No. 22-7580

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR ALFREDO BERMUDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether plain-error review applies to petitioner's claim that the district court inadequately explained the sentence it imposed, where petitioner failed to object in the district court to the adequacy of that explanation.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Bermudez, No. 20-cr-440 (Apr. 29, 2022)

United States Court of Appeals (5th Cir.):

United States v. Bermudez, No. 22-10464 (Feb. 15, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17a-20a) is not published in the Federal Reporter but is available at 2023 WL 2015625.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2023. The petition for a writ of certiorari was filed on May 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiring to possess unregistered firearms, in violation of 18 U.S.C. 371, and two counts of possessing an unregistered firearm, in violation of 26 U.S.C. 5841, 5845, and 5861(d). Pet. App. 21a. He was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. Id. at 22a-23a. The court of appeals affirmed. Id. at 17a-20a.

1. In July 2020, a task force officer with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) learned that petitioner's brother, José, was advertising Glock conversion switches -- devices used to convert semiautomatic Glock pistols into automatic machine guns -- on the social-media service Snapchat. Presentence Investigation Report (PSR) ¶ 11. Due to their capabilities, Glock conversion switches qualify as "machine guns" under federal law. Ibid.; 26 U.S.C. 5845(b).

An ATF agent created an undercover Snapchat account and contacted José about purchasing conversion switches. PSR ¶ 13. After negotiating, José agreed to sell the agent five switches for $4000. Id. ¶¶ 15-16. On the date of the sale, petitioner delivered the switches on José's behalf and explained the characteristics and functionality of the switches to the agent. Id. ¶ 17. Petitioner told the agent that the switches were disabled to avoid detection by law enforcement and advised the agent to research how

to assemble the switches. Ibid. Petitioner also showed the agent a video depicting petitioner firing a Glock pistol in semiautomatic mode, then changing the switch and firing the weapon in fully automatic machine gun mode. Ibid.

Petitioner sold two more switches to the same undercover agent in August 2020. PSR ¶ 26.

2. A grand jury returned an indictment charging petitioner with one count of conspiring to possess unregistered firearms, in violation of 18 U.S.C. 371, and two counts of possessing unregistered firearms, in violation of 26 U.S.C. 5841, 5845, and 5861(d). C.A. ROA 50-58. Petitioner pleaded guilty without a plea agreement. Id. at 96-105.

The Probation Office's presentence report recommended a total offense level of 15 and a criminal history category of II, resulting in an advisory Guidelines range of 21 to 27 months of imprisonment. PSR ¶ 91. The presentence report noted that the district court could consider an upward departure or variance due to the number of Glock conversion switches involved in petitioner's offense. PSR ¶ 104. And the government argued that an upward departure or variance was warranted for that reason. C.A. ROA 423-424.

In his objections to the presentence report, petitioner argued that he was entitled to a minor-role reduction because he did not orchestrate the conspiracy and was simply "a mule in the delivery of the switches." C.A. ROA 404. Petitioner, a lawful

permanent resident, also argued that he should receive a downward variance based on time he had spent in immigration custody following his arrest. Id. at 406. The Probation Office issued an addendum to the presentence report, in which it applied a two-level minor-role reduction, resulting in an advisory Guidelines range of 15 to 21 months of imprisonment. Id. at 414-417.

At petitioner's sentencing hearing, the district court began by advising petitioner that it was considering an above-Guidelines sentence "for the reasons stated both in the [presentence report] and the Government's motion." C.A. ROA.326. After hearing argument from the parties -- including argument from petitioner that the court should vary downward or impose a sentence at the lower end of the Guidelines range, id. at 339 -- the court adopted the factual findings in the presentence report and its two addenda and calculated an advisory Guidelines range of 15 to 21 months of imprisonment, id. at 344. The district court stated, however, that petitioner's Guidelines range did not "adequately reflect the statutory sentencing factors of Section 3553(a)," and the court would therefore "vary from the guidelines in imposing sentence here." Ibid.

The court explained that the "primary reason" for its decision to vary upward was "the seriousness of the offense conduct," which the court characterized as "just incredibly, incredibly dangerous to the whole community." C.A. ROA 344-345. The district court acknowledged, however, that petitioner was less culpable than one

of his co-conspirators, José's brother-in-law, who had received a sentence of 48 months of imprisonment. Id. at 345. The court ultimately selected a sentence of 30 months of imprisonment, which was "a year less than" the co-conspirator's sentence, reduced another six months to account for the time petitioner had spent in immigration custody "that he otherwise would not get credit for" under the Guidelines. Id. at 345. After imposing petitioner's sentence, the district court asked whether there was "anything else" defense counsel wanted "to take up." Id. at 347. Counsel for petitioner responded that she had "[n]othing else." Ibid.

