No. _____

In the

Supreme Court of the United States

_____

Francisco Coto-Mendoza,

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

Whether, after *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), a party may obtain appellate relief when the district court fails to reference or address substantial arguments for a sentence outside the Guideline range, even if the party had not lodged a specific objection to the court's failure to do so?

PARTIES TO THE PROCEEDING

Petitioner is Francisco Coto-Mendoza, 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 Francisco Coto-Mendoza seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is reported at *United States v. Coto-Mendoza*, 986 F.3d 583 (5th Cir. January 25, 2021). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 20, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT RULES AND STATUTE

Section 3553 of Title 18 reads in relevant 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.

***

(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,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

Federal Rule of Criminal Procedure 51 reads as follows:

Preserving Claimed Error

(a) **Exceptions Unnecessary**. Exceptions to rulings or orders of the court are unnecessary.

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

Federal Rule of Criminal Procedure 32 provides in relevant part:

***

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. §3593 (c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. §3553, and the court explains its finding on the record.

(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. §3552 (b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. §3553 (a).

(3) Exclusions. The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Francisco Coto-Mendoza was born into grinding poverty and civil war in El Salvador. *See* (Record in the Court of Appeals, at 141-142). His family lived as subsistence farmers, eating only what they grew. *See* (Record in the Court of Appeals, at 141-142). They lacked running water or electricity, and advised Mr. Coto-Mendoza to be careful of landmines while he played. *See* (Record in the Court of Appeals, at 141-142). Unsurprisingly, Mr. Coto-Mendoza left El Salvador.

Mr. Coto-Mendoza came to the United States without authorization and sustained a range of largely alcohol-involved criminal convictions, the most serious of which is probably a 1993 domestic assault, in which he hit his wife. *See* (Record in the Court of Appeals, at 136-139). He's been removed from the United States four times, and was most recently encountered by immigration officials in October of 2017, a day after his arrest for driving while intoxicated. *See* (Record in the Court of Appeals, at 133).

For reasons that the record does not reveal, the government waited to bring illegal re-entry charges until December of 2019, unilaterally depriving Mr. Coto-Mendoza of any chance for concurrent sentences in the re-entry and DWI cases. *See* (Record in the Court of Appeals, at 132, 139). He pleaded guilty to re-entry, and received a Guideline range of 37-46 months imprisonment. *See* (Record in the Court of Appeals, at 144).

At sentencing, defense counsel urged a below range sentence, noting the miserable conditions in El Salvador during Mr. Coto-Mendoza's childhood, his work history, the delay in bringing federal prosecution, and a plan to work and live in El Salvador for a relative's road construction company. *See* (Record in the Court of Appeals, at 124-125). The court imposed 37 months imprisonment, referencing 18 U.S.C. §3553, but with no other explanation. *See* (Record in the Court of Appeals, at 125-126). A statement of reasons recited all factors named in 18 U.S.C. §3553(a)(2), and further stated that the sentence would have been the same even if the Guidelines were different. *See* (Record in the Court of Appeals, at 159).

B. Appellate Proceedings

Petitioner appealed, contending that the district court had erred in failing to address meaningfully his arguments for a lesser a sentence. *See* Initial Brief in *United States v. Coto-Mendoza*, No. 20-10451, 2020 WL 4928352, at **3-11 (5th Cir. Filed August 13, 2020)("Initial Brief"). The district court, he argued, offered nothing more than a bare reference to 18 U.S.C. §3553 in explanation of the sentence. *See* Initial Brief, at **10-12. It said nothing at all about any of his very plausible reasons for a below Guideline sentence, all of which sounded in the §3553(a) factors, and some of which had drawn downward variances in other cases. *See id.* (citing *United States v. Ramirez-Ramirez*, 365 F.Supp.2d 728, 730 (E.D.Va. 2005), *United States v. Goodman*, 556 F. Supp. 2d 1002, 1015 (D. Neb. 2008), *Dean v. United States*, __U.S.__, 137 S.Ct. 1170 (2017), USSG §2L1.2, comment. (n. 7), and 18 U.S.C. §3553(a)(2)(b)). This, he contended, contravened this Court's precedent in *Rita v. United States*, 551

U.S. 338 (2007), which says that "[w]here 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." *Rita*, 551 U.S. at 357; *see* Initial Brief, at *7.

