No. _____

In the

Supreme Court of the United States

CHRISTOPHER A. BERNARD
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

_____

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

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PETITION FOR WRIT OF CERTIORARI

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Question Presented

This Court in *Holguin-Hernandez* held that a defendant's argument in the district court for a lower sentence preserves appellate review to the substantive reasonableness of the sentence imposed. This Court has yet to address whether that holding applies to procedurally unreasonable sentences, such as in this case, where the district court offered no reasons for rejecting a defendant's comprehensive request for a below-guidelines sentence. On this point, the circuits are split.

Given that a sentencing court is obligated not only to provide a substantively reasonable sentence but also to provide adequate reasons for the sentence, should the logic of *Holguin-Hernandez*'s holding be extended to provide that an argument for a lower sentence preserves review of a claim that the district court's reasons for sentence are inadequate?

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Petition for Certiorari

Christopher Bernard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered below.

Opinion Below

The unpublished opinion of the Court of Appeals is attached as an Appendix to this Petition.

Jurisdiction

The Court of Appeals for the Fifth Circuit rendered judgment on March 31, 2023. This petition is filed within 90 days of that date. *See* SUP. CT. R. 13.1. Section 1254(1), 28 U.S.C., confers jurisdiction on this Court to review the judgment through certiorari.

Authority Involved

Federal Rule of Criminal Procedure 51 provides in pertinent part:

> (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 52 provides in pertinent part:

> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Statement of the Case

After claiming to smell raw, unburnt marijuana emanating from Christopher Bernard's car as he drove past a Shreveport police car, the officers in the police car stopped Bernard and found a firearm and 2.68 ounces of marijuana contained in four plastic baggies, three found inside of a zipped-up backpack and one found inside the closed center console. The Government thereafter obtained an indictment charging Bernard with one count of being a felon in possession of a firearm and one count of possessing a firearm in furtherance of a drug-trafficking offense. After the district court denied Bernard's motion to suppress, Bernard entered a conditional guilty plea to the latter firearm count.

Facing the dramatic sentencing consequences of the application of the career-offender guideline, U.S.S.G. § 4B1.1, which called for a sentencing range of 262 to 327 months, Bernard set out to convince the sentencing court not to impose so severe a sentence. Bernard first argued that the career-offender guideline should not apply to him because his prior 2008 state-court conviction for distribution of 2.9 grams of cocaine concerned conduct that was part of the same course of conduct as the other predicate conviction, which is a 2009 federal conviction for cocaine distribution. The court rejected this argument noting that the Sentencing Commission abandoned the "same course of conduct" test in November 2007.

Bernard argued alternatively that the court should impose a below-guidelines sentence. Bernard noted that but for the application of the career-offender guideline, his sentencing range would be 60 to 66 months, instead of 262 to 327 months. Bernard pointed to a recommendation by the Sentencing Commission that Congress should amend the career-offender guideline to apply only when at least one of the prior convictions is a crime of violence, a recommendation on which the

Congress has yet to act. Bernard has no prior conviction for a crime of violence. Bernard also argued extensively that the application of the career-offender guideline has caused great disparity of sentences from one jurisdiction to another. Finally, Bernard noted that the drug-trafficking offense supporting the firearm conviction involved only a very small amount of marijuana.

The district court did not expressly deny the request for a downward variance. In fact, immediately after Bernard reminded the court of his request for a variance, the court made the following ruling that was not responsive to that request: "The Court would, therefore, adopt the calculation of the sentencing guideline range as per the PSR and that is that he does qualify as a career offender . . . ." The court thereafter imposed a sentence of 262 months, explaining perfunctorily: "This sentence was selected after considering the factors contained in 18 U.S.C. Section 3553(A) pertaining to your extensive criminal history, your personal characteristics, and your involvement in the instant offense."

On appeal, Bernard argued that the district court's reasons for sentence were insufficient under 18 U.S.C. § 3553(c). He also suggested that, consistent with the rule in other circuits, the court should find that he sufficiently preserved full appellate review of the adequacy of the reasons for sentencing by advocating for a lower sentence. Bernard conceded, however, that under Fifth Circuit precedent, review would be for plain error. In fact, the court affirmed based on plain-error review, concluding that the sentencing court's explanation for sentence was not clearly or obviously insufficient.[1]

[1] *Infra*, Appendix at 3.

Reason for Granting the Petition

Though left open by this Court in *Holguin-Hernandez*, the sheer force of the reasoning in that case compels the conclusion that a defendant's argument for a lower sentence not only preserves review to the length of the sentence but also to the adequacy of the district court's reasons given for that sentence.

Ordinarily, when a district court imposes a sentence within the Guideline range, the court's perfunctory reference to the factors of § 3553(a)(1) may satisfy the requirement of § 3553(c), which requires the court to "state in open court the reasons for its imposition of a particular sentence."[2] But where, as here, the defendant "argues for departure" and "presents nonfrivolous reasons" for imposing a below- Guidelines sentence,[3] the district court should "go further and explain why he has rejected those arguments."[4] In this case, the district court failed to give any reasons for rejecting Bernard's request for a lower sentence. Consequently, the court's lack of reasons (1) fails to comply

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[2] *Rita v. United States*, 551 U.S. 338, (2007) ("when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation").

