No. _____

In The
Supreme Court of the United States

HENRY ROBLEDO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To determine whether a sentencing issue is preserved, "The question is simply whether the claimed error was 'brought to the court's attention." *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 767 (2020) (quoting Fed. R. Crim. Pro 52(b)). As a result, a defendant preserves a substantive reasonableness claim by advocating for a particular sentence. *Id.* at 766.

This case presents the next logical question: Is an argument for a sentence based on specific statutory sentencing factors sufficient to preserve a *procedural* reasonableness claim? Because the divide among the circuit courts on this question has firmly remained after *Holguin-Hernandez*, this Court should grant certiorari and resolve the issue.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Henry Robledo and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Robledo*, No. 20-CR-835-LAB, U.S. District Court for the Southern District of California, order issued March 15, 2021.
- *United States v. Robledo*, No. 21-50064, U.S. Court of Appeals for the Ninth Circuit, memorandum disposition issued January 25, 2023.
- *United States v. Robledo*, No. 21-60054, U.S. Court of Appeals for the Ninth Circuit, order denying petition for panel rehearing and rehearing en banc issued May 8, 2023.

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Petitioner Henry Robledo respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

It has been almost two decades since this Court held that sentencing courts commit "significant procedural error" when they "fail[] to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 41 (2007). This rule has two purposes: "By articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned

process but also helps that process evolve." *Rita v. United States*, 551 U.S. 338, 351 (2007).

In the time since, the courts of appeals have splintered over how to preserve a failure-to-explain claim of error for appellate review. The Third, Fifth, Ninth, and D.C. Circuits require a specific objection after the district court has imposed sentence—regardless of how specifically a party argued before a sentence's imposition. *See United States v. Flores-Mejia*, 759 F.3d 253 (3d Cir. 2014) (en banc); *United States v. Rouland*, 726 F.3d 728, 732–33 (5th Cir. 2013); *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 n.3 (9th Cir. 2010); *United States v. Hunter*, 809 F.3d 677, 682–83 (D.C. Cir. 2011).

By contrast, the Fourth and Eleventh Circuits require no objection after a sentence has been imposed, so long as a party's argument sufficiently informed the court of the action they wish for it to take. *See United States v. Lynn*, 592 F.3d 572, 581 (4th Cir. 2010); *United States v. Bonilla*, 463 F.3d 1176, 1181 (11th Cir. 2006).

The circuits have only doubled down on this split in the years since this Court clarified how to preserve *substantive* reasonableness claims at sentencing in *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020). Compare *United States v. Coto-Mendoza*, 986 F.3d 583, 586 (5th Cir. 2021) (applying plain error review despite this Court's reasoning in *Holguin-Hernandez*) with *United States v. Elbaz*, 52 F.4th 593, 612 (4th Cir. 2022) (noting the Circuit's abuse-of-discretion rule for failure to explain procedural error is consistent with this Court's decision in

Holguin-Hernandez). To resolve this split as to how to preserve a *procedural* reasonableness claim at sentencing, this Court should grant review.

OPINION BELOW

The Ninth Circuit affirmed Mr. Robledo's sentence using the plain error standard of review, finding no plain procedural error although the district court did not address each of Mr. Robledo's arguments under the statutory sentencing factors listed in 18 U.S.C. § 3553(a). *See* Appendix to the Petition ("Pet. App.") at A-1–2.

JURISDICTION

The Court of Appeals entered judgment on January 25, 2023. It then denied Mr. Robledo's joint petition for rehearing and rehearing en banc on May 8, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

Section 3553(c) of Title 18 of the U.S. Code provides:

> (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 . . . .

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 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 Rules of Evidence 103.

Federal Rule of Criminal Procedure 52 provides:

> (a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
> (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

Mr. Robledo had just turned twenty-six years old when he was caught trying to import methamphetamine. He had never been arrested before, and he had no criminal history. C.A. P.S.R. 2–3.

He had struggled to overcome a difficult childhood. When he was eleven, his mother—who suffered from a severe drug addiction—abandoned him on an extended family member's porch with a box of "[C]oco [P]uffs." C.A. P.S.R. 10. Mr. Robledo remembers watching his mother drive away. He did not understand why she left. He did not live with his siblings again, and he did not see his mother again until age sixteen.

His father worked as a janitor and drank heavily. On several occasions, while drunk, Mr. Robledo's father hit him. Before Mr. Robledo turned thirteen, his father died from a condition related to liver failure.

Mr. Robledo still managed to graduate from high school. Unlike his parents, Mr. Robledo did not use drugs or drink alcohol. At eighteen, he joined the United States Marine Corps.

