the court of appeals would have deemed the district court's explanation inadequate under any standard of review. Accordingly,

the application of plain-error review did not affect the result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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