Petitioner conceded that he had not objected to the judge's failure to provide clearer explanation for its sentence. *See* Initial Brief, at **4-6. He contended, however, that a nonfrivolous request for a lesser sentence itself represented a request for a response, sufficient to preserve error under Federal Rule of Criminal Procedure 51. *See id*. This, he contended, was the natural expectation of a party offering a reason for a different sentence, and represented a core, overarching duty of a sentencing court. *See id*. Further, he contended that *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), undermined Fifth Circuit precedent that had required a separate objection to the court's failure to explain the sentence. *See id.*

The Fifth Circuit applied plain error and affirmed in a published opinion. [Appendix A]; *United States v. Coto-Mendoza*, 986 F.3d 583 (5th Cir. 2021). It first rejected any impact of *Holguin-Hernandez* on the need for a separate objection. *See* [Appendix A, at p.4]; *Coto-Mendoza*, 986 F.3d at 586. It noted that *Holguin-Hernandez* had reserved the question of objection requirements for procedural reasonableness claims. *See id*. And it reasoned from this premise that the case therefore did not change the law on this subject. *See id*. It said:

> [w]e begin by emphasizing the limited holding of Holguin-Hernandez: the Supreme Court explicitly stated that it was not deciding the issue of "what is sufficient to preserve a claim that a trial court used improper procedures in arriving at its chosen sentence." *Holguin-Hernandez*, 140

> S. Ct. at 767.2 We note that the Supreme Court has cautioned against overruling its earlier precedents by implication…. Accordingly, we remain bound by the plain error standard for forfeited errors set forth in *Molina-Martinez,* 136 S. Ct. at 1343, and *United States v. Olano*, 507 U.S. 725, 731–32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). … Because we hold that *Holguin-Hernandez* does not apply to the facts of this case, we review for plain error.

Id. at 4-5 (citing and quoting *Agostini v. Felton*, 521 U.S. 203 (1997))(internal citations omitted); *Coto-Mendoza*, 986 F.3d at 586.

The court below then said that the district court had adequately explained the sentence because it listened to the parties' arguments, read their submissions, and disclaimed any effect on the Guideline range, "indicating that it gave some thought to the matter." *Id*. at 6-7; *Coto-Mendoza*, 986 F.3d at 586. The court also relied on the judge's recitations of the sentencing factors named at 18 U.S.C. §3553(a)(2). *See id*. at 6; *Coto-Mendoza*, 986 F.3d at 587. The court of appeals thought this adequate to defeat a claim of error even if it had been preserved. *See id*. at 6-7; *Coto-Mendoza*, 986 F.3d at 586-587.

REASONS FOR GRANTING THE PETITION

I. The opinion below conflicts with multiple other courts of appeals and of this Court.

A. The decision below conflicts with the decisions of this Court.

1. Conflict with *Rita v. United States*

A federal criminal sentence should be sufficient but not greater than necessary to accomplish the goals of sentencing set forth in 18 U.S.C. §3553(a)(2)(A). This Court has set forth a two part standard for review of federal sentences. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Assuming a sound process, reviewing courts must decide whether the sentence represents an abuse of discretion as a substantive matter. *See Gall*, 552 U.S. at 51. But before they reach this question, the reviewing courts:

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, **or failing to adequately explain the chosen sentence**—including an explanation for any deviation from the Guidelines range.

Id. (emphasis added).

This Court has provided special guidance regarding the emphasized portion of the passage above: the duty to explain the sentence. It has agreed that a district court's explanation for the sentence may be brief, provided it offers enough to conduct appellate review. *See Rita v. United States*, 551 U.S. 338, 356-357 (2007). And it has noted that a Guideline calculation may help to supply the explanation for a sentence inside the applicable range. *See Rita*, 551 U.S. at 356-357. But more detail is expected

under two circumstances: where the sentence imposed falls outside the Guideline range, and where the parties offer nonfrivolous arguments for a sentence outside the range. *See id.* at 357 ("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.").

