No. 22-7717

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IN THE SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER A. BERNARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# 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 (W.D. La.):

United States v. Bernard, No. 20-cr-139 (Apr. 22, 2022)

United States v. Bernard, No. 08-cr-303 (Apr. 21, 2022)

(judgment on revocation of supervised release)

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

United States v. Bernard, No. 22-30278 (Mar. 31, 2023)

United States v. Bernard, Nos. 22-30279 (Mar. 31, 2023)

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is available at 2023 WL 2733471.

## JURISDICTION

The judgment of the court of appeals was entered on March 31, 2023. The petition for a writ of certiorari was filed on May 31, 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 Western District of Louisiana, petitioner was convicted of possessing a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. 924(c)(1). Pet. App. A1; Judgment 1. Petitioner was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. Judgment 2, 3. The court of appeals affirmed. Pet. App. A1-A3.

1. While patrolling in a high-crime neighborhood in Shreveport, Louisiana, two officers smelled an "overwhelming odor" of marijuana when they pulled over to allow a silver Mercedes sedan to pass by on a narrow two-way street. C.A. ROA 172-175. The officers began following the Mercedes, and, as they got closer, they again smelled marijuana. Id. at 176-177.

The officers stopped the Mercedes to investigate the marijuana odor. C.A. ROA 177. Petitioner, who was driving the Mercedes, pulled into a parking lot. Ibid. As one of the officers approached the car door, he again smelled the "overwhelming" odor of marijuana. Id. at 178. The officer explained to petitioner that the basis for the stop was the strong smell of marijuana, and petitioner responded that he had been smoking marijuana earlier in the day. Id. at 179. The officer asked petitioner to step out of the car, at which point the officer saw a handgun sticking out between the driver's seat and the center console. Id. at 180.

The officer asked for consent to search the car, which petitioner provided. C.A. ROA 180. The officers removed the gun, which was a loaded 9mm pistol that had been reported stolen. Id. at 13, 181. The officers also found a bag containing 3.1 grams of marijuana, as well as "packaging material," in the center console. Id. at 183-184. And in the backseat floorboard, the officers found a backpack that contained 73 grams of marijuana and a digital scale. Id. at 184. The officers arrested petitioner, who at the time was on federal supervised release for a 2008 conviction for distributing crack cocaine. Id. at 185, 187, 270.

2. A federal grand jury returned an indictment charging petitioner with one count of possessing a firearm and ammunition after a felony conviction, in violation of 18 U.S.C. 922(g)(1), and one count of possessing a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. 924(c)(1). C.A. ROA 13. Petitioner pleaded guilty to the second count pursuant to a conditional plea agreement, in which he reserved his right to appeal the denial of a motion to suppress the evidence found during the traffic stop. Id. at 236.

The Probation Office's presentence report observed that petitioner, who had at least two prior convictions for controlled substance offenses, qualified as a career offender under Sentencing Guidelines § 4B1.1. C.A. ROA 333. And applying the career-offender guideline, the Probation Office calculated

petitioner's advisory Guidelines range as 262-327 months of imprisonment. Id. at 334, 346.

Petitioner filed a presentence memorandum, asserting that he was not a career offender because he did not have two prior convictions for a controlled substance offense. C.A. ROA 443-447. Petitioner also argued for a downward variance, asserting nationwide disparities in career offenders' sentence lengths and that his guidelines range would be much lower without the career-offender enhancement. Id. at 447-452.

At the sentencing hearing, the district court agreed with the Probation Office's determination that the career-offender guideline applied and calculated an advisory guidelines range of 262-327 months of imprisonment. C.A. ROA 289, 292. The court acknowledged petitioner's presentence memorandum and stated that it had considered petitioner's arguments for a downward variance. Id. at 289, 290-291; see also id. at 264. The court subsequently sentenced petitioner to 262 months of imprisonment, explaining that it had done so "after considering the factors contained in 18 U.S.C. 3553(a) pertaining to [petitioner's] extensive criminal history, [his] personal characteristics, and [his] involvement in the instant offense." Id. at 299. The district court also revoked petitioner's supervised release and ordered 37 months of imprisonment. Id. at 307-308.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A3.

On appeal, petitioner argued for the first time that the district court inadequately explained its sentence "by not addressing his arguments for a downward variance." Pet. App. A2. Petitioner acknowledged that, under circuit precedent, the court of appeals' review would be for plain error, see Fed. R. Crim. P. 52(b), but argued that the court should review for abuse of discretion on the theory that the district court had constructive notice that it needed to provide additional explanation for its sentence. See Pet. C.A. Br. 11-12. The court of appeals applied plain-error review and found no "clear or obvious" error in the sufficiency of the district court's explanation, observing that the district court "saw no reason to vary from the guidelines range despite [petitioner's] arguments, which it acknowledged" and had "referred to its consideration of the 18 U.S.C. § 3553(a) factors, including [petitioner's] personal characteristics and what the court described as his extensive criminal history." Pet. App. A3.

ARGUMENT

Petitioner contends (Pet. 4-7) 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 the sentence it imposed. 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. The petition for a writ of certiorari should be denied.*

1. The court of appeals properly reviewed petitioner's procedural challenge for plain error. 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 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.

* The question presented here is also presented by the petition in Bermudez v. United States, No. 22-7580 (filed May 12, 2023).

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.

2. Petitioner contends (Pet. 6) 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).

3. Petitioner contends (Pet. 5-6) 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 notes (Pet. 5) 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 Pet. 5 (citing cases). But it has done so in decisions that predate Gall v. United States and Rita v. United States, 551 U.S. 338 (2007), see United States v. Bonilla, 463 F.3d 1176 (11th Cir. 2006) (citing United States v. Williams, 438 F.3d 1272, 1274 (11th Cir.) (per curiam), cert. denied, 549 U.S. 891 (2006)), and in cases that cite those pre-Gall and pre-Rita cases, see United States v. Hamilton, 66 F.4th 1267 (11th Cir. 2023); United States v. Woodson, 30 F.4th 1295 (11th Cir.), cert. denied 143 S. Ct. 412 (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.

4. In any event, this case would be a poor vehicle to address the question presented. Even assuming that the district court's sentencing justification was inadequate, that inadequacy

had no apparent practical effect. The district court's sentencing rationale did not hinder effective appellate review of petitioner's sentence. See 18 U.S.C. 3553(c). And petitioner does not 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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