

No. _____

In the
Supreme Court of the United States

Jessica Arnold,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. What standard applies to appellate review of the appeal of a district court's failure to address arguments of counsel in mitigation of sentencing, where trial counsel did not object to the court's failure to do so?

PARTIES TO THE PROCEEDING

Petitioner is Jessica Arnold, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jessica Arnold seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Arnold*, No. 19-10876, 810 F. App'x 337 (5th Cir. 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence for the underlying criminal case is attached as Appendix B. The district court's judgment and sentence of revocation is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 23, 2020. On March 19, 2020, the Court extended the 90-day deadline to file a petition for certiorari to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

Federal Rule of Criminal Procedure 51 provides:

(a) Exceptions Unnecessary.

Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error.

A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

18 U.S.C. § 3553(a) provides, in pertinent part:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed –
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . .
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for –
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or

policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

LIST OF RELATED PROCEEDINGS

1. *United States v. Jessica Arnold*, 4:16-CR-234-O. United States District Court, Northern District of Texas. Judgment entered March 23, 2017.
2. *United States v. Jessica Arnold*, 4:16-CR-234-O. United States District Court, Northern District of Texas. Judgment of revocation and sentence entered July 26, 2019.
3. *United States v. Jessica Arnold*, Fifth Circuit No. 19-10876, opinion dated June 23, 2020. *United States v. Arnold*, 810 F. App'x 337 (5th Cir. 2020) (unpublished).

STATEMENT OF THE CASE

1. Proceedings in the Criminal Case

In 2017, Petitioner Jessica Arnold pleaded pled guilty to one count of use of a facility of interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. § 1952(a)(3) and (A), pursuant to a plea agreement. The district court sentenced Ms. Arnold to a term of five years' probation. In addition to the standard conditions of probation, the court imposed special conditions that required Ms. Arnold to participate in mental health treatment services; to refrain from unlawful use of controlled substances and to submit to testing for such use; and to participate in a substance abuse treatment program.

The evidence before the district court both at the original sentencing and at revocation shows that Ms. Arnold was a woman abused by both father and boyfriend, the latter of whom coerced her into engaging in the prostitution that ultimately led to her conviction. Unsurprisingly, Ms. Arnold has a substance abuse problem, which she admitted to and is a product of her efforts to cope with her mental health issues.

2. Revocation Proceedings

Ms. Arnold's probation was imposed on March 20, 2017. For almost one year, her only alleged probation violation involved a failure to pay the \$100 special assessment. Not coincidentally, during that time that Ms. Arnold was undergoing mental health treatment. Petitioner was discharged from a nearly one-year long term of mental health treatment on September 27, 2017. She relapsed into drug use in early 2018, and for the next two years she tested positive for drug usage on multiple

occasions, despite also completing both a residential drug treatment program and an intensive outpatient treatment during that time. After the court took no action on three prior notifications from probation about Petitioner's positive drug tests, the probation office petitioned the district court for action against Petitioner for submitting positive drug tests and associated drug usage. The petition determined Ms. Arnold to have committed a Grade C violation. Therefore, given Ms. Arnold's Criminal History Category of II, her Guideline imprisonment range was four to ten months.

Ultimately, Ms. Arnold admitted to the allegations relating to her drug usage and her failure to submit to required drug testing, and the government did not proceed with any other allegations. The government asked that Ms. Arnold be violated, but it did not argue for any particular sentence.

Ms. Arnold's counsel argued for a sentence at the low end of her Guideline range, followed by a supervised release term that included mental health treatment. Admitting that Ms. Arnold suffered from both a substance abuse problem and a mental health problem, her counsel suggested to the court that "her substance abuse problem is simply a product of an underlying mental health problem which needs to be addressed before the substance abuse problem can be fully addressed." Counsel then reminded the court of the abuse Ms. Arnold had suffered at the hands of her father, her childhood spent being shipped between various homes, her teenage pregnancy, and her romantic relationship with a codefendant—a relationship marked by physical and mental abuse and that led to Petitioner being prosecuted for her

offense. “Given this history, it seems likely that there is an underlying mental health issue, post-traumatic stress disorder or something of that nature, I would assume, and that’s going to need to be addressed before she can fully address her substance abuse problem.” Because Ms. Arnold had not been charged with any new offenses, counsel argued that she posed no danger to anyone but herself.

