No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TOMAS MORENO-TURRUBIATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when a defendant presents nonfrivolous mitigation arguments in favor of a lower sentence, a district court must address those arguments as part of its required sentence explanation under 18 U.S.C. § 3553(c).

2. Whether a claim of procedural unreasonableness for inadequate explanation is preserved for appellate review without a specific objection, as the Fourth, Seventh, and Eleventh Circuits have held, or whether a specific objection is required to avoid plain-error review on appeal, as other circuits have held.

3. Whether a plainly inadequate explanation for a sentence within the imprisonment range calculated under the United States Sentencing Guidelines affects a defendant's substantial rights in the ordinary case.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

DIRECTLY RELATED CASES

- *United States v. Moreno-Turrubiates*, No. 15-cr-00533, U.S. District Court for the Southern District of Texas. Judgment entered January 15, 2020.
- *United States v. Moreno-Turrubiates*, No. 19-cr-00498, U.S. District Court for the Southern District of Texas. Judgment entered January 13, 2020.
- *United States v. Moreno-Turrubiates*, No. 20-40021, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 23, 2020.
- *United States v. Moreno-Turrubiates*, No. 20-40022, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 23, 2020.

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PRAYER

Petitioner Tomas Moreno-Turrubiates prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Moreno-Turrubiates's case is attached to this petition as an Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment was entered on July 23, 2020. *See* Appendix. This petition is filed within 150 days of that date. *See* Sup. Ct. Order of Mar. 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553. Imposition of a sentence

(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 actof 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.

*** * ***

(c) Statement of reasons for imposing a sentence.--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 the 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 the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court

shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [*sic*] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

STATEMENT OF THE CASE

The questions presented in this case concern the adequacy of the district court's sentence explanation. For the offense of illegal reentry after removal and for violating supervised-release conditions by returning to the United States without permission, the district court sentenced Mr. Moreno-Turrubiates to a combined prison sentence of five years. The district court gave a very brief explanation that did not address Mr. Moreno-Turrubiates's extensive mitigating arguments in support of a lower sentence.

A. Original proceedings, indictment, plea, and alleged violations of supervised release.

On June 16, 2015, Mr. Moreno-Turrubiates was indicted for the offense of being found unlawfully present in the United States after having been previously deported after sustaining a felony conviction, in violation of 8 U.S.C. § 1326(a) and (b)(1). Mr. Moreno-Turrubiates was convicted on his guilty plea and was sentenced, on February 17, 2016, to 48 months in the custody of the Bureau of Prisons, to be followed by three years of supervised release. The supervised-release term included a special condition to not reenter the United States illegally. Mr. Moreno-Turrubiates's supervised-release term began on November 26, 2018, and was scheduled to expire on November 25, 2021.

On May 14, 2019, Mr. Moreno-Turrubiates was indicted for the offense of being found unlawfully present in the United States after having been previously deported after sustaining a felony conviction, in violation of 8 U.S.C. § 1326(a) and (b)(1). On September 3, 2019, Mr. Moreno-Turrubiates entered a plea of guilty, without a plea agreement.

Meanwhile, on May 24, 2019, the United States Probation Office filed a petition to

revoke Mr. Moreno-Turrubiates's term of supervised release. The petition alleged that Mr. Moreno-Turrubiates had violated the conditions of his supervised release by illegally reentering the United States.

B. The presentence report and Sentencing Guidelines calculations.

The district court ordered the Probation Office to prepare a presentence report ("PSR") to assist the court in sentencing Mr. Moreno-Turrubiates. Using the 2018 version of the United States Sentencing Guidelines ("USSG"), the PSR calculated Mr. Moreno-Turrubiates's total offense level to be 19 and criminal history category of IV, as shown in the tables below:

Calculation	Levels	USSG §	Description
Base offense level	8	2L1.2(a)	8 U.S.C. § 1326
Specific offense characteristic	+4	2L1.2(b)(1)(A)	Felony illegal-reentry conviction before the defendant committed the instant offense
Specific offense characteristic	+10	2L1.2(b)(2)(A)	Before first order of deportation/removal, engaged in criminal conduct that, at any time, resulted in a felony non-illegal-reentry conviction for which the sentence imposed was five years or more and received criminal history points
Adjustment to offense level	-3	3E1.1(a) & (b)	Acceptance of responsibility
Total offense level	**19**		

Date of sentence	Offense and description	USSG §	Pts.
03/24/1998	Driving while intoxicated: 30 days' custody suspended for 1 year of probation, probation revoked 07/24/2000 to 30 days' custody	4A1.2(e)(3)	0
04/01/1998	Driving while intoxicated: 6 months' custody suspended for 12 months' probation	4A1.2(e)(3)	0
07/24/2000	Driving while intoxicated-2nd: 30 days' custody	4A1.2(e)(3)	0

Date of sentence	Offense and description	USSG §	Pts.
01/05/2001	Driving while intoxicated: 5 years' custody, suspended for 5 years' probation	4A1.2(e)(3)	0
11/14/2005	Driving while intoxicated: 2 years' custody suspended for 5 years' probation	4A1.2(e)(3)	0
10/27/2009	Driving while intoxicated, evading arrest, aggravated assault: 7 years' custody	4A1.1(a)	3
02/17/2016	Illegal reentry: 48 months' custody, to be followed by 3 years of supervised release	4A1.1(a)	3
	Committed the instant offense while on supervised release	4A1.1(d)	2
Criminal history points (Category)			**8 (IV)**

With an offense level of 19 and a criminal history category of IV, the PSR determined the Guidelines imprisonment range to be 46 to 57 months.

C. Combined sentencing and revocation hearing.

On January 8, 2020, the district court held a combined sentencing and revocation hearing. The district court confirmed that counsel for Mr. Moreno-Turrubiates did not have any objections to the PSR. Government's Exhibit No. 1, which contained certain documents related to Mr. Moreno-Turrubiates's prior convictions, was admitted into evidence without objection. The government recommended a sentence of 57 months in custody in large part due to Mr. Moreno-Turrubiates's recent prior sentence of 48 months. The government further pointed to Mr. Moreno-Turrubiates's six convictions for driving while intoxicated.