The opinion below, however, holds that a district court need not reference the defendant's arguments for a lesser sentence even if the defense does object, so long as the judge listens to the parties, reads their filings, and disclaims any impact on the Guidelines. *See* [Appendix A, at 5-7, & nn. 3, 6]; *Coto-Mendoza*, 986 F.3d at 586-587, & nn. 3, 6. Indeed, the opinion below holds that a bare reference to 18 U.S.C. §3553 may suffice under these circumstances. *See id.*

That is simply not consistent with *Rita*. That decision emphasizes the importance of sentence explanation in building public confidence in the legal system, and in facilitating reasonableness review. *See Rita*, 551 U.S. at 356-357. It distinguishes between cases involving the simple selection of a Guideline sentence, and those in which the court is confronted with nonfrivolous arguments for an out-of-range sentence. *See id.* While it emphasizes that the former cases require only a minimal explanation, it requires "more" in the latter. *See id.* This case is plainly of the latter category, yet the district court offered nothing but a cite to 18 U.S.C. §3553(a), a recitation of statutory factors, and a Guideline disclaimer.

Indeed, the Guideline disclaimer – the judge's statement that the Guidelines did not influence the sentence – would seem to destroy the only arguable basis for

understanding the judge's reasoning. *Rita* holds that a judge may effectively adopt the Sentencing Commission's reasoning in lieu of his or her own explanation. *See Rit*a, 551 U.S. at 556-557 ("[w]hen 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."). But if, as here, the judge says that the Commission's judgments were irrelevant to the outcome, the reader is left with no idea at all about what mattered to the selection of the sentence.

In short, the decision below conflicts with longstanding precedent of this Court, namely *Rita*. The conflict is clear, direct, and manifest in a published opinion. This Court should intervene.

2. Conflict with *Holguin-Hernandez*

Nor is the decision below consistent with this Court's teachings as to the standards for preservation. The published opinion below requires a separate objection to preserve a failure to respond claim. *See* [Appendix A, at 4-5]; *United States v. Coto-Mendoza*, 986 F.3d at 586 (5th Cir. 2021). This requirement persists even where the party requests a sentence outside the range, offers nonfrivolous arguments for a lesser sentence, and challenges only the district court's failure to respond thereto. *See* [Appendix A, at 4-7]; *Coto-Mendoza*, 986 F.3d at 586-587.

That approach does not heed the guidance of this Court's recent decision in *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), which held that substantive reasonableness review may be preserved without a specific objection. *See Holguin-Hernandez*, 140 S.Ct. at 764. In *Holguin-Hernandez*, this Court explained that a simple request for a lesser sentence adequately communicates that a greater sentence is unnecessary under §3553(a), thus preserving substantive reasonableness claims. *See id.* at 766. Such a request does what Federal Rule of Criminal Procedure 51 demands: tell the court what action the party wishes it to take, and provide the grounds for the request. *See id*. The Rule, emphasized this Court, does not require appealing parties to state the standard of review in an objection, "reasonableness." *See id*. at 766-767.

To be sure, *Holguin-Hernandez* reserved the question of what objections are necessary to preserve claims of procedural error. It said:

> The Government and amicus raise other issues. They ask us to decide what is sufficient to preserve a claim that a trial court used improper procedures in arriving at its chosen sentence. And they ask us to decide when a party has properly preserved the right to make particular arguments supporting its claim that a sentence is unreasonably long. We shall not consider these matters, however, for the Court of Appeals has not considered them. *See, e.g., Tapia v. United States*, 564 U.S. 319, 335, 131 S.Ct. 2382, 180 L.Ed.2d 357 (2011); *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). We hold only that the defendant here properly preserved the claim that his 12-month sentence was unreasonably long by advocating for a shorter sentence and thereby arguing, in effect, that this shorter sentence would have proved "sufficient," while a sentence of 12 months or longer would be "greater than necessary" to "comply with" the statutory purposes of punishment. 18 U.S.C. § 3553(a).

Id. at 767.

Nonetheless, the reasoning of *Holguin-Hernandez* provides significant support for the notion that formulaic "procedural reasonableness" objections are not required by Rule 51, provided the defendant has made some effort to inform the court of the action it wishes to take, and the reasons therefor. In *Holguin-Hernandez*, this Court found that a request for a lesser sentence appraises the trial judge of its "overarching duty" to impose a sentence no greater than necessary under §3553(a). Similarly, an argument for a lesser sentence triggers an "overarching duty" to fairly explain the judge's thinking about the issues presented to it. *See Rita*, 551 U.S. at 556-557. Further, *Holguin-Herrera* states in terms that an appealing party "need not also refer to the standard of review" to preserve error. *See Holguin-Hernandez*, 140 S.Ct. at 766-767. "Procedural reasonableness," like "substantive reasonableness," is not an error but a standard of review. *See Gall*, 552 U.S. at 51. There is no need to mention it in an objection.

