No. _____

In the

Supreme Court of the United States

DONOVAN ROMO, 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 FOR REVIEW

Does a defendant forfeit a challenge to the manner in which the district court imposed sentence by failing to object after the sentence is pronounced, even though the district court does not invite additional objections after it announces the sentence and before it concludes the sentencing hearing?

Statement of Related Proceedings

- *United States v. Donovan Romo*,
  - Case No. 20-cr-375-VAP (C.D. Cal., April 13, 2022)

- *United States v. Donovan Romo*,
  - 2023 WL 4893634 (9th Cir. Aug. 1, 2023)

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Donovan Romo petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I. OPINIONS BELOW

The opinion of the court of appeals is unpublished, but available at 2023 WL 4893634 (9th Cir. Aug. 1, 2023). (App. 1a.) The ruling of the district court is unreported, and was rendered orally. (App. 7a (transcript of sentencing hearing, Case No. 20-cr-375-VAP (C.D. Cal., April 13, 2022).)[1]

II. JURISDICTION

The judgment of the court of appeals was entered on August 1, 2023. (App. 1a.) Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] Citations to "App." are to the appendix to this petition. Citations to "ER" are to the Excerpts of Record filed in the Court of Appeals.

III. CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 51:

> **(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:

> **(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.

IV. INTRODUCTION

This petition provides the Court an opportunity to clarify when objections to a district court's pronouncement of sentence are forfeited—given that defendants often have no chance to lodge objections to the sentence after it is announced in court and before the sentencing hearing concludes. The Circuits are deeply split on this question, with some holding no forfeiture occurs unless the district court explicitly invites additional objections after it pronounces the sentence, others holding it is sufficient if the defendant merely advocates for a different sentence before the sentence is announced, and still others—like the Ninth Circuit here—holding sentencing objections are forfeited even if the party *did* request a different sentence, and no additional objections were invited after the sentence's pronouncement at all. The Circuits' stark disagreement about how much of an opportunity is required to object—or even whether *any* real opportunity is required—calls for this Court's clarification.

This case exemplifies the Ninth Circuit's problematic approach. The district court imposed—over petitioner Donovan Romo's objection—two supervised release conditions implicating his fundamental liberty

interests: his First Amendment right to view non-obscene depictions of adult sexual content, and his Fourth Amendment right to be free from unreasonable searches and seizures. And it put those burdensome conditions in place for thirty years. But the district court never explained why it believed those conditions, or the thirty-year supervised release term, to be appropriate under 18 U.S.C. § 3553, or no more burdensome than necessary as that section requires. It simply announced the sentence and imposed the conditions, then ended the hearing. Romo was never invited to make additional objections, after the sentence's pronouncement, to the adequacy of the district court's explanation.

But the Ninth Circuit held the district court's failure to invite post-sentencing objections made no difference to the standard of review. Romo still forfeited his objections to the district court's failure to explain its sentence, the Court held, even though Romo could not have foreseen—before the sentence was actually pronounced—that the district court would fail to provide that explanation. Because in the Ninth Circuit, as the panel acknowledged, the burden of objecting rests irrevocably on the parties, even when the parties are not invited to

lodge further objections to the sentence's level of explanation after the sentence is imposed. This illogical and unfair rule prevents district courts from correcting sentencing errors on the spot, invites unnecessary appeals, precludes parties from litigating meritorious challenges to the quality of district courts' reasoning, impedes appellate review, and calls for reexamination and correction by this Court.

V. STATEMENT OF THE CASE

Donovan Romo pled guilty to one count each of distribution and possession of child pornography, 18 U.S.C. §§ 2252A(a)(2), 2252A(a)(5): conduct that was aberrational for him. (App. 7a.) He had zero criminal history points, no history of any sexual offense, and had been working to support his wife and young daughter when he sent a single file of child pornography to an undercover federal agent. (*See United States v. Romo*, no. 22-50075, Appellant's Opening Brief, at 5-6, 12-13.) As his sentencing pleadings explained, Romo was not a pedophile; rather, a psychological evaluation showed his offense conduct resulted from intense stress and substance abuse. (*Id.* at 9-12.) Indeed, by the time of his sentencing Romo—having been out on bond for over a year—had already taken substantial steps to address the underlying causes of his

offense. He had found stable employment, voluntarily enrolled in a drug treatment program, complied with his bond conditions, and planned to pursue a career in auto mechanics. (*Id.* at 5-6.)