After his discharge from the Marines, Mr. Robledo worked while supporting a growing family. In late 2019, he was laid off from his job. To support his family, in a

serious lapse of judgment, he agreed to smuggle drugs into the United States. C.A. P.S.R. 9–13.

In February 2020, Mr. Robledo was arrested with about 12.9 kilograms of methamphetamine inside the gas tank of his car. He immediately waived his rights and confessed. He pleaded guilty.

Before sentencing, Mr. Robledo requested a variance below the guideline range. He filed a sentencing memorandum specifically identifying numerous factors that supported the requested variance: his good conduct post-arrest, his unstable childhood, his accomplishments despite his unstable childhood, his difficulty adapting to incarceration, the disproportionate and negative effects COVID-19 had on incarcerated people, and his inability to qualify for an early release program associated with drug and alcohol dependency. Mr. Robledo tied these mitigating arguments to specific factors the sentencing court must consider under 18 U.S.C. § 3553(a) and elaborated upon these arguments at sentencing. C.A. E.R. 9–13, 23.

The court failed to address Mr. Robledo's mitigation arguments or their relationship to the § 3553(a) factors at sentencing. The court simply said there was "no reason for a variance here," and imposed an 87-month sentence. C.A. E.R. 62. After imposing sentence, the court never specifically asked the parties whether they had any objections to the sentence. Instead, after advising Mr. Robledo his appellate rights, the court only asked, "anything else?" C.A. E.R. 65.

On appeal, Mr. Robledo argued the sentencing court failed to adequately respond to his specific, non-frivolous mitigation arguments. In a memorandum

disposition, the Ninth Circuit affirmed Mr. Robledo's sentence using a plain error standard of review, citing *Valencia-Barragan*, 608 F.3d at 1108. Pet. App. A-2.

REASONS FOR GRANTING THE PETITION

After two decades of percolation, and despite this Court's several-year-old clarification on preserving substantive sentencing errors in *Holguin-Hernandez*, the courts of appeals remain deeply divided on the correct standard of review for procedural sentencing errors, especially failure-to-explain errors.

The Court should use this case to resolve this split. Mr. Robledo squarely presents the issue, and the Ninth Circuit's approach is wrong. As with the Fifth Circuit's approach this Court disapproved of in *Holguin-Hernandez*, the Ninth Circuit's rule misunderstands the plain language of Federal Rule of Criminal Procedure 51—that formal "[e]xceptions to rulings or orders of the court are unnecessary." Fed. R. Crim. Pro. 51(a); *see Holguin-Hernandez*, 140 S. Ct. at 765–67. So long as a party "inform[s] the court . . . of the action the party wishes the court to take," either "when the court ruling . . . is made or sought," he has sufficient preserved his procedural sentencing error on appeal. Fed. R. Crim. Pro. 51(b). This Court should grant the petition.

I. Despite *Holguin-Hernandez*'s guidance on preserving substantive sentencing errors, courts of appeal remain divided on how to preserve procedural sentencing errors.

As this Court explained in 2007, courts of appeal must review all federal sentences for "reasonableness." *Gall*, 552 U.S. at 46. Reasonableness has two components. *Id.*

First, courts "ensure that the district court committed no significant procedural error. *Id.* at 51. Procedural errors include "failing to adequately explain the chosen sentence," among other errors like calculating an incorrect Guidelines range. *Id.* To "adequately explain the chosen sentence," a court must demonstrate that it considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decision making authority." *Rita*, 551 U.S. at 356. Although the extent of the judge's explanation may vary, *some* explanation is required. It "allow[s] for meaningful appellate review and . . . promote[s] the perception of fair sentencing." *Gall*, 552 U.S. at 50.

Second, courts consider "the substantive reasonableness of the sentence." *Holguin-Hernandez*, 140 S. Ct. at 766–67. They determine whether "the chosen sentence was 'reasonable' or whether the judge had instead 'abused his discretion in determining that the § 3553(a) factors supported' the sentence imposed."

In *Holguin-Hernandez*, this Court rejected the Fifth Circuit's rule that errors under this second consideration, substantive reasonableness, need not be preserved through objections following the imposition of sentence. *Id.* at 765–67. Instead, whether before or after sentencing is imposed, "[T]he question is simply whether the claimed error was 'brought to the court's attention.'" *Id.* at 766 (quoting Fed. Rule Crim. Pro 52(b)).

Yet the circuit courts remain sharply divided as to how to preserve many errors under the *first* sentencing consideration—procedural reasonableness.