Yet the court below has repeatedly and categorically rejected any lessons from *Holguin-Hernandez* beyond the narrow question of how to preserve substantive reasonableness review. *See United States v. Cuddington*, 812 F. App'x 241, 242 (5th Cir. 2020)("But the Supreme Court in *Holguin-Hernandez* explicitly declined to address whether its reasoning applied to procedural reasonableness. … Accordingly, our case law requiring a specific objection to preserve procedural error remains undisturbed, as we have previously held in at least one unpublished decision.")(internal citations and quotations omitted); *United States v. Gonzalez-Cortez*, 801 Fed. Appx. 311, 312, n.1 (5th Cir. 2020)(unpublished)(applying plain error

review to a claim of procedural error). Indeed, it did so in the opinion below. *See* [Appendix A, at 4-5]; *Coto-Mendoza*, 986 F.3d at 586.

Holguin-Hernandez seriously undermines the requirement of a separate objection for certain claims of procedural reasonableness, specifically, a claim of error founded on a district court's failure to respond to arguments for a sentence outside the Guidelines. Because the court below has failed to heed that guidance, this Court should grant review.

B. The decision below conflicts with the law of the Fourth, D.C., and Seventh Circuits.

1. Conflict with the Fourth Circuit

The decision below is contrary to the law of several other circuits, and certainly to the law of the Fourth Circuit. In the Fourth Circuit, Petitioner would have received relief in the instant case. The Fourth Circuit has long held, even before *Holguin-Hernandez*, that defendants may preserve a failure-to-respond claim by offering non-frivolous arguments for a lesser sentence. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010). They need not object to the sentence to the explanation after the sentence is pronounced. *See Lynn*, 592 F.3d at 578. The Fourth Circuit has explained that:

> [b]y 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.

Id.

The Fourth Circuit has also recently twice reaffirmed, after *Holguin-Hernandez*, its prior view that some claims of procedural error do not require formal and specific objection. *See United States v. Rivera*, 819 Fed. Appx. 139, 141 (July 20, 2020)(unpublished); *United States v. Myles*, 805 Fed. Appx 184, 188-189 (4th Cir. 2020)(unpublished)("a defendant preserves a claim of inadequate explanation by 'drawing arguments from [18 U.S.C.] § 3553 for a sentence different than the one ultimately imposed.'")(quoting *Lynn*, *supra*).

Three recent cases from the Fourth Circuit make clear that it is also in conflict with the court below as to the merits of failure to explain claims. In *United States v. Myles*, 805 Fed. Appx 184 (4th Cir. 2020)(unpublished), the defendant received a Guideline sentence of life imprisonment. *See Myles*, 805 Fed. Appx at 185-186. The district court merely noted the Guidelines and imposed the sentence. *See id.* at 189-190. The Fourth Circuit regarded the explanation as plainly and reversibly insufficient. *See id.* at 185, 188-191. Notably, the court there found that the defendant failed to meet even the relaxed standard of *Lynn*: counsel had not requested a sentence below the Guidelines. *See id*. at 188-189. Yet it also found that the court's explanation should be reversed on plain error review. *See id.* at 185, 188-191.

The government pointed to the district court's statements "that Myles 'was untruthful,' that he 'tried to avoid facing the facts that were clearly established,' and that 'the government's position regarding the drug weight' was 'well supported by the evidence' before pronouncing the sentence." *Id*. at 190. When these statements were coupled with the court's Guideline calculations, argued the government, they

provided adequate reasoning for a Guideline sentence. *See id.* But the Fourth Circuit rejected that argument, finding that the court's reasoning for a Guideline calculation could not be used to explain its choice of sentence under §3553(a). *See id.*

Myles illustrates that the instant case would have easily qualified for relief in the Fourth Circuit. Myles failed to offer any reason for a lesser sentence, apart from his Guideline objection. *See id.* at 188-189. Yet, the Fourth Circuit reversed on plain error review. *See id.* at 185, 188-191. Petitioner, by contrast, offered perfectly reasonable arguments for a lesser sentence – his terrifying and miserable childhood in El Salvador, the arbitrary delay in federal prosecution, his work history, and a concrete plan to remain in El Salvador, *see* (Record in the Court of Appeals, at 124-125) -- yet the court below found that the district court's explanation would have sufficed even under plenary review, *see* [Appendix A, at 5-7, & nn. 3, 6]; *Coto-Mendoza*, 986 F.3d at 586-587, & nn. 3, 6.