[3] *See Spears v. United States*, 555 U.S. 261, 263-64 (2009) (holding that district court may depart downward based on policy disagreement with the Sentencing Commission); *United States v. Newhouse*, 919 F. Supp. 2d 955, 973-74 (N.D. Iowa 2013) (imposing downward departure for low-level, drug addicted dealer based on policy disagreement with career-offender guideline); *United States v. Telfair*, 507 F. App'x 164, 179 (3rd Cir. 2012) (noting in *Anders* review that downward departure was reasonable as it was based on district court's finding that application of career-offender guideline was "overly harsh" where defendant "barely satisfied" requirements for that enhancement); *United States v. Mitchell*, 624 F.3d 1023, 1028-29 (9th Cir. 2010) (affirming as reasonable downward policy-grounds departure from range determined by career-offender provision); *United States v. Feemster*, 572 F.3d 455 (8th Cir.2009) (en banc) (affirming sentence below career-offender range on various grounds, including fact that defendant had a "troubled youth" and that most of his priors occurred when he was a juvenile).

[4] *See Rita*, 551 U.S. at 357 ("Unless a party . . . argues for departure, the judge normally need say no more. . . [but 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.").

with the requirement of § 3553(c), (2) prevents any "meaningful appellate review" of the sentence imposed, and (3) fails to "promote the perception of fair sentencing."[5]

Notwithstanding the clear inadequacy of the court's reasons for sentence, the error was effectively insulated from review by the Fifth Circuit's application of the plain-error standard of review, which applies in that circuit if the defendant does not affirmatively object to the inadequacy of the court's reasons.[6]

The Fifth Circuit's rule is in direct conflict with the rule in the Fourth and Eleventh Circuits. The Fourth Circuit holds 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."[7] The Eleventh Circuit similarly holds: "A defendant's challenge to a district court's failure to comply with § 3553(c)(1) is reviewed de novo, even if the defendant did not object below."[8] In those

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[5] *See Gall v. United States*, 552 U.S. 28, 50 (2007). *Compare Rita*, 551 U.S. at 344- 45, 358 (holding that although the judge "might have said more," reasons were sufficient where "record [made] clear that sentencing judge listened to each argument [and] considered the supporting evidence" as shown by the court's express acknowledgment and restatement of the defendant's arguments for a variance, the questions asked of counsel, and the elicitation of counter arguments from the Government).

[6] *United States v. Martinez*, 872 F.3d 293, 303 (5th Cir. 2017) (holding that a general objection "to the reasonableness of the sentence" does not preserve review of a challenge to the adequacy of the trial court's reasons for sentence); *United States v. Mondragon-Santiago*, 564 F.3d 357, 361-62 (5th Cir. 2009) (applying plain error review after concluding that an objection generally arguing that a sentence was "greater than necessary" would not put the district court on notice "that the defendant wanted further explanation of the sentence").

[7] *United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010). *See United States v. Fowler*,58 F.4th 142, 153 (4th Cir. 2023) (following rule in *Lynn*).

[8] *United States v. Hamilton*, 66 F.4th 1267, 1274 (11th Cir. 2023) (citing *United States v. Bonilla*, 463 F.3d 1176, 1181 (11th Cir. 2006); *United States v. Woodson*, 30 F.4th 1295, 1307-08 (11th Cir. 2022)). *See United States v. Tate*, 630 F.3d 194, 197-99 (D.C. Cir. 2011) (counsel's pre-ruling arguments for a lower sentence based on crack/powder disparity preserved claim of procedural unreasonableness without need for post-ruling objection).

circuits, Bernard's claim would have received full appellate review because his extensive and detailed arguments for a below-Guidelines sentence sufficiently brought to the court's attention the need to fulfill its statutory obligation to provide reasons for rejecting those arguments.

The holdings in the Fourth and Eleventh Circuits are also consistent with *Holguin-Hernandez v. United States*, in which this Court held that a challenge to the substantive reasonableness of a sentence is preserved for review on appeal whenever the defendant advocates in the district court for a sentence shorter than the one thereafter imposed by the district court.[9] This Court noted that Rule 51, FED. R. CRIM. P., dispensed with the need for formal exceptions to the trial court's rulings and that a party may satisfy the objection requirement even before the court issues its ruling.[10] The only question, the Court held, is whether the claimed error was "brought to the court's attention."[11]

Although this Court indicated that it was not deciding what constitutes a sufficient objection to preserve a claim of procedural error,[12] the logic of its holding applies with equal strength to a claimed procedural error, insofar as that error concerns the adequacy of the court's reasons for sentence. Thus, just as a district court must, in all cases, impose a sentence that is not substantively unreasonable, a court must, in all cases, provide adequate reasons for the sentence imposed.[13]

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[9] 140 S. Ct. 762, 766-67 (2020).

[10] *Id.* at 766. *See* FED. R. CRIM. P. 51(b) ("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** . . . .") (emphasis added).

[11] 140 S. Ct. at 766.

[12] *Id.*

[13] *Gall v. United States*, 552 U.S. 38, 50 (2007).

Bernard's non-frivolous arguments for a below-Guidelines sentence triggered the court's obligation to provide reasons for rejecting those arguments.

Conclusion

This Court should grant certiorari to address whether the holding in *Holguin-Hernandez*, extends to the adequacy of the reasons imposed for sentence and to resolve the split among the circuits on this issue.

Respectfully submitted,

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