A. Four courts of appeal require an additional objection following imposition of sentence to preserve most procedural errors.

The Third, Fifth, Ninth, and D.C. Circuits require a party to object *after* imposition of sentence to preserve most procedural errors for review.

The Third Circuit's holding in *Flores-Mejia* exemplifies this timing-based rule in failure-to-explain cases. There, it explained, "when a party wishes to take an appeal based on a procedural error at sentencing—such as the court's failure to meaningfully consider that party's arguments or to explain one or more aspects of the sentence imposed—the party must object to the procedural error complained of after sentence is imposed in order to avoid plain error review on appeal." *Flores-Mejia*, 759 F.3d at 255; *accord Rouland*, 726 F.3d at 732–33; *Valencia-Barragan*, 608 F.3d at 1108 n.3; *Hunter*, 809 F.3d at 682–83.

Each court of appeal has continued to regularly apply their timing-based procedural objection rules following this Court's decision in *Holguin-Hernandez*. *See, e.g.*, *United States v. Dawson*, 32 F.4th 254, 268–69 (3d Cir. 2022) (extending the rule that procedural objections must be made "[a]t the time that sentence is imposed," rather than beforehand in a sentencing memorandum or earlier at a sentencing hearing); *United States v. Gomez-Gomez*, 841 Fed. App'x 2 (9th Cir. 2021) (unpublished) (applying rule to failure to object that the district court's explanation the of above-Guidelines sentence after imposition was insufficient required plain error review); *United States v. Gordon*, 839 Fed. App'x 574, 575 (D.C. Cir. 2021) (unpublished) (applying plain error to failure-to-explain issue in case

where, after calculating 30-to-37-month Guidelines, district court imposed 120-month sentence without addressing § 3553(a) arguments made by defendant).

Indeed, the Fifth Circuit has "decline[d]" to "reconsider [its] circuit precedent in light of" *Holguin-Hernandez*'s "limited holding." *Coto-Mendoza*, 986 F.3d at 586.

B. Two courts of appeal do not require an additional post-sentencing objection to preserve procedural errors.

By contrast, the Fourth and Eleventh Circuits have no similar overarching rule. Neither requires formal objections after a sentence's imposition to preserve a procedural reasonableness claim regarding a failure to explain a sentence.

Instead, in the Fourth Circuit, "By 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." *Lynn*, 592 F.3d at 578. So too in the Eleventh Circuit: "The question of whether a district court complied with 18 U.S.C. § 3553(c)(1)"—the requirement to "state, in open court, the reason for its particular sentence"—is "*de novo*, even if the defendant did not object below." *Bonilla*, 463 F.3d at 1181.

Both Circuits have continued to apply these rules in the wake of *Holguin-Hernandez*. *See, e.g.*, *United States v. Elbaz*, 52 F.4th 593, 611–12 (4th Cir. 2022) (summarizing precedent "appl[ying] abuse-of-discretion review when a defendant fails to expressly object to the sentencing issue raised on appeal," noting procedural reasonableness claims' preservation depends on whether a party's argument "sufficiently 'inform[s] the court' that they 'wish] the court to take' a different path"

(quoting Fed. R. Crim. Pro. 51(b)); *United States v. Woodson*, 30 F.4th 1295, 1307 (11th Cir. 2022) ("We review compliance with 18 U.S.C. § 3553(c)(1) de novo.").

II. The division among the circuits demands the Court's attention.

Resolving this circuit split is particularly important for two reasons.

First, the government already asked this Court to decide this issue in 2019. In *Holguin-Hernandez*, the Solicitor General "ask[ed] [this Court] to decide what is sufficient to preserve a claim that the trial court used improper *procedures* in arriving at its chosen sentence." 140 S. Ct. at 767. This Court declined to do so for vehicle reasons: "the Court of Appeals ha[d] not considered" "these matters" in that case. *Id.* In asking this Court to clarify the preservation requirements in the context of *both* substantive and procedural reasonableness appeals in *Holguin-Hernandez*, the Solicitor General recognized their twin importance.

Indeed, and second, whether or not an appellate court applies the plain error standard usually controls the outcome of an appeal based on procedural reasonableness error. *See* Hon. G. Ross Anderson Jr., *Metamorphasis of the Sentencing Landscape: Changes in Procedure Affect Judges, Attorneys, and Defendants*, 57 OCT Fed. Law. 62, 63 (2010) ("What should be of preliminary importance within this changing regime is which standard of review a court employs, because the standard of review chiefly determines the ultimate direction of the appeal.")