And while the *Myles* judge's comments about the defendant's dishonesty were directed to the Guideline calculations, they were at least reasonably specific to the case at hand, and might have shed some light on the decision-making process. *See Myles*, 805 Fed. Appx at 189-190. Here, by contrast, the court offered nothing but a reference the factors in §3553(a) that govern every single federal case, and a boilerplate Guideline disclaimer.[1] *See* (Record in the Court of Appeals, at 125-126,

[1] The court below thought the Guideline disclaimer – an assertion that the sentence would have been the same even if the Guidelines were different – showed that the judge "gave some thought to the matter." [Appendix A, at 6-7]; *Coto-Mendoza*, 986 F.3d at 586…" To the contrary, the context of the case reveals that the Guideline disclaimer was quite *pro forma*. The 37 month sentence corresponded to the low end

159). The instant case and *Myles* do not reflect consistent appellate standards between the circuits.

So with the Fourth Circuit's recent published reversal in *United States v. Patterson*, 957 F.3d 426 (4th Cir. 2020). In *Patterson*, the defendant violated the terms of his supervised release, but sought a below Guideline sentence at his revocation. *See Patterson*, 957 F.3d at 430, 432-433. In particular, "Patterson's counsel argued that he (1) had a strong employment record and could continue performing janitorial work; (2) enjoyed extensive family support; and (3) was attempting to address his substance abuse problem." *Id*. at 432; These contentions notably resemble those of defense counsel here. *Compare* (Record in the Court of Appeals, at 124-125).

In *Patterson*, "the district court gave a fulsome explanation of the factors it considered under § 3553(a) in arriving at the revocation sentence." *Patterson*, 957 F.3d at 439. Specifically, it pointed out that the defendant had evaded his drug tests 24 times, it noted that general deterrence supported a harsh sentence, and it explained that most of the sentence was attributable to two particular violations proven by the government. *See id.* Yet in spite of this "fulsome" explanation, the

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of the Guideline range, and cannot reasonably be explained in any other way. It is not in any way a round number – it does not end in zero or five, and is not divisible by 12. Nor does it correspond to any other significant number in the case, such as a prior sentence, nor the sentence of a comparably culpable codefendant. Rather than suggesting a thoughtful sentencing process, the disclaimer suggests a script. Further, as explained above, the disclaimer effectively strips the case of the sole basis for affirmance arguably offered by *Rita*: a presumption that the district court's sentencing rationale tracks that of the Commission. *See Rita*, 551 U.S. at 556-557. The judge *affirmatively disclaimed* reliance on the Guideline calculations as the basis for sentence, so the Guideline sentence cannot be understood to adopt the Commission's reasoning reflected in the Guidelines.

Fourth Circuit reversed because "the district court procedurally erred by failing to acknowledge that it had considered Patterson's arguments for a downward variance or departure." *Id.* at 436.

Patterson, a published case, cannot be reconciled with the published case below. *Patterson* recognizes a duty to respond to arguments in mitigation that is independent of the abstract duty to explain the sentence imposed. *See id.* at 436, 439. Further, it recognizes that duty even when the sentence complies with the Guidelines, and even in supervised release cases, where the district court is thought to enjoy more discretion. *See id.* at 437 ("This Court has applied these principles to revocation sentences, with the understanding that such sentences are entitled to a more 'deferential appellate posture' in order to 'account for the unique nature of ... revocation sentences.'")(quoting *United States v. Gibbs*, 897 F.3d 199, 203 (4th Cir. 2018)). The court below, however, affirmed an explanation that made no arguable reference to the defendant's mitigation arguments, and did so in a case involving an original sentence rather than a revocation. *See* [Appendix A, at 5-7, & nn. 3, 6]; *Coto-Mendoza*, 986 F.3d at 586-587, & nn. 3, 6.