The district court stating, merely that it “consulted with the policy statements,” imposed a sentence of imprisonment of 24 months and a three-year term of supervised release, during which Ms. Arnold was ordered to participate in treatment for both mental health and substance abuse. Ms. Arnold’s counsel objected to the sentence, arguing that it was greater than necessary to comply with the statutory purposes of sentencing. The court replied,

Well, after considering all of the evidence in this case and after considering only those 3553(a) factors I am to consider in this case, I determine that based on the number and significance of the violations that [Ms. Arnold] has committed, that this is the appropriate sentence in this case. So that objection is overruled.

(ROA.126–27).

3. The Appeal

Petitioner appealed, contending that the district court had committed procedural error by failing to explain the above range sentence or to reference or respond to Petitioner’s arguments for leniency. Although acknowledging that defense counsel had failed to object to the district court’s explanation, she nonetheless maintained that it was unnecessary to lodge a separate objection to the procedural reasonableness of a criminal sentence, citing *Chavez-Meza v. United States*, 138 S.Ct. 1959 (2018).

The court of appeals disagreed and explicitly applied the plain error doctrine to reject Appellant's argument. It concluded, without reference to the record, that the district court adequately explained its sentence after "consider[ing] the Chapter 7 policy statements; the 18 U.S.C. § 3553(a) sentencing factors; the probation officer's reports; and the evidence and arguments presented, including [Petitioner's] request for leniency . . ." [Appendix A, at 337].

REASONS FOR GRANTING THIS PETITION

- I. **This Court should grant *certiorari* to resolve the apparent conflict between the Fifth Circuit and this Court's decision in *Chavez-Meza v. United States*, 138 S.Ct. 1959 (2018), as well as a split in circuit authority regarding the standard of review when a district court fails to address arguments of counsel in mitigation of sentencing.**

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* 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 decision making 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.

Chavez-Meza v. United States, 138 S.Ct. 1959 (2018), applied the requirement of sentence explanation to reductions under 18 U.S.C. §3582(c). In *Chavez-Meza*, the district court reduced a drug defendant's sentence to the middle of his reduced Guidelines, following a retroactive Guideline Amendment. *See Chavez-Meza*, 138 S.Ct. at 1964. The court did so on a pre-printed form, which *Chavez-Meza* argued to be inadequate. *See id.* This Court held that reviewing courts could look to the explanation provided at the original sentencing to determine the basis for the sentence ultimately imposed. *See id.* at 1965. Finding that original explanation adequate, this Court affirmed the sentence. *See id.*

This opinion offers potential benefit to Petitioner by permitting plenary review of the defendant's failure-to explain claim, even though there is no evidence that

Chavez-Meza ever objected to the procedural reasonableness of the sentence. *See id.*; *see also United States v. Chavez-Meza*, 854 F.3d 655 (10th Cir. 2017); Brief for the Petitioner in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709088, at *3-6 (Filed March 26, 2018)(detailing the case's factual background); Brief for the Respondent in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709089, at *2-8 (Filed March 28, 2018)(same). In the case at bar, the Fifth Circuit held that such claims could be reviewed only for plain error in the absence of explicit objection. *See* [Appx. B, at p.2]. That position is refuted by this Court's treatment of the claim in *Chavez-Meza*, which comports with well-reasoned decisions of the Fourth and Seventh Circuits. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010) ("By drawing arguments from § 3553 for a sentence different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim."); *United States v. Cunningham*, 429 F.3d 673, 675-680 (7th Cir. 2005) (Posner, J.) (offering plenary review, and relief, to a district court's failure to address a defendant's arguments in mitigation).

This Court has held that more extensive explanation may be necessary when the parties offer non-frivolous reasons for a sentence outside the range. That proposition was reaffirmed in *Chavez-Meza* itself. *See Chavez-Meza*, 138 S.Ct. at 1965 (citing *Rita*, 551 U.S. at 357). The reasons offered by Petitioner in district court were hardly frivolous. Yet the district court did not address the arguments for a lesser sentence of imprisonment. In the absence of a plain error standard – dispensed with

by *Chavez-Meza* – Petitioner was reasonably likely to prevail. And even if the standard of review in *Chavez-Meza* may be ignored, the district court’s treatment of the issue was sparse enough to justify the limited remand authorized in *Chavez-Meza*. In any event, certiorari should be granted to resolve the split in the circuits and the conflict with the holding by this Court in *Chavez-Mesa*, so the proper standard of appellate review can be determined for the failure of the district court to address mitigation arguments on behalf of the defendant at sentencing.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* and reverse the judgment below, so that the case may be remanded to the district court for resentencing. He prays alternatively for such relief as to which he may be justly entitled.

Respectfully submitted this 20th day of November, 2020.

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