Counsel for Mr. Moreno-Turrubiates gave a lengthy presentation of mitigating factors. Counsel explained that Mr. Moreno-Turrubiates had come to the United States when he was a teenager. He started drinking alcohol "at a very young age" and "became

very dependent on that." His criminal history was "alcohol related," and Mr. Moreno-Turrubiates had "never been in [any] other kind of trouble," such as "drugs, fights, or anything." Mr. Moreno-Turrubiates's convictions for aggravated assault were alcohol related. Under Texas law, Mr. Moreno-Turrubiates's conduct constituted an aggravated assault because the car he was driving while intoxicated qualified as a weapon.

Counsel discussed Mr. Moreno-Turrubiates's work history and educational background. Mr. Moreno-Turrubiates is "a hardworking man [who] work[ed] in the fields in agriculture." Mr. Moreno-Turrubiates also worked "as a mechanic [to] provid[e] for his family and for himself." So that he could "work and help his family," Mr. Moreno-Turrubiates stopped attending school in the fourth grade.

Counsel further discussed Mr. Moreno-Turrubiates's family situation. The rest of Mr. Moreno-Turrubiates's family "have all attained legal status" to live in the United States. But Mr. Moreno-Turrubiates could not do that because of his alcohol-related criminal history. Mr. Moreno-Turrubiates "has two daughters, one [of whom] is a teenager, the other one is 11 years old." Because of Mr. Moreno-Turrubiates's "troubles, he has practically never seen or spent time with the youngest one. . . . She was about 11 months to a year when he got in trouble and was sent away, and now she's 11." Mr. Moreno-Turrubiates told counsel, "with tears in his eyes" that "he's tired of this and the only reason he came back was to be close to his daughters and provide for them." Mr. Moreno-Turrubiates told counsel that, despite his lack of ties to Mexico because he came to the United States "at such a young age," and despite his family being in the United States, Mr. Moreno-Turrubiates had "resolved to not be in jail again."

Regarding Mr. Moreno-Turrubiates's immigration-related criminal history, counsel acknowledged that Mr. Moreno-Turrubiates was sentenced to 48 months in custody for his first illegal-reentry conviction. Counsel explained that, during that period of incarceration, Mr. Moreno-Turrubiates had "a big epiphany" when he realized the difficulties his problems with alcohol were causing him and his family. While incarcerated in a medium security prison, he worked with his counselor and "took a series of classes to address the alcohol problems and other problems and, upon completion of his courses, he was downgraded to a low security" prison. In the low security prison, "he did very well. He worked and completed his time and [was] deported."

For all of those reasons, counsel for Mr. Moreno-Turrubiates asked the court "to consider not just the low end [of the Guidelines range], but a lower sentence." Counsel for Mr. Moreno-Turrubiates expressed his belief "that this time around [Mr. Moreno-Turrubiates will] go back to Mexico and he will not come back. He knows he's facing more and more time every time he comes back and he doesn't want that, Your Honor."

Mr. Moreno-Turrubiates gave his allocution. He apologized for returning to the United States again. He explained that he returned because his daughters asked him to return. He acknowledged that he had made mistakes, but explained that he was "tired of being in jail" and didn't "want [his] daughters to see [him] anymore in jail."

The court imposed a sentence of 52 months in the custody of the Bureau of Prisons, to be followed by a two-year term of supervised release. The court's entire explanation for its sentence was: "I adopt the factual findings and guideline applications in the Pre-Sentence Investigation Report. I have considered the factors in 18 U.S.C. [§] 3553(a), but

will not apply a variance."

The court recommended to the Bureau of Prisons that Mr. Moreno-Turrubiates be evaluated for and, if found appropriate, participate in an alcohol-abuse treatment program while incarcerated. The court imposed special conditions of supervised release related to immigration. The court waived imposition of a fine based on Mr. Moreno-Turrubiates's inability to pay one. And the court granted the government's motion to remit the $100 special assessment.

Turning to the revocation of supervised release, Mr. Moreno-Turrubiates pleaded true to the violations alleged in the petition. The government recommended a sentence of eight months to run consecutively to the 52-month sentence. Counsel for Mr. Moreno-Turrubiates and Mr. Moreno-Turrubiates himself requested a concurrent sentence.

The court revoked Mr. Moreno-Turrubiates term of supervised release and sentenced Mr. Moreno-Turrubiates to eight months in the custody of the Bureau of Prisons, consecutive to the 52-month sentence, for a total sentence of 60 months. The court did not explain its revocation sentence. The sentencing hearing concluded without counsel for Mr. Moreno-Turrubiates making any objections to the sentence after it was imposed.

D. Appeal.

Mr. Moreno-Turrubiates filed timely notices of appeal on January 13, 2020, in both cases. The Fifth Court granted Mr. Moreno-Turrubiates's unopposed motion to consolidate the appeals.

On July 23, 2020, the Fifth Circuit issued its opinion affirming the district court's judgment. The court held that "[t]he explanation given by the district court, though brief,

was enough to satisfy [the Fifth Circuit] that the [district] court heard Moreno-Turrubiates's arguments and plea for leniency and that it had 'a reasoned basis for exercising [its] own legal decision making authority." *United States v. Moreno-Turrubiates*, 813 Fed. Appx. 161, 162 (5th Cir. 2020) (unpublished) (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007)). Mr. Moreno-Turrubiates now requests this Court to resolve three conflicts among the lower courts related to sentence explanations: First, whether, when a defendant presents nonfrivolous mitigation arguments in favor of a lower sentence, a district court must address those arguments as part of its required sentence explanation under 18 U.S.C. § 3553(c); second, whether a specific objection is required to preserve a claim of procedural unreasonableness for inadequate explanation for appellate review; and third, whether a plainly inadequate explanation for a sentence within the imprisonment range calculated under the United States Sentencing Guidelines affects a defendant's substantial rights in the ordinary case.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are divided in three ways in how they evaluate district courts' sentence explanation. First, they are divided on whether, when a defendant presents nonfrivolous mitigation arguments in favor of a lower sentence, a district court must address those arguments as part of its required sentence explanation under 18 U.S.C. § 3553(c). Second, they disagree as to whether a specific objection is required to preserve a claim of procedural unreasonableness for inadequate explanation for appellate review. And third, they are divided on whether a plainly inadequate explanation for a sentence within the imprisonment range calculated under the United States Sentencing Guidelines affects a defendant's substantial rights in the ordinary case. All three are important questions of federal law that this Court should decide.