3. The court of appeals affirmed petitioner's sentence in an unpublished per curiam opinion. Pet. App. 17a-20a.

On appeal, petitioner argued for the first time that his sentence was procedurally unreasonable, asserting that the district court failed to sufficiently explain its upward variance. See Pet. C.A. Br. 7. The court of appeals observed that "[b]ecause he did not preserve the procedural-unreasonableness issue in the district court, review is only for plain error," under which he was required to show "clear-or-obvious error * * * that affected his substantial rights" in order for the court of appeals to have discretion to grant relief, which it would then generally exercise only if the error "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" Pet. App. 18a (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)) (brackets omitted).

The court of appeals then observed that the district court had "thoroughly considered [petitioner's] mitigating arguments, as referenced both in its Statement of Reasons and its granting the six-month sentencing credit he requested." Pet. App. 18a. It further noted that the district court had "explained * * * that a variance was necessary to address[] the seriousness of [the] offense conduct; the Sentencing Guidelines' failure to account for the true nature of the offense; the need to provide adequate deterrence * * * ; and the need to provide just punishment and protect the public." Ibid. The court of appeals added that "[i]nasmuch as [petitioner] maintains the [district] court should have separately or specifically addressed his mitigating arguments when imposing the upward variance, he fails to demonstrate the requisite clear-or-obvious procedural error." Id. at 18a-19a. And the court determined that "[e]ven assuming the [district] court's explanation was clear-or-obvious procedural error," any such error did not affect petitioner's substantial rights because petitioner did "not contend, much less demonstrate a reasonable probability, that a more detailed explanation would have resulted in a lesser sentence." Id. at 19a.

ARGUMENT

Petitioner contends (Pet. 7-13) that the court of appeals improperly applied plain-error review to his procedural objection, raised for the first time on appeal, to the district court's explanation for varying upward from the advisory guideline range.

As a threshold matter, petitioner's challenge to his term of imprisonment does not warrant this Court's review because he is scheduled for release in January 2024, which will moot his claim. In any event, the court of appeals' decision is correct, and this Court has repeatedly declined to address the minimal circuit disagreement on the question presented. In addition, petitioner's case would be a poor vehicle for considering the question presented because the district court did not commit any error, plain or otherwise, when sentencing petitioner. The petition for a writ of certiorari should be denied.[1]

1. This case will likely become moot before the Court would issue a decision. According to the Federal Bureau of Prisons, petitioner is scheduled to be released on December 18, 2023. See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/mobile/find_inmate/index.jsp (last visited July 31, 2023) (search for register number 07452-509). Because petitioner's claim is directed only to the length of his sentence, rather than his underlying conviction, the case will become moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

[1] The question presented here is also presented by the petition in Bernard v. United States, No. 22-7717 (filed May 31, 2023).

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But a "presumption of collateral consequences" does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges only the length of his term of imprisonment, his completion of that prison term moots an appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that those consequences are "'likely to be redressed by a favorable judicial decision,'" id. at 7 (citation omitted).

Petitioner cannot make that showing here. By the time that the Court would issue a decision in this case, the only portion of petitioner's sentence to which he would still subject would be his three-year term of supervised release. In United States v. Johnson, 529 U.S. 53 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. Id. at 54. The Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so

"if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." 529 U.S. at 60 (quoting 18 U.S.C. 3583(e)(1)). But as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009); see also Rhodes v. Judiscak, 676 F.3d 931, 934-935 (10th Cir.) (adopting Burkey's reasoning), cert. denied, 567 U.S. 935 (2012).[2]

2. Review would be unwarranted in any event.

a. To preserve a claim for appellate review, a defendant must object to an allegedly erroneous district court ruling at the time the ruling "is made or sought," and must inform the district court "of the action the [defendant] wishes the court to take, or the [defendant's] objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). A claim that is not

[2] Other courts of appeals have concluded that the possibility that the sentencing court would exercise its discretion to reduce a defendant's supervised-release term is sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See, e.g., United States v. Ketter, 908 F.3d 61, 66 (4th Cir. 2018); Pope v. Perdue, 889 F.3d 410, 414 (7th Cir. 2018); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006); Mujahid v. Daniels, 413 F.3d 991 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006); Johnson v. Pettiford, 442 F.3d 917, 917-918 (5th Cir. 2006) (per curiam). Regardless, the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the question presented.

preserved in that manner is subject to review only for plain error. Fed. R. Crim. P. 52(b).

