No. _____

In the

Supreme Court of the United States

_____

Joel Castro-Lopez,

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 a district court errs should reference or address substantial arguments for a sentence outside the Guideline range?

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

INDEX TO APPENDICES iv

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND RULES PROVISIONS 1

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THIS PETITION 11

The opinion below conflicts with multiple other courts of appeals and of this Court 11

CONCLUSION 16

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Gall v. United States,
552 U.S. 38 (2007) 11

Rita v. United States,
551 U.S. 338 (2007) 10, 11, 12, 13

United States v. Castro-Lopez,
No. 21-10254, 2021 WL 5871879 (5th Cir. December 10, 2021)(unpublished) 10, 12, 14, 15

United States v. Cunningham,
429 F.3d 673 (7th Cir. 2005) 15, 16

United States v. Gibbs,
897 F.3d 199 (4th Cir. 2018) 14

United States v. Hardin,
No. 19-4556, 2021 WL 2096368 (4th Cir. May 25, 2021)(unpublished) 14, 15

United States v. Joiner,
988 F.3d 993 (7th Cir. 2021) 16

United States v. Patterson,
957 F.3d 426 (4th Cir. 2020) 13, 14

United States v. Rosales,
813 F.3d 634 (7th Cir. 2016) 16

Federal Statutes

8 U.S.C. § 1326 9

18 U.S.C. § 3552 (b) 5

18 U.S.C. § 3553 ..... 1, 4

18 U.S.C. § 3553 (a) 5, 10, 11, 13

18 U.S.C. § 3553(a)(2)(A) 11

18 U.S.C. § 3593 (c) 4

18 U.S.C. § 3742(g) 2

28 U.S.C. § 994(a)(1) 2, 3

28 U.S.C. § 994(a)(4) 3

28 U.S.C. § 994(p) 2

28 U.S.C. § 994(w)(1)(B) 3

28 U.S.C. § 1254(1) 1

Rules

Fed. R. Crim. P. 26.2 7

Fed. R. Crim. P. 26.2(a)-(d) 7

Fed. R. Crim. P. 26.2(f) 7

Fed. R. Crim. P. 32 3

Fed. R. Crim. P. 32(i)(4) 8

Fed. R. Crim. P. 32(d)(3) 7

Fed. R. Crim. P. 32.2 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joel Castro Lopez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Castro-Lopez*, No. 21-10254, 2021 WL 5871879 (5th Cir. December 10, 2021)(unpublished). 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 December 10, 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 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 Joel Castro-Lopez pleaded guilty to one count of re-entering the United States following removal and without authorization, a violation of 8 U.S.C. §1326. *See* (Record in the Court of Appeals at 27-28). A Presentence Report (PSR) concluded that his Guideline range should be 46-57 months imprisonment, the product of an offense level of 19 and a criminal history category of IV. *See* (Record in the Court of Appeals at 118).

The PSR also recounted the defendant's reason for return: he explained to the Probation Officer that he returned upon learning that his daughter was ill with COVID-19. *See* (Record in the Court of Appeals at 117). At the sentencing hearing, defense counsel urged leni-ency on this ground. See (Record in the Court of Appeals at 101). The district court instead imposed a 72-month sentence. See (Record in the Court of Appeals at 102). It explained the upward variance by reference to the defendant's criminal history and repeated re-entry. See (Record in the Court of Appeals at 102). This explanation did not, however, reference, acknowledge or address the defendant's argument for leniency. See (Record in the Court of Appeals at 102). The court said:

> This is an upward variance. The Defendant has a history of theft of property, driving while intoxicated, failing to stop and render aid, and unlawfully entering the United States. Specifically, he has four prior deportations, two voluntary removals, and a prior conviction for illegal reentry after deportation.
>
> Additionally, he has engaged in criminal conduct while in the United States including a conviction for aggravated sexual assault of a child under 14.

> He has not been deterred by sentences of imprisonment and the likelihood of him committing other crimes, including reentering is great.
>
> Accordingly, I conclude that an upward variance is warranted in this case.

(Record in the Court of Appeals at 102).

Defense counsel objected to the sentence as greater than necessary to fulfill the purposes of sentencing named at 18 U.S.C. §3553(a). *See* (Record in the Court of Appeals at 104).

B. Appellate Proceedings

Petitioner appealed, contending that the district court had erred in failing to address meaningfully his arguments for a lesser a sentence. Specifically, the district court made no reference to his motivation for re-entry, namely to care for his daughter, who had become ill with COVID-19. Some effort to address this obviously substantial area of mitigation, he argued, was compelled by this Court's decision in *Rita v. United States*, 551 U.S. 338 (2007).

The court of appeals rejected this argument. It found that the district court satisfied any obligation to address mitigating arguments because it *heard* them:

> The argument appeared in the presentence report, which the district court adopted, and was repeated by defense counsel at sentencing and by Castro-Lopez during his allocution.

United States v. Castro-Lopez, No. 21-10254, 2021 WL 5871879, at *1 (5th Cir. December 10, 2021)(unpublished); [Appx. A]. Further, it found that its explanation for an upward departure – though it did not address the argument in mitigation – represented an "implicit determination" that it was outweighed. *Castro-Lopez*, No. 21-10254, 2021 WL 5871879, at *1.

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 a decision of this Court.

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 so long as the judge listens to the parties and provides some affirmative reason for the sentence *United States v. Castro-Lopez*, No. 21-10254, 2021 WL 5871879, at *1 (5th Cir. December 10, 2021)(unpublished); [Appx. A]. That is simply not consistent with *Rita*.

Rita 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 Rita*, 551 U.S. at 356-357. 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. As such, *Rita* expects more than listening, and more than an explanation for the sentence – it expects that the judge "explain why he has rejected those arguments" for a lesser sentence.

The decision below conflates listening and explaining, two very different acts that are both necessary to promote public confidence in the judiciary. And in holding that the district court's reasons for the sentence may do service for its reasons to reject defense arguments in mitigation, it simply collapses the distinction between two kinds of cases that Rita expects judges to treat differently. It defies *Rita*.

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.

B. The decision below conflicts with the decisions of other courts.

The decision below also clearly conflicts with the decisions of at least two other circuits. Recent cases from the Fourth Circuit make clear that it is in conflict with the court below as to the merits of failure to explain claims.

The conflict manifests, first, in 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

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 decision below. *Patterson* recognizes a duty to respond to arguments in mitigation that is independent of the abstract duty to explain the sentence imposed, the opposite of the Fifth Circuit's view that an explanation for the sentence "implicitly" states the reasons for rejecting arguments in mitigatiopn. *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 Castro-Lopez*, 2021 WL 5871879, at *1.

Further, the conflict between this Court and the Fourth Circuit is illustrated by the Fourth Circuit's 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 the court below, the fact that a judge *heard or read* an argument may indeed be sufficient to explain its decision. *See Castro-Lopez*, 2021 WL 5871879, at *1. *Hardin* expressly rejects that approach. *See Hardin*, 2021 WL 2096368, at *7.

In addition, 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 last 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. Yet the Seventh Circuit vacated the sentence in *Cunningham*, while the Fifth Circuit affirmed here.

There is a clear split between the decision below and the position of at least two other courts. It pertains a widespread and recurrent issue, meriting review.

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 10th day of March, 2022.

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