I. This Court has provided limited guidance on how federal appellate courts should evaluate the adequacy of district courts' sentence explanations.

After *United States v. Booker*, 543 U.S. 200 (2005), federal courts of appeals review sentences for reasonableness. *See Booker*, 543 U.S. at 261-62. Under the reasonableness review mandated by *Booker*, "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007). Reasonableness review of federal sentences has two components: procedural and substantive. *See Gall*, 552 U.S. at 51. Procedural reasonableness review requires that a court of appeals "first ensure that the district court committed no significant procedural error, such as . . . failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Id.* Only if there is no "significant procedural error" will the appellate court proceed to review the substantive reasonableness of the sentence. *Id.*

In *Rita v. United States*, 551 U.S. 338 (2007), *Gall*, and *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018), this Court has provided some guidance for appellate courts'

evaluation of the adequacy of a district court's sentence explanation. In *Rita*, the Court considered whether the district court in that case had adequately explained its sentence. *Rita*, 551 U.S. at 356. The Court observed that not only does 18 U.S.C. § 3553(c) require courts to "state in open court the reasons for its imposition of the particular sentence," but such a "requirement reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Rita*, 551 U.S. at 356.

Although judges have some discretion to determine how brief or detailed an explanation to give based on the particulars of a case, the Court explained that "[t]he 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." *Rita*, 551 U.S. at 356 (*United States v. Taylor*, 487 U.S. 326, 336-37 (1988)). If, for example, a sentencing judge decides to impose a sentence within the range suggested by the Sentencing Guidelines, it may be that a limited explanation is all that is required by the circumstances of the case. *Rita*, 551 U.S. at 357. If, however, "the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence," that is, a sentence outside the Guidelines range, "the judge will normally go further and explain why he has rejected those arguments." *Id.*

Applying those principles, the Court in *Rita* determined that the sentence explanation in that case was "brief but legally sufficient." *Id.* at 358. The sentencing transcript showed that the judge had summarized two of the mitigation arguments made on

the defendant's behalf in favor of a below-Guidelines sentence, the judge had "asked questions about each factor" that had been articulated in favor of a below-Guidelines sentence, and the judge stated that the Guidelines range was not "inappropriate" and a sentence at the bottom of the Guidelines range was "appropriate." *Rita*, 551 U.S. at 344-45, 358. The Court concluded that the law did not require a more extensive explanation in that case because the matters were "conceptually simple . . . and the record ma[de] clear that the sentencing judge considered the evidence and arguments." *Id.* at 359.

Decided the same Term as *Rita*, the Court in *Gall* further elucidated how appellate courts should review sentencing decisions and what obligations district courts have to explain their sentences. Regarding the former, the Court held that appellate courts conducting their reasonableness review of sentences outside the Guidelines range may consider "the degree of the variance" and "the extent of a deviation from the Guidelines," but they may not require "'extraordinary' circumstances to justify a sentence outside the Guidelines range." *Gall*, 552 U.S. at 47. Such a requirement would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id.*

Regarding the sentencing procedures in district court, the Court explained that a judge should, after allowing both sides to advocate for the appropriate sentence, "consider all of the [18 U.S.C.] § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 49-50 (citing *Rita*, 551 U.S. at 351). In addition, "[a]fter settling on the

appropriate sentence, [the judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 522 U.S. at 50 (citing *Rita*, 551 U.S. 338). The Court praised the "uniform and constant . . . federal judicial tradition for the sentencing judge to 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 52 (quoting *Koon v. United States*, 518 U.S. 81, 98 (1996)).

The Court in *Gall* approved of the below-Guidelines, probationary sentence for conspiracy to distribute the controlled substance of ecstasy, and in doing so rejected the appellate court's conclusion that the sentencing judge had failed to consider the seriousness of the offense. *Gall*, 552 U.S. at 53. Although the Court acknowledged that the judge had not specifically referenced "the (unquestionably significant) health risks posed by ecstasy," the Court found that argument to be unpersuasive because "the prosecutor did not raise ecstasy's effects at the sentencing hearing." *Id.* at 54. But "[h]ad the prosecutor raised the issue, specific discussion of the point might have been in order . . . ." *Id.*

Three Terms ago, in *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018), the Court reaffirmed these basic obligations of sentencing judges and principles for appellate review of sentence explanations. *See Chavez-Meza*, 138 S. Ct. at 1963-64. At issue in *Chavez-Meza* was the adequacy of a district court's explanation when modifying a previously imposed sentence. Drawing from *Gall* and *Rita*, the Court reiterated that a sentencing judge must sufficiently explain its sentence "to allow for meaningful appellate review," but "[j]ust how much of an explanation" is required depends "upon the

circumstances of the particular case." *Chavez-Meza*, 138 S. Ct. at 1965 (quoting *Gall*, 552 U.S. at 50, and then citing *Rita*, 551 U.S. at 356-57). "In some cases, it may be sufficient for purposes of appellate review that the judge simply relied upon the record, while making clear that he or she has considered the parties' arguments and taken account of the § 3553(a) factors, among others." *Chavez-Meza*, 138 S. Ct. at 1965. But in other cases, "more explanation may be necessary . . . even when there is little evidence in the record affirmatively showing that the sentencing judge failed to consider the § 3553(a) factors." *Chavez-Meza*, 138 S. Ct. at 1965.

II. The Court should resolve the three entrenched circuit splits concerning the legal standards governing the adequacy of sentence explanations in light of defendants' nonfrivolous mitigating arguments.

Against the above backdrop, the circuits have diverged in three significant ways with regard to the legal standards governing the adequacy of sentence explanations when a defendant has presented nonfrivolous arguments supporting a lower sentence. First, the circuits have taken different approaches to whether a district court must address a defendant's nonfrivolous mitigation arguments in favor of a lower sentence as part of its required sentence explanation under 18 U.S.C. § 3553(c). Second, the circuits have divided on whether a defendant must make a specific objection to preserve a claim of procedural unreasonableness for inadequate explanation for appellate review. And third, the circuits disagree on whether a plainly inadequate explanation for a sentence within the imprisonment range calculated under the United States Sentencing Guidelines affects a defendant's substantial rights in the ordinary case. All three questions are important, recurring questions in federal criminal sentencing law.