At sentencing, the district court varied downward from the Guidelines range of 151-188 months, to impose a sentence of 96 months. (App. 1a-2a.) It also imposed several supervised release conditions, including a search condition permitting a full search of Romo's residence, papers, effects, and electronic devices whenever he was suspected of violating any condition of supervised release (the "electronic search condition") and a prohibition on Romo viewing or possessing material depicting "sexually explicit conduct" involving adults, as defined in 18 U.S.C. § 2256 (the "sexually explicit conduct condition"). (App. 3a, 52a, 54a-55a.) It also imposed the term of supervised release to run for thirty years—far longer than the five-year term of supervised release term the defense requested. (App. 2a-3a; *United States v. Romo*, no. 22-50075, Appellant's Opening Brief, at 15, 21.)

Though Romo's counsel objected before the sentence's pronouncement to both the electronic search condition and the sexually

explicit conduct condition, the district court provided no explanation for them at the sentencing hearing. On the contrary, when Romo's counsel objected that the sexually explicit conduct condition was too broad—as no evidence suggested Romo was driven to commit the offense conduct by viewing adult pornography—the district court *agreed*, calling it a "fair point," but said the condition was appropriate because defendants in *other* cases might have been prompted to view child pornography by materials depicting adults. (App. 50a-51a.)

It gave even less explanation of the electronic search condition. Though vigorously contested by the defense's sentencing memorandum,[2] the electronic search condition was never discussed during the sentencing hearing at all. Nor was any explanation given for the thirty-year length of the supervised release term.

In pronouncing sentence, the district court imposed the adult sexually explicit conduct condition and the electronic search condition, and the thirty-year term of supervised release, without further explanation or discussion. (App. 43a, 52a, 54a.) It then asked the

[2] (*United States v. Romo*, no. 22-50075, Appellant's Opening Brief, at 22.)

defense "anything further?" but did not invite further objections. (App. 62a.) The sentencing hearing then concluded. (App. 62a.)

On appeal, Romo argued that the Court had failed sufficiently to explain its imposition of the challenged supervised release conditions and 30-year supervised release term.[3] He further argued that the Ninth Circuit should review those failure-to-explain challenges for abuse of discretion—the normal standard for preserved objections to supervised release conditions and term length—rather than for plain error, because he had not been given a chance to lodge additional objections to the extent of the district court's explanation after the sentence was announced. The Ninth Circuit rejected that contention, citing its precedent in *United States v. Vanderwerfhorst*, 576 F.3d 929, 934 (9th Cir. 2009) for the proposition that Ninth Circuit "precedent does not require trial judges to invite new objections after announcing the sentence but prior to adjourning a sentencing hearing." (App. 2a n.1 (cleaned up).) It thus reviewed Romo's failure-to-explain arguments only for plain error and—finding none—affirmed. (App. 1a-6a.)

[3] (*United States v. Romo*, no. 22-50075, Appellant's Opening Brief, at 41-48.)

VI. REASONS FOR GRANTING THE WRIT

The Circuits are deeply divided as to what type of objections—if any—by a defendant are necessary to preserve challenges to district courts' statements made in the course of pronouncing sentence. The Fourth and Seventh Circuits hold it sufficient if a party merely makes clear what sentence it is requesting before the district court rules. The Sixth, Eleventh, and D.C. Circuits instead require that district courts affirmatively invite additional objections after rendering their rulings, and that—absent such affirmative invitation—the plain error standard cannot be applied on appeal to parties' challenges to district courts' level of explanation. Still other Circuits—the Third and Ninth—simply hold that a party's failure to object forfeits the issue and requires plain error review, regardless of whether the district court invited additional objections after pronouncing the sentence. Certiorari is needed to clarify the correct standard, and also to clarify that—contrary to the Third and Ninth Circuits' approach—a party's failure to object cannot forfeit an issue if the party was not given an opportunity to make the objection in the first place.

A. The Circuits are Divided as to Whether Failure to Object After Pronouncement of Sentence Forfeits Challenges to the Sentence's Explanation

District courts are required to explain their sentences in open court while imposing the sentence, which typically occurs at the conclusion of the sentencing hearing. 18 U.S.C. § 3553(c). And parties are required to object in district court to preserve their challenges to the sentence for appeal. Fed. R. Crim. P. 51, 52. Absent a timely objection below, parties' challenges on appeal are reviewed only for plain error, Fed. R. Crim. P. 52(b): a deferential standard that asks not just whether the district court erred but whether it *plainly* erred in a way that affected the party's substantial rights and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (internal citation and quotation omitted). Even if all of those conditions are satisfied, the Court of Appeals is still not required to correct the error; it merely has discretion to do so. *Id.* To be certain that the appellate court will review an error—and correct it if reversible error is found—a party thus needs to object to the error in district court.