In United States v. Booker, 543 U.S. 220 (2005), this Court confirmed that, in the context of imposing a sentence, the courts of appeals would continue to apply "ordinary prudential doctrines * * * [such as] whether the issue was raised below and whether it fails the 'plain-error' test," when reviewing an advisory Guidelines sentence for reasonableness. Id. at 268. And in this case, because petitioner did not inform the district court that he believed the court's explanation was inadequate, the court of appeals correctly applied plain-error review to petitioner's belated claim that the district court failed to adequately explain its sentence.

In United States v. Vonn, 535 U.S. 55 (2002), this Court applied plain-error review to a claim that a trial court had failed to conduct an adequate guilty-plea colloquy. The Court explained that "the point of the plain-error rule" is "always" that "the defendant who just sits there when a mistake can be fixed" cannot "wait to see" whether he is satisfied with the judgment and then identify the mistake in the first instance in the court of appeals if he is not. Id. at 73. Instead, a defendant must raise a specific, contemporaneous objection, which ensures that "the district court can often correct or avoid the mistake." Puckett v. United States, 556 U.S. 129, 134 (2009); see Vonn, 535 U.S. at

72 (noting the benefits of "concentrat[ing] * * * litigation in the trial courts, where genuine mistakes can be corrected easily").

The reasons for requiring a contemporaneous objection under Federal Rule of Criminal Procedure 51(b) apply with full force to claims like petitioner's. A district court that is alerted to the possibility that a defendant views its explanation as insufficient may well supplement that explanation. Even a court that believes that its existing explanation suffices may choose to add more detail to satisfy an inquiring defendant or to obviate the need for an appeal and potential remand. A deficient explanation is thus precisely the sort of error that can be, and should be, corrected by the district court in the first instance.

b. Petitioner contends (Pet. 9) that the court of appeals' application of plain-error review to his procedural unreasonableness claim is at odds with this Court's recent decision in Holguin-Hernandez v. United States, 140 S. Ct. 762 (2020). That contention is mistaken.

In Holguin-Hernandez, this Court found that a "defendant's district-court argument for a specific sentence (namely, nothing or less than 12 months) preserved his claim on appeal that [his] 12-month sentence was unreasonably long." 140 S. Ct. at 764. The Court held that a defendant who has advocated for a shorter term of imprisonment at sentencing on a particular ground has timely "inform[ed] the court * * * of the action the party wishes the court to take," Fed. R. Crim. P. 51(b), with respect to the court's

obligation to select a "sufficient, but not greater than necessary" punishment for the offense, 18 U.S.C. 3553(a), and does not therefore have to "refer to the 'reasonableness' of a sentence to preserve such claims for appeal." Holguin-Hernandez, 140 S. Ct. at 766; see id. at 765-766.

Holguin-Hernandez did not, however, address whether defendants need to lodge contemporaneous objections to preserve other types of challenges to a sentence. See 140 S. Ct. at 767. And Holguin-Hernandez's holding and rationale are inapposite where, as here, a defendant fails to make any objection to the district court's allegedly inadequate explanation during sentencing and instead raises a new claim relating to the district court's explanation for the first time on appeal. See id. at 767 (Alito, J., concurring) (emphasizing that failing to object to a procedural error "will subject a procedural challenge to plain-error review" (citing Molina-Martinez v. United States, 578 U.S. 189 (2016)). Unlike in Holguin-Hernandez, a request for a lesser sentence does not itself provide the district court with "the opportunity to consider and resolve" the propriety of the procedures it employed, including the adequacy of its explanation for the sentence it ultimately imposed. Puckett, 556 U.S. at 134; see also Gall v. United States, 552 U.S. 38, 51, 56 (2007) (explaining difference between substantive and procedural errors).

c. Petitioner contends (Pet. 10-13) that the court of appeals' application of plain-error review to an unpreserved claim

of procedural sentencing error conflicts with decisions of other courts of appeals. Although some disagreement exists in the courts of appeals about whether and when an unpreserved challenge to the adequacy of a district court's sentencing explanation is reviewed for plain error, that disagreement is narrower than petitioner suggests and does not warrant this Court's review.

A clear majority of the courts of appeals have agreed -- both before and after Holguin-Hernandez -- that plain-error review applies when a defendant does not specifically object to the district court's failure to explain a sentence. See United States v. Rivera-Berríos, 968 F.3d 130, 134 (1st Cir. 2020); United States v. Flores-Mejia, 759 F.3d 253, 256-257 (3d Cir. 2014) (en banc); United States v. Rangel, 697 F.3d 795, 805 (9th Cir. 2012), cert. denied, 568 U.S. 1182 (2013); United States v. Akhigbe, 642 F.3d 1078, 1085-1086 (D.C. Cir. 2011); United States v. Corona-Gonzalez, 628 F.3d 336, 340 (7th Cir. 2010); United States v. Statman, 604 F.3d 529, 534 (8th Cir. 2010); United States v. Mondragon-Santiago, 564 F.3d 357, 361 (5th Cir.), cert. denied, 558 U.S. 871 (2009); United States v. Robertson, 568 F.3d 1203, 1210, 1214 (10th Cir.), cert. denied, 558 U.S. 1083 (2009); United States v. Vonner, 516 F.3d 382, 385-386 (6th Cir.) (en banc), cert. denied, 555 U.S. 816 (2008); United States v. Villafuerte, 502 F.3d 204, 211 (2d Cir. 2007).