A. The circuits are divided on whether, when a defendant presents nonfrivolous mitigation arguments in favor of a lower sentence, a district court must address those arguments as part of its required sentence explanation under 18 U.S.C. § 3553(c).

Six Circuits—the First, Third, Fourth, Sixth, Seventh, and Ninth—have adopted a relatively robust, searching approach to their review of district courts' sentence explanations. These circuits require a district court to explain its reasons for rejecting defendants' nonfrivlous arguments in favor of a below-Guidelines sentence, even if the court imposes a within-Guidelines sentence. In the First Circuit, a sentence is procedurally unreasonable when a district court imposes a within-Guidelines sentence but fails to respond to a defendant's "potentially forceful" argument for a downward variance. *United States v. Robles-Alvarez*, 874 F.3d 46, 53 (1st Cir. 2017). If, however, the district court "mentioned many of the personal characteristics that the defendant had highlighted in his request for a downward variance" and the unacknowledged mitigation argument is not "potentially forceful," then there is no procedural error for inadequate explanation. *United States v. Rivera-Morales*, 961 F.3d 1, 20 (1st Cir. 2020).

A district court within the Third Circuit abuses its discretion and thus imposes a procedurally unreasonable sentence when "it fails to give 'meaningful consideration' to an argument advanced by the defendant." *United States v. Flores-Mejia*, 759 F.3d 253, 259 (3d Cir. 2014) (*en banc*). Although the analysis depends on the particular circumstances, a district court's boilerplate statement that it has "'considered all the § 3553(a) factors' [is] not enough to show meaningful consideration of a specific argument." *United States v. Flores-Mejia*, 759 F.3d 253, 259 (3d Cir. 2014) (discussing *United States v. Sevilla*, 541

F.3d 226 (3d Cir. 2008), *overruled on other grounds by Flores-Mejia*). Nor does a district court's response of "'Ok, thanks. Anything else?' . . . reflect that meaningful consideration was given to [the defendant's specific mitigation] argument." *Flores-Mejia*, 759 F.3d at 259.

In the Fourth Circuit, a sentence is procedurally unreasonable when the district court gives "a perfunctory recitation of the defendant's arguments or the § 3553(a) factors 'without application to the defendant being sentenced'" because such a sparse explanation "'does not demonstrate reasoned decisionmaking or provide an adequate basis for appellate review.'" *United States v. Blue*, 877 F.3d 513, 518 (4th Cir. 2017) (quoting *United States v. Carter*, 564 F.3d 325, 329 (4th Cir. 2009)). An explanation can be brief, so long as the district court "outlined the defendant's particular history and characteristics not merely in passing or after the fact, but as part of its analysis of the statutory factors and in response to defense counsel's arguments for a downward departure." *United States v. Lynn*, 592 F.3d 572, 584 (4th Cir. 2010) (quoting *United States v. Johnson*, 587 F.3d 625, 639 (4th Cir. 2009)). A sentencing court in the Fourth Circuit "must address the parties' nonfrivolous arguments in favor of a particular sentence, and if the court rejects those arguments, it must explain why in a sufficiently detailed manner to allow [the appellate court] to conduct a meaningful appellate review." *Blue*, 877 F.3d at 519. When developing its standards, the Fourth Circuit drew from the record before this Court in *Rita*, where "the appellate court could look to the district court's lengthy discussion with, and questioning of, defense counsel and determine that the district court understood the defendant's arguments for a reduced sentence and had reasons for rejecting those arguments." *Lynn*, 592 F.3d at 584.

In the Sixth Circuit, a sentencing judge "may ignore an argument only if the argument's frivolous nature is obvious to the court and will be obvious on appellate review." *United States v. Givhan*, 740 Fed. Appx. 458, 466 (6th Cir. 2018) (unpublished) (citing, among others, *United States v. Gapinski*, 561 F.3d 467, 474 (6th Cir. 2009)). In *Givhan*, for example, the district court did not need to address the frivolous argument that the defendant "should receive a reduced sentence because of his race" since race is "not relevant in the determination of a sentence." *Givhan*, 740 Fed. Appx. at 466-67 (quoting USSG § 5H1.10, and citing *Koon*, 518 U.S. at 93, as "explaining that race 'never can be [a] bas[i]s for departure'") (brackets in *Givhan*). In *Gapinski*, however, the Sixth Circuit found procedural error when the district court addressed some but not all of the defendant's reasons for a lower sentence, and had in particular neglected to address the defendant's substantial assistance to the government. *Gapinski*, 561 F.3d at 474-76. Similarly, in *United States v. Wallace*, 597 F.3d 794 (6th Cir. 2010), the Sixth Circuit concluded that the sentence was procedurally unreasonable when the sentencing judge did not address "the central point of [the defendant's] argument for a lower sentence," namely, unwarranted disparities between co-defendants' sentences. *Wallace*, 597 F.3d at 803. Although the district court had discretion to reject this argument and the government had offered reasons at the sentencing hearing to do just that, the Sixth Circuit held that "the district judge's failure to properly address this issue is apparent because [the appellate court was] unable to answer the simple question of why the district judge decided to impose a sentence more than twice as long as [a co-defendant's]. *Id.*

Like the Sixth Circuit, the Seventh Circuit requires sentencing judges to "address a

criminal defendant's 'principal' arguments in mitigation unless they are 'so weak as not to merit discussion.'" *United States v. Lee*, 897 F.3d 870, 872 (7th Cir. 2018) (Barrett, J.) (quoting *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005)); *see also, e.g.*, *United States v. Panice*, 598 F.3d 426, 443 (7th Cir. 2010); *United States v. Williams*, 553 F.3d 1073, 1084-85 (7th Cir. 2009). In *Lee*, the duty to explain was not triggered because the defendant "did not come close to presenting a developed, meritorious argument" about unwarranted disparities. *Lee*, 897 F.3d at 873. By contrast, in *Cunningham*, the Seventh Circuit reversed when the district court imposed a bottom-of-the-Guidelines sentence but failed "to mention [the defendant's] psychiatric problems and substance abuse, which [his] lawyer wove into a pattern suggestive of entrapment not as a defense but as a mitigating factor not reflected in the guidelines and also as a basis for [his] being given a sentence different from a straight prison sentence." *Cunningham*, 429 F.3d at 678.