Finally, the conflict between this Court and the Fourth Circuit is illustrated by the Fourth Circuit's very recent decision in *United States v. Hardin*, No. 19-4556, 2021 WL 2096368, at *7–8 (4th Cir. May 25, 2021)(unpublished). In that case, the defendant received a life term of supervised release, which comported with his Guideline range. *See Hardin*, 2021 WL 2096368, at *2. Though the defendant argued that he was less culpable than similar offenders, the district court followed the

Guidelines, commenting that the term of release could be terminated or modified. *See id.* The Fourth Circuit emphasized that it did "not doubt that the district court heard and understood Hardin on his objection." *Id.* at *7. It nonetheless found the explanation insufficiently responsive to the defendant's request for a variance. *See id.*

Hardin is quite clearly at odds with the reasoning below, in at least two ways. In the court below, the fact that a judge has "heard and understood" an argument may indeed be sufficient to explain its decision. *See* [Appendix A, at 6][rejecting Petitioner's claim of an inadequate explanation because "[t]he district court also read the sentencing memorandum submitted by Coto-Mendoza's counsel—which included information about Coto-Mendoza's childhood, employment, family, criminal history, and multiple deportations—and heard both Coto-Mendoza's counsel's argument and Coto-Mendoza's personal request for a more lenient sentence."]; *Coto-Mendoza*, 986 F.3d at 586-587. *Hardin* expressly rejects that approach. *See Hardin*, 2021 WL 2096368, at *7.

Further, the judge in *Hardin* at least offered *some* response to the defendant's request for a sentence below the Guideline, albeit one that would have applied to every case, namely, that an overlong sentence could be terminated or modified. *See id.* at *2. In the instant case, the court offered nothing more than a reference to the governing statute, the factors named therein, and a Guideline disclaimer. *See* (Record in the Court of Appeals, at 125-126, 159). Yet Hardin received relief, and Petitioner received none.

As can be seen, the Fourth and Fifth Circuits clearly disagree about the means of preserving a district court's failure to acknowledge and respond to a party's argument for a different sentence. They also disagree about the district court's duty to respond at all. The differences have persisted in spite of relevant authority from this Court. This split alone merits review.

2. Conflict with the D.C. Circuit

On the question of whether *Holguin-Hernandez* affects the standards for preservation of procedural error, the decision below conflicts with the position of the D.C. Circuit. The opinion below, in keeping with multiple unpublished Fifth Circuit opinions preceding it, holds that the reasoning of *Holguin-Hernandez* may be entirely confined to substantive reasonableness appeals. *See* [Appendix A, at 4-5]; *Coto-Mendoza*, 986 F.3d at 586; *Cuddington*, 812 Fed. Appx at 242; *Gonzalez-Cortez*, 801 Fed. Appx. at 312, n.1.[2]

By contrast, the D.C. Circuit has given *Holguin-Hernandez* a broader reading, concluding that it excused the need for at least some procedural objections. In *United*

[2] The court below is joined in this view by the Tenth and Eleventh Circuits, which have likewise confined *Holguin-Hernandez* to the substantive realm. *See United States v. Finnesy*, 953 F.3d 675, 691, n.8 (10th Cir. 2020)(concluding that *"Holguin-Hernandez's* holding has no direct bearing on the preservation standards" for procedural claims."); *United States v. Sanders*, 820 F. App'x 932, 937, n.4 (11th Cir. 2020)(unpublished)("The Supreme Court's recent decision in *Holguin-Hernandez* … does not change our conclusion. In that case the Court held that by requesting a certain sentence, a defendant generally preserves his argument that a higher sentence is substantively unreasonable. But the Court expressly did not decide 'what is sufficient to preserve a claim that a trial court used improper procedures in arriving at its chosen sentence.' Nor does the reasoning of *Holguin-Hernandez* help Sanders.")(internal citations omitted).

States v. Abney, 957 F.3d 241 (D.C. Cir. 2020), the D.C. Circuit considered the impact of *Holguin-Hernandez* on the preservation of a defendant's allocution claim. *See Abney*, 957 F.3d at 246-249. In that case, the defendant asked to speak in the middle of sentencing. *See id.* at 245. But instead of offering a chance to allocute (which had not earlier been provided), the court stopped him and continued imposing the punishment. *See id.* at 245.