Petitioner suggests (Pet. 13) that the Seventh Circuit held that a contemporaneous objection is not required to preserve a

claim that the district court provided an inadequate explanation of its sentence in United States v. Cunningham, 429 F.3d 673 (2005). But in a decision post-dating both Cunningham and Holguin-Hernandez, the Seventh Circuit has expressly stated that, where a defendant "did not object to [an] alleged procedural deficiency at the time of sentencing, [it] review[s] for plain error." Corona-Gonzalez, 628 F.3d at 340. Petitioner's reliance on United States v. Joiner, 988 F.3d 993 (7th Cir. 2021) is similarly misplaced. That case did not concern a procedural challenge to a defendant's sentence at all; instead, the court of appeals found that the district court did not err in declining to address an unsupported argument made by a defendant in a motion for compassionate release. See id. at 995.

Petitioner notes (Pet. 10-11) that the Fourth Circuit has not required a contemporaneous objection to preserve a claim that the district court provided an inadequate explanation of its sentence. In United States v. Lynn, 592 F.3d 572 (2010), the Fourth Circuit treated a claim of procedural error as preserved without a separate objection. See id. at 578 ("By drawing arguments from [Section] 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."). But this Court has repeatedly declined to review the question presented following the decision in Lynn. See, e.g., Hull v. United States, 139 S.

Ct. 1376 (2019) (No. 18-7140); Smith v. United States, 139 S. Ct. 1319 (2019) (No. 18-6237); Rangel v. United States, 568 U.S. 1182 (2013) (No. 12-8088); Reyes v. United States, 568 U.S. 1030 (2012) (No. 12-5032); Villarreal-Pena v. United States, 565 U.S. 1236 (2012) (No. 11-7084); Satchell v. United States, 565 U.S. 1204 (2012) (No. 11-6811); McClain v. United States, 565 U.S. 1159 (2012) (No. 11-5738); Alcorn v. United States, 565 U.S. 1159 (2012) (No. 11-5024); Mora-Tarula v. United States, 565 U.S. 1156 (2012) (No. 10-11209); Williams v. United States, 565 U.S. 931 (2011) (No. 10-9941); Hoffman-Portillo v. United States, 565 U.S. 918 (2011) (No. 11-5656); Wilson v. United States, 562 U.S. 1116 (2010) (No. 10-7456). Petitioner identifies no reason for a different result here.

The Eleventh Circuit has also stated that challenges to a district court's compliance with the sentence-explanation requirements of 18 U.S.C. 3553(c) are reviewed de novo. See United States v. Bonilla, 463 F.3d 1176, 1181 (11th Cir. 2006) (citing United States v. Williams, 438 F.3d 1272, 1274 (11th Cir.) (per curiam), cert. denied, 549 U.S. 891 (2006)). But it has done so in decisions that predate Gall v. United States and Rita v. United States, 551 U.S. 338 (2007), see Bonilla, 463 F.3d at 1181, and in cases that cite those pre-Gall and pre-Rita decisions, see United States v. Hamilton, 66 F.4th 1267 (11th Cir. 2023); United States v. Woodson, 30 F.4th 1295 (11th Cir. 2022). In light of this Court's elaboration of reasonableness review, the Eleventh Circuit

could still revisit its decisions and bring its practice in line with the majority of the circuits.

3. In any event, this case would be a poor vehicle to address the question presented, for two reasons.

First, the district court's explanation was adequate, and thus would not provide a basis for relief even if plain-error review did not apply. As the court of appeals observed, the district court "thoroughly considered" petitioner's arguments and explained that a variance was necessary to address "the seriousness of his offense conduct; the Sentencing Guidelines' failure to account for the true nature of the offense; the need to provide adequate deterrence * * * ; and the need to provide just punishment and protect the public." Pet. App. 18a.

Second, even assuming the district court's sentencing justification was inadequate (and even setting aside mootness concerns, see pp. 7-9, supra), that inadequacy had no apparent practical effect. As in the court of appeals, see Pet. App. 19a, petitioner does not now contend that a more detailed explanation would have resulted in a lower sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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