The Ninth Circuit follows a similar approach to that of the Seventh Circuit, where a district court's duty-to-explain is triggered "when a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence." *United States v. Carty*, 520 F.3d 984, 992-93 (9th Cir. 2008) (*en banc*). In that situation, "the judge should normally explain why he accepts or rejects the party's position." *Id.* Failure to do so will result in reversal. *See, e.g.*, *United States v. Trujillo*, 713 F.3d 1003, 1010 (9th Cir. 2013); *United States v. Garcia*, 491 Fed. Appx. 815, 817 (9th Cir. 2012) (unpublished).

In contrast to the relatively robust, searching review of these circuits, the remaining circuits conduct a much more circumscribed review of district courts' sentence explanations. In the Fifth, Tenth, and Eleventh Circuits, a general, summary statement will

suffice, even when that statement does not address a principal nonfrivolous mitigating argument.

The Fifth Circuit, as illustrated by petitioner's case, will accept a terse, boilerplate explanation that does not address the nonfrivolous mitigating arguments raised at the sentencing hearing. In petitioner's case, defense counsel gave a lengthy presentation of mitigating factors, explaining that petitioner had come to the United States when he was a teenager. Counsel further explained that much of petitioner's criminal history was tied to his struggles with alcohol, and petitioner had begun drinking alcohol "at a very young age" and "became very dependent on that." Petitioner had, however, "a big epiphany" when he realized the difficulties his problems with alcohol were causing him and his family. While incarcerated in a medium security prison, he worked with his counselor and "took a series of classes to address the alcohol problems and other problems and, upon completion of his courses, he was downgraded to a low security" prison. In the low security prison, "he did very well. He worked and completed his time and [was] deported."

Counsel further discussed petitioner's work history, educational background, and family situation. Counsel described petitioner as "a hardworking man [who] work[ed] in the fields in agriculture," who had worked "as a mechanic [to] provid[e] for his family and for himself," and had stopped attending school in the fourth grade so that he could "work and help his family." In addition, counsel noted that the rest of petitioner's family "have all attained legal status" to live in the United States, but petitioner could not do that because of his alcohol-related criminal history. Petitioner "has two daughters, one [of whom] is a teenager, the other one is 11 years old." Petitioner "has practically never seen or spent time

with the youngest one. . . . She was about 11 months to a year when he got in trouble and was sent away, and now she's 11." Counsel relayed to the court that petitioner, "with tears in his eyes," had told counsel that "he's tired of this and the only reason he came back was to be close to his daughters and provide for them." Defense counsel expressed his belief "that this time around [petitioner will] go back to Mexico and he will not come back. He knows he's facing more and more time every time he comes back and he doesn't want that, Your Honor." For all of those reasons, counsel asked the court "to consider not just the low end [of the Guidelines range], but a lower sentence."

The district court's response was to impose a sentence of five years, with the following explanation: "I adopt the factual findings and guideline applications in the Pre-Sentence Investigation Report. I have considered the factors in 18 U.S.C. [§] 3553(a), but will not apply a variance." Although this explanation would be insufficient and require a remand in the First, Third, Fourth, Sixth, Seventh, and Ninth Circuits, the Fifth Circuit deemed the court's explanation to be adequate and affirmed. *See* Appendix.

In the Tenth Circuit, a district court need not explicitly address mitigation arguments if the court imposes a within-Guidelines sentence. Rather, the district court "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." *United States v. Clark*, ___ F.3d ___, No. 19-7046, 2020 WL 6733473, at *9 (10th Cir. Nov. 17, 2020) (quoting *United States v. Sanchez-Leon*, 764 F.3d 1248, 1262 (10th Cir. 2014) (quotations omitted)); *accord United States v. Lente*, 647 F.3d 1021, 1034 (10th Cir. 2011).

A summary statement by district courts is permissible in the Eleventh Circuit as well. In *United States v. Nagel*, 835 F.3d 1371 (11th Cir. 2016), the Eleventh Circuit rejected a procedural reasonableness challenge to a within-Guidelines sentence where the defendant had raised non-frivolous arguments for a downward variance, and the district court gave only a summary statement to explain its sentence. The court acknowledged that "several circuits have held that a summary statement like the one given by the court is not sufficient for appellate review," but nonetheless found the limited explanation to be adequate under that circuit's precedent. *See id.* at 1375-76.

Finally, the Second, Eighth, and D.C. Circuits employ presumptions. The Second Circuit applies a "'presumption 'that [the] sentencing judge has faithfully discharged her duty to consider the statutory factors,' with a caveat, however: 'in the absence of record evidence suggesting otherwise.'" *United States v. Hernandez*, 604 F.3d 48, 54 (2d Cir. 2010) (quoting *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006)). That circuit "will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors *simply because* she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced." *Hernandez*, 604 F.3d at 54 (emphasis added in *Hernandez*) (quoting *Fernandez*, 443 F.3d at 30).

In the Eighth Circuit, "where the district court heard argument from counsel about specific § 3553(a) factors, [the court] may presume that the court considered those factors." *United States v. Diaz-Pellegaud*, 666 F.3d 492, 504 (8th Cir. 2012) (quoting *United States v. Keating*, 579 F.3d 891, 893 (8th Cir. 2009)). Put slightly differently, when the appeals

court determines that "the district court was aware of [the defendant's] arguments," the court will "therefore presume that the district court considered and rejected them." *United States v. Bevins*, 848 F.3d 835, 841 (8th Cir. 2017) (quoting *United States v. Johnson*, 619 F.3d 910, 922 (8th Cir. 2010)).

Likewise, the D.C. Circuit "do[es] not require the District Court to individually and expressly address every non-frivolous argument advanced by a defendant on the record." *United States v. Pyles*, 862 F.3d 82, 88 (D.C. Cir. 2017). "Rather, so long as the judge provides a 'reasoned basis for exercising his own legal decisionmaking authority,' [the court] generally presume[s] that he or she adequately considered all arguments and uphold[s] the sentence if it is otherwise reasonable." *Id.* at 89 (quoting *United States v. Locke*, 664 F.3d 353, 358 (D.C. Cir. 2011)). A vigorous dissent prompted the expression of competing views on the meaning of this Court's *Rita* decision. The dissenting judge read *Rita* as requiring district courts to acknowledge and respond to nonfrivolous mitigating arguments. *Pyles*, 862 F.3d at 99-100 (Williams, J., dissenting). The dissenting judge found in *Rita* "no license to disregard defense contentions." *Id.* at 99 (Williams, J., dissenting). The majority disagreed, countering that "this supposed requirement for an explicit response appears nowhere in [*Rita*]." *Pyles*, 862 F.3d at 89 (majority op.).