Examining the lessons of *Holguin-Hernandez*, the D.C. Circuit concluded that the defendant's request to speak placed the court on notice of its duty to invite allocution, the absence of formal objection notwithstanding. *See id.* at 246-249. The court believed that *Holguin-Hernandez*, taking the text of Rule 51 as a guide, required nothing more than a request for court action, in that case to permit allocution. *See id.* at 247. Further, the court thought it "fair to assume district court judges during sentencing 'hav[e] in mind'" the duty of presentence allocution, just as the *Holguin-Hernandez* court thought it fair to assume courts "have in mind" the duty to comply with §3553(a)(2)(A). *See id.* at 248 (quoting *Holguin-Hernandez*, 140 S.Ct. at 746).

Although the *Abney* court acknowledged that application of *Holguin-Hernandez* beyond substantive reasonableness had been by reserved this Court, it nonetheless thought the case's rationale governed:

> In applying *Holguin-Hernandez*, we acknowledge distinctions between that case and this one. The Court there held that a simple request for a shorter sentence preserved for appeal the claim that the sentence was excessive in violation of 18 U.S.C. § 3553(a), but noted that it was not thereby deciding "what is sufficient to preserve a claim that a trial court used improper procedures in arriving at its chosen sentence." Holguin-Hernandez, 140 S. Ct. at 767; accord id. (Alito, J., concurring). The Court's caveat was evidently sparked by the concern that a general

> request for a lower sentence might not suffice, for example, to bring to a sentencing court's attention procedural errors in Sentencing Guidelines calculations.
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> ***
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> This case involves a claim of procedural error, but because the procedural right involved is a requisite of any sentencing and its omission is easy to detect, we treat it as akin to the straightforward claim of excessive sentence in *Holguin-Hernandez* and unlike the buried flaws in Sentencing-Guidelines calculations described in *Molina-Martinez* and *Rosales-Mireles* that may call for more specific and detailed objections to be effectively preserved under the first clause of Rule 51(b). District courts have a clear, well-established, affirmative obligation to invite defendants to exercise their right to speak on their own behalf before sentencing. *See* Fed. R. Crim. P. 32(i)(4)(A)(ii), 32.1(b)(2)(E). Against that backdrop, it is difficult to envision a request by a defendant to be heard at sentencing that would not suffice under Rule 51(b) to "inform[ ]the court" of the nature of the claim. There was no more need here for Abney to specify that he sought to "allocute" than there was for Gonzalo Holguin-Hernandez to specify that he sought a sentence that was no "greater than necessary" under 18 U.S.C. § 3553(a), or to specify that he took exception to the sentence the court imposed as "unreasonable." *Holguin-Hernandez*, 140 S. Ct. at 766.

Id. at 248- 249.

Abney cannot be reconciled with the decision below, (nor with the position of the Tenth and Eleventh Circuits discussed in Note 2). The decision below confines *Holguin-Hernandez* to the substantive reasonableness context, finding that it has no significance in determining the adequacy of objections to procedural error. *See* [Appendix A, at 4-5]; *Coto-Mendoza*, 986 F.3d at 586. By contrast, *Abney* found the case entirely dispositive on the standard of review for at least one class of procedural claims.

3. Conflict with the Seventh Circuit

Finally, the decision below reflects a long-standing conflict with the Seventh Circuit regarding the duty of a district court to respond to substantial arguments for a lesser sentence. In *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005), the defendant received a Guideline sentence for brokering sales of crack cocaine. *See Cunningham*, 429 F.3d at 675-676. He challenged the sentence as procedurally unreasonable due to the district court's failure to explain it. *See id*. at 676. The district court did offer some case-specific reasons for the sentence, such as the number of times the defendant had brokered crack. *See id*. at 677. But because it "passed over in silence" mitigating arguments of some force, such as the defendant's psychiatric condition, the Seventh Circuit vacated for resentencing. *Id.* at 679.