But objecting to a district court's deficient explanation in pronouncing sentence is often difficult, because—since the lack of explanation only becomes apparent at the moment the sentence is pronounced—"the defendant may not know if he will have reason to object until the sentence is handed down." *United States v. Blackie*, 548 F.3d 395, 398 (6th Cir. 2008). And by then it may well be too late, because the sentencing hearing may already be over and the court may not provide the parties another opportunity to object. Federal Rule of Criminal Procedure Rule 51(b) makes allowance for such difficulties by providing that " [i]f 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." Fed. R. Crim. P. 51(b). It further provides that, "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." Fed. R. Crim. P. 51(b). The rule explicitly provides that "exceptions"—or after-the-fact objections to court rulings or orders—are "unnecessary." Fed. R. Crim. P. 51(a).

Relying on Rule 51(b), the Fourth and Seventh Circuits deem it sufficient to preserve a claim of procedural error at sentencing that the defendant "inform[s] the court . . . of the action the party *wishes the court to take*" before the sentence is pronounced. *United States v. Lynn*, 592 F.3d 572, 577-78 (4th Cir. 2010) (quoting Fed. R. Crim. P. 51(b)); *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009). As the Seventh Circuit explained in *Bartlett*, "the [Federal Rules of Criminal Procedure] do not require a litigant to complain about a judicial choice after it has been made." *Id.* at 910. "Such a complaint is properly called, not an objection, but an exception," and exceptions are "unnecessary" under Rule 51(a). *Id.* "Litigants cannot be required to interrupt a judge mid-explanation (and risk inviting the ire of the court or being held in contempt), and post-ruling exceptions are unnecessary [under Rule 51(a)]." *United States v. Wood*, 31 F.4th 593, 598 (7th Cir. 2022). Moreover, requiring objections after pronouncement of sentence "would saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case" and threaten "a never-ending stream of objections after each sentencing explanation."

Lynn, 592 F.3d at 578 & n.3 (internal citation and quotation marks omitted).

Another group—the Sixth, Eleventh and D.C. Circuits—takes a different approach. Rather than deeming a party's ex ante request for relief sufficient to preserve objections to a district court's subsequent failure sufficiently to explain its sentence (as the Fourth and Seventh Circuits do), these Circuits hold that a party's failure to object to the ruling does not constitute a forfeiture unless the district court expressly invites the parties to make additional objections after it rules. *United States v. Hunter*, 809 F.3d 677, 683 (D.C. Cir. 2016) (district court must invite objections, but need not follow a specific script); *United States v. Campbell*, 473 F.3d 1345, 1347 (11th Cir. 2007); *United States v. Bostic*, 371 F.3d 865, 872–73 (6th Cir. 2004). The Sixth Circuit reasons that "[p]roviding a final opportunity for objections after the pronouncement of sentence, 'will serve the dual purpose[s] of permitting the district court to correct on the spot any error it may have made and of guiding appellate review.'" *Blackie*, 548 F.3d at 398 (cleaned up).

Still a third category of Circuits—the Third and Ninth—place the entire burden of objecting on criminal defendants, even when the

district court provides them no express opportunity to do so between the sentence's announcement and the hearing's conclusion. *United States v. Flores–Mejia,* 759 F.3d 253, 258 n. 8 (3d Cir.2014) (en banc); *Vanderwerfhorst*, 576 F.3d at 934. As the Third Circuit explained in *Flores-Mejia*, this rule is based on the premise that "the procedural objection [to the district court's failure sufficiently to explain its sentence] can be raised for the first time only after the sentence is pronounced without adequate explanation." *Flores-Mejia*, 759 F.3d at 257. And requiring objection to be made at that point, the Third Circuit held, comports with Rule 51(b)'s requirement that parties inform the court "when the court ruling or order is made or sought—of the action the party wishes the court to take:" the ruling or order being sought is a more complete explanation of the sentence, and that result can only be sought after the sentence is handed down with incomplete or inadequate explanation. *Id.* at 257 n.4. It further reasoned that requiring contemporaneous objection promotes efficiency by helping courts correct errors on the spot, and prevents "sandbagging" by litigants who might otherwise withhold objections in hopes of later obtaining vacatur and remand for resentencing after appeal. *Id.* at 257.