Because the circuits have adopted contradictory legal standards for evaluating the adequacy of sentencing courts' explanations when presented with nonfrivolous mitigating arguments in favor of a lower sentence, this Court's intervention is necessary to restore uniformity.

B. The circuits disagree as to whether a claim of procedural unreasonableness for inadequate explanation is preserved for appellate review without a specific objection.

The circuits disagree as to whether a claim of procedural unreasonableness for inadequate explanation is preserved for appellate review without a specific objection. In the Fourth, Seventh, and Eleventh Circuits, no specific objection to that effect is required. In other circuits, however, a specific objection is required to avoid plain-error review on appeal. Last Term, this Court held in *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020), that a defendant need not make a specific objection to the substantive reasonableness of the sentence to preserve such a challenge for appellate review, but the Court expressly left open that question in the context of procedural reasonableness. *See Holguin-Hernandez*, 140 S. Ct. at 767.

In an *en banc* decision, the Third Circuit acknowledged the circuit split on this issue and decided to switch sides. *Flores-Mejia*, 759 F.3d at 257-58. The Third Circuit found that its "new rule," of requiring a specific objection to preserve a procedural reasonableness challenge for appeal, was "consistent with the holdings of most other circuit courts of appeals that have ruled on the issue. The First, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuit Courts of Appeals all require a defendant to object when sentence is pronounced if a district court makes the procedural error of failing to adequately explain a sentence." *Id.* (citing *United States v. Rice*, 699 F.3d 1043, 1049 (8th Cir. 2012); *United States v. Rangel*, 697 F.3d 795, 805 (9th Cir. 2012); *United States v. Wilson*, 605 F.3d 985, 1033-34 (D.C. Cir. 2010); *United States v. Davila-Gonzalez*, 595 F.3d 42, 47 (1st Cir. 2010); *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009); *United States v. Vonner*, 516

F.3d 382, 385-86 (6th Cir. 2008) (*en banc*); *United States v. Romero*, 491 F.3d 1173, 1177-78 (10th Cir. 2007)). The Second Circuit does as well. *United States v. Villafuerte*, 502 F.3d 204, 211 (2d Cir. 2007).

The Fourth, Seventh, and Eleventh Circuits, however, do not require a specific objection. Rather than "requiring a party to lodge an explicit objection after the district court explanation," a party in the Fourth Circuit preserves an explanation challenge for appeal "[b]y drawing arguments from § 3553 for a sentence different than the one ultimately imposed." *Lynn*, 592 F.3d at 578. In the Fourth Circuit's view, a party who presents those types of arguments at sentencing "has sufficiently alert[ed] the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim." *Id.*

To reach this conclusion, the Fourth Circuit emphasized that the Federal Rules of Criminal Procedure "abandon[ed] the requirement of formulaic 'exceptions'—after the fact—to court rulings." *Id.* at 577. Rather, the text of Fed. R. Crim. P. 51(b) expressly provides that "[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." *Id.* at 577-78 (quoting Fed. R. Crim. P. 51(b)) (emphases added in *Lynn*). This Court relied on similar reasoning in *Holguin-Hernandez* when holding that a specific objection was not required to preserve a substantive reasonableness challenge for appeal. *Holguin-Hernandez*, 140 S. Ct. at 766.

The Seventh Circuit has focused on practical considerations for not requiring such

an objection, reasoning that "[t]o insist that defendants object at sentencing to preserve appellate review for reasonableness would create a trap for unwary defendants and saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case." *United States v. Castro-Juarez*, 425 F.3d 430, 433-34 (7th Cir. 2005). The Seventh Circuit further explained its view that requiring that objection would not "further the sentencing process in any meaningful way" because "the district court will already have heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence." *Id.*

The Eleventh Circuit reviews *de novo* the adequacy of the sentence explanation, "even if the defendant did not object below." *United States v. Bonilla*, 463 F.3d 1176, 1181 (11th Cir. 2006). The justification for the Eleventh Circuit's rule is statutory. Since the relevant statute places the onus on district courts to give a sentence explanation, the Eleventh Circuit "focus[es] exclusively on the 'sufficiency' of the court's conduct at sentencing, not that of the defendant." *United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006). The Eleventh Circuit has further emphasized that, "[w]hen a sentencing court fails to comply with [the explanation] requirement, the sentence is imposed in violation of law." *Id.* (emphasis omitted) (quoting *United States v. Veteto*, 920 F.2d 823, 826 (11th Cir. 1991)).

To resolve this well-established division among the circuits regarding error preservation and to address the question left open by the Court last Term in *Chavez-Meza*, the Court should grant the petition.

C. The circuits are divided on whether a plainly inadequate explanation for a sentence within the imprisonment range calculated under the United States Sentencing Guidelines affects a defendant's substantial rights in the ordinary case.

A third division among the circuits has emerged regarding the legal standards for evaluating sentence-explanation challenges that are raised for the first time on appeal. Errors to which there was no objection in the district court on reviewed on appeal for plain error. Fed. R. Crim. P. 52(b). Plain-error review has four prongs: (1) "there must be an error that has not been intentionally relinquished or abandoned"; (2) "the error must be plain—that is to say, clear or obvious"; (3) "the error must have affected the defendant's substantial rights"; and (4) "[o]nce these three conditions have been met, the court of appeals should exercise its discretion to correct the forfeited error if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). To prevail on the third-prong of plain-error review "in the ordinary case," the defendant "must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." *Molina-Martinez*, 136 S. Ct. at 1343 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

Under current Fifth Circuit law, petitioner's sentence-explanation claim was subject to plain-error review. Had petitioner's sentencing occurred in the Sixth Circuit, he could meet his burden on the third prong of plain-error review. But because his sentencing occurred in the Fifth Circuit, he could not.

