No. _____

In the

Supreme Court of the United States

_____

Joseph Martinez,

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?

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

PARTIES TO THE PROCEEDING

Petitioner is Joseph Martinez, 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 Joseph Martinez 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The unpublished opinion of the Court of Appeals is reported at *United States v. Martinez*, No. 21-10715, 2022 WL 118965 (5th Cir. January 12, 2022)(unpublished).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 January 12, 2022. 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 provides:

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

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or

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

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Joseph Martinez pleaded guilty to one count of possessing a firearm in connection with a drug trafficking crime, a violation of 18 U.S.C. §924(c). *See* (Record in the Court of Appeals at 97-99). After his release, he sustained several state convictions, including one for possession of a controlled substance with intent to deliver. *See* (Record in the Court of Appeals at 146-147, 205-206). After seven years in state custody, the federal government acted to revoke his federal term of supervised release. *See* (Record in the Court of Appeals at 150, 205-206). He pleaded true. *See* (Record in the Court of Appeals at 205-206).

At the sentencing hearing, defense counsel asked for a sentence of time served. *See* (Record in the Court of Appeals at 205-206). She urged leniency on several grounds: 1) that the defendant's revocation conduct had occurred long ago, 2) that the defendant's ongoing state parole would provide an adequate measure of deterrence, 3) that the defendant developed realistic plans to re-enter society, including plausible employment and residential prospects, and 4) that his family had a pressing need for his assistance. *See* (Record in the Court of Appeals at 205-208). The district court instead imposed a 24-month sentence, explaining that the state sentence was intended as a separate and distinct punishment from the violation of supervised release. *See* (Record in the Court of Appeals at 210-211). But it did not reference the deterrent value of the defendant's parole, the rehabilitative value of his re-entry plans, or his family ties. *See* (Record in the Court of Appeals at 210-211).

B. Appellate Proceedings

Petitioner appealed, contending that the district court had erred in failing to address meaningfully his arguments for an out-of-range sentence. Some effort to address his substantial claims in mitigation, he argued, was compelled by this Court's decision in *Rita v. United States*, 551 U.S. 338 (2007).

The court of appeals expressly applied plain error review, and affirmed with the following commentary:

> The record as a whole reflects that the district court considered Martinez's arguments concerning the passage of time between his supervised release violations and the revocation proceeding, the time he served in state prison in the interim, his state parole supervision, and his personal circumstances. The court's stated explanation for the within-guidelines sentence provided a reasoned basis for it. Accordingly, the court did not err by failing to reference each of Martinez's arguments.

[Appx. A]; *United States v. Martinez*, No. 21-10715, 2022 WL 118965, at *1 (5th Cir. Jan. 12, 2022)(unpublished)(citing *Rita*, 551 U.S. at 343-45, 356, 358-59; *United States v. Coto-Mendoza*, 986 F.3d 583, 584, 586-87 & nn.4-6 (5th Cir. 2021); *United States v. Becerril-Pena*, 714 F.3d 347, 351-52 (5th Cir. 2013)).

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 an out-of-range sentence so long as the explanation for the sentence is adequate when considered in a vacuum. *See* [Appx. A]; *United States v. Martinez*, No. 21-10715, 2022 WL 118965, at *1 (5th Cir. Jan. 12, 2022)(unpublished).

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 falls in the latter category. *Rita* tells us the rule for this situation:

> [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.

Id. at 357. The opinion below, by contrast, holds that the district court need not "explain why he has rejected [the parties'] arguments" for a different sentence.

Rather, in its view, the explanation need not address the arguments presented to the sentencing court. These are opposite positions.

2. Conflict with *Holguin-Hernandez*

Nor is the decision below consistent with this Court's teachings as to the standards for preservation. The opinion below applies plain error, thus requiring a separate objection to preserve a failure to respond claim. *See Martinez*, 2022 WL 118965, at *1. This requirement persists even where, as here, 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 id.*

That approach does not heed the guidance of this Court's 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. 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 (internal citations omitted).

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 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 has done so in a published opinion addressing the very kind of claim raised here. *See United States v. Coto-Mendoza*, 986 F.3d 583, 586 (5th Cir. 2021).

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 relatively 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 -- the deterrent value of state parole, the defendant's sturdy plans for re-entry, and his family's need for his assistance, *see* (Record in the Court of Appeals at 205-208) -- yet the court below required no specific response. *See Martinez*, 2022 WL 118965, at *1.

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.

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 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 like the one at bar. *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 where the district court made no reference to the

defendant's mitigation arguments. *See* (Record in the Court of Appeals, at 210-211); s*ee Martinez*, 2022 WL 118965, at *1.

Finally, 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 at odds with the reasoning below. 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 no specific response to several arguments offered for a lesser sentence. *See* (Record in the Court of Appeals, at 210-211). 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 Seventh Circuit

The decision below also 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 205-208, 210-211). Yet the Seventh Circuit vacated the sentence in *Cunningham*, while the Fifth Circuit affirmed here. The circuits are in clear conflict as to the obligations of a sentencing court.

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 division of authority regarding the standard of review is quite directly presented, as Petitioner clearly offered reasons for a lesser sentence. *See* (Record in the Court of Appeals, at 205-208). In the Fourth Circuit, and likely under *Rita* and *Holguin-Hernandez*, this preserves error in the district court's failure to respond.

The arguments for a lesser sentence were plainly substantial, clearly implicating the expectation of a response discussed in *Rita* and the precedent of the Fourth and Seventh Circuits. The grounds for a lesser sentence were obviously not frivolous, and required a response under this Court's precedent and the precedent of the Fourth and Seventh Circuits. The division of authority on the merits is squarely implicated, making the case an excellent vehicle.

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 12th day of April, 2022.

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