But even the Third and Ninth Circuits implicitly recognize the potential for unfairness in their rule requiring parties to object after a sentence that has already been handed down. The Third Circuit in *Flores-Mejia* encouraged district courts "[t]o ensure that timely objections are made" by "inquir[ing] of counsel whether there are any objections to procedural matters," though it expressly declined to make that a requirement. *Flores-Mejia*, 759 F.3d at 258 n.8. And the Ninth Circuit maintains that—while district courts are not required to expressly invite additional objections after pronouncing sentence—parties must have at least "a fair opportunity to raise any objections before the conclusion of the sentencing hearing." *Vanderwerfhorst*, 576 F.3d at 934. But neither the Third nor the Ninth mandates any procedure to ensure parties actually receive such a "fair opportunity." Parties in the Third and Ninth Circuits must thus run the hazard of interrupting the judge during sentencing, risking reprimand or even contempt, in order to ensure their objections to the sentence will be reviewed on appeal under the ordinarily-applicable standard of review for preserved errors. !

B. This Court Should Grant Certiorari to Resolve the Conflict

Certiorari is needed to resolve the Circuits' disagreement as to whether parties must object after pronouncement of the sentence to preserve their inadequate-explanation arguments for appeal—and whether district courts must expressly invite such objections. This question promises to impact thousands of sentencing appeals each year. Indeed, in fiscal year 2021 over five thousand appeals were brought from sentencing decisions in criminal cases, and close to five thousand in fiscal year 2022.[4] Many, if not most, likely involved procedural challenges to the sentence: staple arguments in sentencing appeals.[5]

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[4] *See* United States Sentencing Commission, 2021 Fiscal Year Sourcebook of Federal Sentencing Statistics, Table A-7 & n.1 (providing information for 5,111 appeals during fiscal year 2022 in which the sentence imposed was one of the issues on appeal); 2022 Fiscal Year Sourcebook of Federal Sentencing Statistics, Table A-7 & n.1 (providing information for 4,946 appeals during fiscal year 2022 in which the sentence imposed was one of the issues on appeal.)

[5] *See* United States Sentencing Commission, 2021 Fiscal Year Sourcebook of Federal Sentencing Statistics, Table A-6 (showing that, of 311 appeals in which the original sentence was reversed or remanded, 297 involved procedural challenges.); 2022 Fiscal Year Sourcebook of Federal Sentencing Statistics, Table A-6 (showing that, of 433 appeals in which the original sentence was reversed or remanded, 428 involved procedural challenges.)

The current hodgepodge of Circuit-specific rules for how, and whether, criminal defendants must raise procedural objections that only become apparent upon the sentence's pronouncement threatens uneven development of the law Circuit-to-Circuit. The Fourth and Seventh Circuits' rule that defendants need not object after the sentence's pronouncement more easily permits appellate review of procedural sentencing errors. The Sixth, Eleventh, and D.C. Circuits' rule requiring district courts to invite post-pronouncement objections, by contrast, likely obviates the need for an appeal in many cases, while ensuring that when an appeal does occur review will usually be pursuant to the ordinary abuse-of-discretion standard. Compared to the Third and Ninth Circuits—where parties are both required to object *and* not guaranteed any clear chance to do so—these other Circuits' more forgiving procedural frameworks for eliciting objections promise to result in more readily-available review of sentencing errors and issuance of more appellate decisions explicating the level of discussion required of district courts at sentencing. It is inequitable to preclude criminal defendants in the Third and Ninth Circuits of the same level of

appellate guidance on sentencing requirements, and opportunity to obtain review of their claims, as is afforded to those in other circuits.

C. The Ninth Circuit's Rule is Wrong and Prejudiced Romo's Appeal

Certiorari is also needed to clarify that the approach of circuits outside the Third and Ninth is the right one: either parties should not be required to object after pronouncement of sentence to errors in that pronouncement (as the Fourth and Seventh Circuits hold), or courts should be required to invite objections after the sentence is pronounced before parties may be deprived of appellate review due to their failure to object (as the Sixth, Eleventh, and D.C. Circuits hold). It is unfair to require criminal defendants to object to sentencing rulings after the fact without requiring district courts to give them a chance to do so, as is the rule in the Third and Ninth Circuits. Unless district courts explicitly invite objections after announcing the sentence, parties will simply have to interrupt the district court at their peril, risking talking out of turn, disrupting court procedures, or even—potentially—contempt. Although the Ninth Circuit purports to consider whether parties had an adequate opportunity to object after the sentence's announcement,

Vanderwerfhorst, 576 F.3d at 934, that claim rings hollow without any requirement that the court actually invite such objections after ruling.