In the Sixth Circuit, a defendant who demonstrates that the court's explanation was

plainly adequate, given his valid reasons for a lower sentence, may meet his substantial-rights burden by pointing to the fact that the inadequate explanation "implicated [his] right to meaningful appellate review." *Wallace*, 597 F.3d at 806. The Sixth Circuit located the right to meaningful appellate review in 18 U.S.C. § 3553(c)'s requirement that a district court explain its sentence. *Wallace*, 597 F.3d at 806 (citing *United States v. Blackie*, 548 F.3d 395, 402 (6th Cir. 2008)).

Previously, the Sixth Circuit had held in *Blackie* that a district court's plainly inadequate explanation for its sentence outside the Guidelines range affected a defendant's substantial rights. *Wallace*, 597 F.3d at 806 (discussing *Blackie*'s holding that a violation of 18 U.S.C. § 3553(c)(2), "which deals with sentences outside the guidelines, affected a defendant's substantial rights"). And the Sixth Circuit found no reason to treat within-Guidelines sentences differently. *Wallace*, 597 F.3d at 807 ("The logic [of *Blackie*] applies with equal force to claims under § 3553(c)(1)[.]"). The Sixth Circuit thus concluded that "the right to meaningful appellate review . . . is equally substantial for someone who is sentenced to either a guidelines sentence or an above-guidelines sentence," emphasizing that "[t]he substantial right to meaningful appellate review is identical under both § 3553(c)(1) and § 3553(c)(2)." *Wallace*, 597 F.3d at 807.

Looking to other circuits, the Sixth Circuit noted that the Fifth and Tenth Circuits had rejected *Blackie*'s approach for sentences outside the Guidelines. *Wallace*, 597 F.3d at 807 (citing *United States v. Whitelaw*, 580 F.3d 256 (5th Cir. 2009), and *United States v. Mendoza*, 543 F.3d 1186 (10th Cir. 2008)). But the Sixth Circuit was unaware of any circuit having "created a distinction between § 3553(c)(1) and § 3553(c)(2)." *Wallace*, 597 F.3d

at 807. In fact, the Second and D.C. Circuits had relied on *Blackie* to find that a plainly inadequate explanation affected a defendant's substantial rights without making any "differentiation between the subparts of § 3553(c)." *Wallace*, 597 F.3d at 807 (citing *United States v. Lewis*, 424 F.3d 239, 247 (2d Cir. 2005), and *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008)). And so the Sixth Circuit decided to "follow the logic of *Blackie* and find that § 3553(c) generally implicates a 'substantial right.'" *Wallace*, 597 F.3d at 807.

The *Wallace* court expressed concern about the consequences of a contrary ruling. Finding that a defendant did not meet his substantial-rights burden "would begin to reduce the § 3553(c) requirements almost to irrelevancy with respect to within guidelines sentences." *Wallace*, 597 F.3d at 808. The court worried that, "[i]n addition, to effectively immunize § 3553(c)(1) errors from appellate review would provide even more incentive to district courts to mindlessly apply the guidelines without utilizing their own expertise to arrive at a sentence that is 'sufficient, but not greater than necessary.'" *Wallace*, 597 F.3d at 808 (quoting 18 U.S.C. § 3553(a)). The Sixth Circuit found that its ruling in favor of remand promoted the mandatory explanation requirement of § 3553(c) and avoided reducing that statutory directive to "some formality that can be ignored without consequence." *Wallace*, 597 F.3d at 808 (quoting *Blackie*, 548 F.3d at 403).

Unlike the Sixth Circuit, the Fifth Circuit has adopted a categorical ban on defendants' meeting their substantial-rights burden after they have shown that a district court's sentence explanation was plainly inadequate given their legitimate mitigation arguments. In *United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009), the

Fifth Circuit concluded that the district court plainly erred by inadequately explaining its within-Guidelines sentence when the defendant had presented legitimate reasons for a below-Guidelines sentence. *Mondragon-Santiago*, 564 F.3d at 362-64. Turning to the third prong of plain-error review, the Court noted that "other circuits have relaxed [the substantial-rights] requirement in the sentencing context" but the Fifth Circuit had not. *Id.* at 365 (citing *In re Sealed Case*, 527 F.3d at 193, and *Lewis*, 424 F.3d at 248).

The Fifth Court held that the district court's plainly inadequate sentence explanation did not affect the defendant's substantial rights for three reasons. First, the Fifth Circuit found that, when a district court imposes a sentence within the Guidelines range, "the effect of" the court's plainly inadequate sentence explanation "is diminished." *Mondragon-Santiago*, 564 F.3d at 365. Second, the Fifth Circuit rejected the defendant's argument that the "error affected his substantial rights because it makes meaningful appellate review impossible." *Id.* Although the Court acknowledged that two other circuits had embraced that argument "when reviewing sentences outside of the Guidelines range," the Fifth Circuit found that its own precedents "forclose[d] [that] argument so far as within-Guidelines sentences are concerned." *Id.* (emphasis in original).

Regarding its own precedents, the Fifth Circuit in *Mondragon-Santiago* pointed to *United States v. Izaguirre-Losoya*, 219 F.3d 437 (5th Cir. 2000), and *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008). Neither case, however, mentioned the argument about the deprivation of meaningful appellate review. The issue in *Izaguirre-Losoya* was whether the district court inadequately explained its rejection of the defendant's argument for his federal sentence to run concurrently with his state sentence.

The court assumed that the district court's explanation was plainly inadequate but found that "the defendant [had] not shown that the error affected his substantial rights" because (1) a concurrent sentence was not required, (2) a consecutive sentence "was within the court's discretion given the defendant's extensive criminal background," (3) the parties gave the court reasons for and against a consecutive sentence, and (4) the district court's sentence was lower than the government's request and therefore "reflect[ed] a balanced consideration of competing statutory factors." *Id.* at 441. Because "the sentence imposed was supported by the record and not contrary to law," the court held that the district court's "failure to articulate precise reasons for imposing the sentence did not impair the defendant's substantial rights." *Id.* Nowhere did the court consider an argument that the plainly inadequate explanation deprived the defendant of his substantial right to meaningful appellate review.