For example, in *Lynn*, the Fourth Circuit consolidated the cases of four different defendants who each made claims that the district court failed to

adequately explain the sentence imposed. 592 F.3d at 574. The preserved errors were remanded for resentencing; the plain errors were affirmed. *Id.* Thus "[t]he role of the standard of review cannot be overstated." Anderson, 57 OCT Fed. Law. at 65. The petition should be granted to ensure that the outcome of an appeal will not depend upon the circuit in which a defendant happens to be sentenced.

III. Mr. Robledo's case presents the right vehicle to resolve the circuit split on preserving procedural sentencing errors.

Mr. Robledo's case is the right vehicle to resolve this long-standing split, as his case squarely presents the issue.

Before sentencing, in his memorandum to the district court, Mr. Robledo presented significant evidence in mitigation in support of his request for a variance below the Guideline range. He tied that evidence to statutory sentencing factors contained in § 3553. For example, he explained why his father's alcoholism and early death, his abandonment by his mother, his ability to graduate high school and stay sober in light of his family history, and his time in the Marine Corps all reflected his individualized "history and characteristics," § 3553(a)(1), that warranted a downward variance. He identified how severe conditions in jails and prisons during the COVID-19 pandemic in 2020 affected "the need for the sentence imposed—. . . to provide the defendant with needed . . . medical care, or other correctional treatment in the most effective manner." C.A. E.R. 9–14.

He reiterated those reasons for a variance at the sentencing hearing. C.A. E.R. 45–50.

Yet, because he did not object for a third time after the district court had already imposed sentence, the Ninth Circuit reviewed his procedural reasonableness argument for plain error. Had Mr. Robledo been sentenced in the Fourth or Eleventh Circuits, by contrast, his claim would have received abuse-of-discretion review.

IV. This Court should clarify that the plain language of Rule 51 controls the preservation of both procedural and substantive sentencing claims.

The Fourth and Eleventh Circuits' approach is the right one. Making an argument for a particular sentence, tied to specific § 3553(a) factors, preserves the procedural error that the district court failed to adequately explain its own weighing of the same § 3553(a) factors. As with the other major form of procedural sentencing error, like calculating incorrect Guidelines, so long as a court is informed of the right action to take, there is no need for a formal re-objection after the district court has already imposed sentence.

Indeed, Federal Rule of Criminal Procedure 51(a)'s plain language expressly provides that "[e]xceptions to rulings or orders of the court are unnecessary." As such, "the Rules abandon the requirement of formulaic 'exceptions'—after the fact—to court rulings." *Lynn*, 592 F.3d at 578.

Instead, "[t]he Federal Rules of Criminal Procedure provide two ways" of "mak[ing] [one's] objection known to the trial court judge." *Holguin-Hernandez*, 140 S. Ct. at 764. They say that '[a] party may preserve a claim of error by informing the court . . . of [1] the action the party wishes the court to take, or [2] the party's

objection to the court's action and the grounds for that objection.'" *Id.* (quoting Fed. R. Crim. Pro. 51(b)) (alterations in original). Only "[e]rrors 'not brought to the court's attention'" are reviewed for plain error. *Id.* (quoting Fed. R. Crim. Pro. 52(b)).

The Rules did so for a practical reason, as the Fourth Circuit explains:

> Requiring a party to lodge an explicit objection after the district court explanation would 'saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case.' When the sentencing court has already 'heard argument and allocution from the parties and weighed the relevant § 3553(a) factors before pronouncing sentence,' we see no benefit in requiring the defendant to protest further.

Lynn, 592 F.3d at 578–79. Indeed, the government has expressed concern that defendants routinely make this kind of talismanic objections in the Third Circuit, which has adopted the same rule the Ninth Circuit applied here in Mr. Robledo's case. *See United States v. Zhinin*, 815 Fed. App'x 638, 641 n.3 (3d Cir. 2020) (unpublished) ("The Government suggests that the Federal Community Defender Office for the Eastern District of Pennsylvania routinely cites [the Circuit's procedural reasonableness preservation rule] in bad faith to preserve any issue on appeal.").

Adopting the Fourth and Eleventh Circuits' approach would also be the right result under the reasoning of *Holguin-Hernandez*. As this Court explained there, "The rulemakers, in promulgating Rule 51," "chose not to require an objecting party to use any particular language or even to wait until the court issues its ruling." 140

S. Ct. at 766. Rather, "[t]he question is simply whether the claimed error was 'brought to the court's attention.'" *Id.* (quoting Fed. R. Crim. Pro. 52(b)).

As with substantive errors, so too with procedural errors. "By 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." *Lynn*, 592 F.3d at 578. This Court should grant the petition.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

August 7, 2023

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