Cunningham thus stands for the proposition that a judge must acknowledge at least a party's chief arguments for an out-of-range sentence if they are not insubstantial. *See id.* A decision issued just this year confirms that *Cunningham* remains good law in the Seventh Circuit. *See United States v. Joiner*, 988 F.3d 993, 995 (7th Cir. 2021)("*Cunningham* requires a court to address each of the movant's principal arguments, unless they are 'too weak to require discussion' or 'without factual foundation.'")(quoting *United States v. Rosales*, 813 F.3d 634, 637 (7th Cir. 2016)).

Cunningham decision cannot be reconciled with the decision below. Here, as in *Cunningham*, the defendant offered substantial reasons for a sentence outside the range, yet the district court did not address them. *See* (Record in the Court of Appeals,

at 124-126, 159). And while the judge in *Cunningham* at least offered case-specific reasons for the sentence imposed (the number of transactions), *see Cunningham*, 429 F.3d at 677, the judge here merely referenced §3553(a) factors and disclaimed Guideline error. Yet the Seventh Circuit vacated the sentence in *Cunningham*, while the Fifth Circuit affirmed here in a published opinion. Notably, the Seventh Circuit rejected the notion that "[t]he judge could have a stamp that said 'I have considered the statutory factors,' which he placed on every guidelines sentence that he imposed[, and] that would be okay." *Id.* at 676. That practice is effectively what the Fifth Circuit affirmed below.

C. The present case is an appropriate vehicle to address the conflict.

This case well presents the issues that have divided the courts of appeals. The opinion is published and definitive. All three issues involving circuit splits drew direct holdings from the court below. First, the court below held that a defendant must lodge a separate objection to the district court's failure to address arguments in mitigation of the sentence. *See* [Appendix A, at 4-5]; *Coto-Mendoza*, 986 F.3d at 586. This directly contradicts the Fourth Circuit in *Lynn*. *See Lynn*, 592 F.3d at 578.

Second, the court below held that *Holguin-Hernandez* is confined to questions of substantive reasonableness. *See* [Appendix A, at 4-5]; *Coto-Mendoza*, 986 F.3d at 586. This directly contradicts the D.C. Circuit's decision in *Abney*. *See Abney*, 957 F.3d at 248-249.

Finally, the court below held that a bare reference to 18 U.S.C. §3553 could discharge the judge's duty to explain why it rejected substantial arguments for an out-of-range sentence, provided that the judge read the parties filings, listened to

their arguments, and disclaimed the Guidelines. *See* [Appendix A, at 5-7]; *Coto-Mendoza*, 986 F.3d at 586-587. This is clearly contrary to the Seventh Circuit's opinion in *Cunningham*, and the Fourth Circuit's recent decisions in *Myles*, *Patterson*, and *Hardin*. *See Cunningham*, 429 F.3d at 676-677.

The arguments for a lesser sentence were plainly substantial. The request for a variance based on a defendant's traumatic childhood in war-torn El Salvador may well have succeeded before another judge. *See United States v. Ramirez-Ramirez*, 365 F.Supp.2d 728, 730 (E.D.Va. 2005)(considering defendant's experience in Salvadoran civil war in sup-port of a large downward variance from USSG §2L1.2). Similarly, the defendant's stable work history represented a reasonable argument in his favor -- an extensive work-history predicts a lesser risk of serious recidivism. *See United States v. Goodman*, 556 F. Supp. 2d 1002, 1015 (D. Neb. 2008)(noting defendant's "stable work history and has maintained consistent and continuous employment" in support of exercise of leniency). The Guidelines particularly authorize a departure due to time in state custody where the defendant loses a chance for concurrent sentences. *See* USSG §2L1.2, comment. (n. 7). And the defendant's concrete work plans in El Salvador have an obvious bearing on the need to deter another illegal return. See 18 U.S.C. §3553(a)(2)(b)("The court, in determining the particular sentence to be imposed, shall consider … the need for the sentence imposed … to afford adequate deterrence to criminal conduct.").

Yet none of these arguments were referenced, much less addressed by the district court. The case thus clearly presents the question: whether, after *Holguin-*

Hernandez v. United States, __U.S.__, 140 S.Ct. 762 (2020), a party may obtain appellate relief when the district court fails to reference or address substantial arguments for a sentence outside the Guideline range, even if the party has not lodged a specific objection to the court's failure to do so.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 24 day of June, 2021.

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