Requiring trial courts to clearly elicit objections after handing down the sentence will also promote efficiency and fairness while facilitating appellate review. As the Sixth, Eleventh, and D.C. Circuits recognize, inviting parties to object before the sentencing hearing adjourns gives courts a chance to correct any errors and may obviate the need to appeal at all. And if appeal does occur, objected-to failures to explain can be reviewed and addressed under the normally-applicable abuse of discretion standard: a development that will promote clarity in the law by focusing such review on the merits of the challenge, instead of on the plain-error standard's alternative focus on whether any error is obvious and will affect substantial rights. Moreover, requiring district courts to invite objections after imposing sentence will promote the very values the Third and Ninth Circuits purport to promote by their contemporaneous-objection rule: ensuring that errors are timely pointed out to district courts so that they can be corrected without the need for appeal at all, and discouraging parties from sandbagging by withholding claims for appeal. If district courts

must give parties a chance to object, parties will no longer be able to complain on appeal that they had no such opportunity.

Ensuring that district courts invite post-hoc objections to their sentencings also respects the Federal Rules of Criminal Procedure. As the Fourth and Seventh Circuits recognize, objecting after a ruling has already been made is not an objection at all but an exception. "An exception is a complaint about a judicial choice, such as a ruling or an order, after it has been made." *Wood*, 31 F.4th at 597. When such a ruling creates new grounds for appeal at the time it is handed down in court, "the litigant is taken by surprise and lacks the notice or opportunity to advance a pre-ruling position." *Id.* at 598. Thus, while "[b]oth the Rules of Evidence and the Rules of Criminal Procedure require a litigant to make known the position it advocates and to present evidence and argument for that position" as "essential [steps] to facilitate intelligent decision in the district court," a litigant is not required to "to complain about a judicial choice after it has been made." *Bartlett*, 567 F.3d at 910. Indeed, Federal Rule of Criminal Procedure 51(a) expressly deems exceptions "unnecessary." Fed. R. Crim. P. 51(a); see also *United States v. Walker*, 449 F.2d 1171, 1173 n.6 (D.C. Cir.

1971). Circuits' procedural requirements for objecting should hew to that distinction.

Finally, the Ninth Circuit's overly-harsh rule made a difference in this case. Had Romo been in the Fourth, Sixth, Seventh, Eleventh, or D.C. Circuits, his supervised release conditions and thirty-year term would have been reviewed under an abuse of discretion standard instead of for plain error: he complied with the Fourth and Seventh Circuits' rule by objecting to the conditions, and requesting a five-year supervised release term, before the district court ruled, and plain error would have been inappropriate under the Sixth, Eleventh, and D.C. Circuits' rule because the district court did not expressly invite additional objections after it ruled. And, had abuse-of-discretion been the standard, there is at least a reasonable probability Romo would have prevailed on his inadequate-explanation claim: the district court never provided any justification for the adult sexually-explicit conduct provision specific to Romo's case, even agreeing with defense counsel that nothing suggested Romo's individual viewing of child pornography was linked to his viewing of adult sexual content. (App. 50a-51a.) The electronic search condition was never mentioned or explained at all, nor

was the five year supervised-release term.[6] Had the district court not required any error to be "plain," it could well have determined that the district court's perfunctory statements at sentencing were insufficient.!

VII. CONCLUSION

For the foregoing reasons, Romo respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: October 10, 2023

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[6] The panel's memorandum disposition deemed the district court's explanation of the 30-year supervised release term not clearly erroneous because the district court, among other things, said it thought the 60-month mandatory minimum was too short but the Guideline range was too high, and it considered the parties' filings. (App. 2a-3a.) But that discussion by the district court was irrelevant to the supervised release term; it pertained only to the custodial sentence. (*Id.*) Nor did it suggest it considered anything in the parties' pleadings in fixing the length of the supervised release term. It is at least reasonably probable that—had the district court applied the ordinary abuse-of-discretion standard instead of only reviewing for plain error—it would have refined its analysis to recognize that the district court's discussion was limited to the custodial portion of the sentence.