In *Campos-Maldonado*, the court found "no reversible plain error" because "[t]he record demonstrate[d] that the district court was aware of [the defendant's] arguments for a non-guidelines sentence based on his particular circumstances." *Campos-Maldonado*, 531 F.3d at 339. Despite those arguments, the district court "concluded that the Guidelines provided the appropriate sentencing range." *Id.* The court in *Campos-Maldonado* never discussed the third prong of plain-error review, beyond the recitation of that prong, along with the other three, in its statement of the standard of review.

Nevertheless, *Mondragon-Santiago* remains binding precedent in the Fifth Circuit and foreclosed petitioner's argument that the district court's plainly inadequate sentence explanation affected his substantial rights. *See, e.g.*, *United States v. Traxler*, 764 F.3d 486,

489 (5th Cir. 2014) ("Indeed, even if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void.") (citation omitted); *see also, e.g.*, *United States v. Mendez*, 377 Fed. Appx. 345, 346 (5th Cir. 2010) (unpublished) (accepting the defendant's concession that his argument that "an explanation of his within-guidelines sentence would have changed his sentence and thus affected his substantial right" was "foreclosed under Mondragon-Santiago").

The Sixth Circuit's approach is more consistent with this Court's recent decision in *Molina-Martinez*. In *Molina-Martinez*, this Court resolved a division among the circuits on how to analyze the third prong of plain-error review in the context of plain errors in calculating the Guidelines range. The Fifth Circuit had required defendants to provide "additional evidence," beyond the calculation error, to demonstrate an effect on substantial rights when the correct and incorrect ranges overlapped. *Id.* at 1344. This Court determined that approach was "incorrect" because "[n]othing in the text of [Fed. R. Crim. P.] 52(b), its rationale, or the Court's precedents supports a requirement that a defendant seeking appellate review of an unpreserved Guidelines error make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings." *Id.* at 1345.

Rather than require additional evidence, the Court held that "the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.* The Court reasoned that, "[f]rom the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is

no other evidence that the sentencing outcome would have been different had the correct range been used." *Id.*

That reasoning lends support to the Sixth Circuit's approach in *Wallace*. The Court in *Molina-Martinez* found that "in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Molina-Martinez*, 136 S. Ct. at 1347. In a similar vein, the Sixth Circuit treats plainly inadequate sentence explanations when a defendant has presented legitimate reasons for a lower sentence as ordinarily satisfying the third prong because of the fundamental importance of sentence explanations "to allow for meaningful appellate review and to promote the perception of fair sentencing." *Wallace*, 597 F.3d at 804 (quoting *Gall*, 552 U.S. at 50); *see also Certain Underwriters at Lloyd's, London v. Axon Pressure Prod. Inc.*, 951 F.3d 248, 269 (5th Cir. 2020) ("A statement of reasons is one of the handmaidens of judging.") (quoting *Schwarz v. Folloder*, 767 F.2d 125, 133 (5th Cir. 1985)).

Moreover, the Sixth Circuit explained that requiring a district court to "explicitly address every nonfrivolous argument raised by a defendant . . . promotes [three] critical goals." *Wallace*, 597 F.3d at 804 (quoting *United States v. Petrus*, 588 F.3d 347, 353 (6th Cir. 2009)). First, "it provides the defendant with a clear understanding of the basis for his or her sentence." *Wallace*, 597 F.3d at 804 (quoting *Petrus*, 588 F.3d at 353). Second, "it allows the public to understand the rationale underlying the chosen sentence." *Wallace*, 597 F.3d at 804 (quoting *Petrus*, 588 F.3d at 353). And third, it helps appellate courts "avoid the difficulties of parsing the sentencing transcript when determining whether the

district court in fact considered the defendant's arguments." *Wallace*, 597 F.3d at 804 (quoting *Petrus*, 588 F.3d at 353).

Two further considerations by this Court in *Molina-Martinez* cast doubt on correctness of the Fifth Circuit's categorical rule against relief. First, the Court expressed concern for the "significant number of cases [where] the sentenced defendant will lack the additional evidence the Court of Appeals' rule would require, for sentencing judges often say little about the degree to which the Guidelines influenced their determination." *Molina-Martinez*, 136 S. Ct. 1338, at 1347. By contrast, the Fifth Circuit in *Mondragon-Santiago* emphasized that "a defendant's burden of establishing prejudice should not be too easy." *Mondragon-Santiago*, 564 F.3d at 364 (quoting *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005)). Second, the Court in *Molina-Martinez* took into account that "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez*, 136 S. Ct. at 1348 (quoting *United States v. Wernick*, 691 F.3d 108, 117-18 (2nd Cir. 2012)). Without the benefit of *Molina-Martinez*, the Fifth Circuit's decision in *Mondragon-Santiago* did not consider that factor.

D. The questions presented are frequently litigated and important.

All three questions presented are frequently litigated in the federal courts of appeals, especially after this Court in *Gall* identified the failure "to adequately explain the chosen sentence" as a quintessential "significant procedural error." *Gall*, 552 U.S. at 51. Since *Gall*, thousands of appeals have challenged the adequacy of the district court's sentence

explanation.[1] The outcome of those appeals depends largely on the happenstance of geography, however, given the three ways in which the circuits have diverged in their approaches to the legal standards governing such appeals.

In addition to being recurrent, the questions presented are important because requiring district courts to give an individualized sentence explanation is not a mere procedural formality but can affect sentencing outcomes. A 2012 study of cases where a sentence was reversed for the procedural error of inadequate explanation found that in a majority (57%) of cases the sentence imposed on remand differed from the original sentence. Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation in Federal Sentencing*, Champion at 48 (March 2012). When the study "[l]ook[ed] only at within-guideline sentences reversed on the defendant's appeal, which represent[ed] the largest number of such reversals, the rate is 52 percent (36 of 69 sentences were less severe on remand)." *Id.* And, "[f]or sentences outside the guidelines, the rate is nearly 69 percent on the defendant's appeal where sentences were both above and below the guideline (24 of 35 sentences were less severe on remand), and 53 percent on the government's appeal where all were below the guideline range (8 of 15 sentences were more severe on remand)." *Id.* The Court should grant the petition to resolve the important and recurring questions presented on which the lower federal courts have persistently divided.

[1] A West Key Number Headnote for sufficiency of findings and statement of reasons in the area of sentencing and punishment identifies 3,372 federal intermediate appellate court decisions since *Gall*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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