No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMAAL PARKER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

(CA6 No. 22-6047)

Petition for *Writ of Certiorari*

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QUESTIONS PRESENTED

This Petition implicates two splits in the Circuits.

First, a district judge can grant a new criminal trial "if the interest of justice so requires." Fed. R. Crim. Pro. 33(a). The Circuits do not agree about whether a new trial requires trial error that would have been reversible on appeal. *Compare, e.g.*, *United States v. Wilkerson*, 251 F.3d 273, 280 (1st Cir. 2001) ("[T]he error, if any, was harmless. The motion for a new trial should not have been granted."), *with United States v. Scroggins*, 379 F.3d 233, 255 (5th Cir. 2004) ("A miscarriage of justice warranting a new trial in certain circumstances may occur even when there has been no specific legal error." (citations and footnote omitted)).

Second, a district court "shall state in open court the reasons for its imposition of the particular sentence…." 18 U.S.C. § 3553(c). Yet, "a circuit split [exists] on the issue of whether a defendant must object at sentencing to preserve error on appeal" over the insufficiency of the district court's explanation. *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009) (citation omitted).

To resolve those Circuit splits, Mr. Parker asks this Court to answer the following:

1. Did the Sixth Circuit err in affirming the district court's denial of Mr. Parker's motion for new trial; and

2. Did Mr. Parker preserve for appeal a claim of insufficiency of the district court's sentencing explanation?

LIST OF PARTIES

All parties appear in the caption of this Petition's cover page.

PRIOR PROCEEDINGS

U.S. District Court for the Eastern District of Tennessee

United States v. Jamaal Parker, No. 1:19-cr-00046-TRM-SKL (E.D. Tenn). Judgment entered on December 5, 2022.

U.S. Court of Appeals for the Sixth Circuit:

United States v. Jamaal Parker, No. 22-6047 (6th Cir). Judgment entered on February 7, 2024.

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Cases

Statutes

Rules

Jamaal Parker respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Sixth Circuit Court of Appeals did not select its opinion for publication. The opinion is reprinted in the Appendix. [1a-18a].

The district court did not select its opinion for publication. The opinion is reprinted in the Appendix. [19a-24a].

JURISDICTION

The district court had jurisdiction over the underlying criminal action pursuant to 18 U.S.C. § 3231. It entered final judgment on December 5, 2022.

The U.S. Court of Appeals for the Sixth Circuit had jurisdiction to consider the district court's final judgment. 28 U.S.C. §§ 1291, 1294.

This Court has jurisdiction to review the Sixth Circuit's judgment. 28 U.S.C. § 1254(1). Judgment was entered on February 7, 2024.

REGULATORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 33:

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) Time to File.
>
> > (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending,

the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

* * *

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.

STATEMENT OF THE CASE

I. Proceedings in the District Court

Following a plea of not guilty, Mr. Parker proceeded to a two-and-a-half-day trial on a superseding indictment returned against him in the Eastern District of Tennessee. The only charges remaining by the time of trial were the following:

- Count One, alleging that he participated in a conspiracy to distribute controlled substances;
- Count Two, alleging that he maintained a premises for the purposes of distributing controlled substances;
- Count Eight, alleging that he maintained a firearm in furtherance of the conspiracy in Count One; and
- Count Nineteen, alleging that he engaged in money laundering.

At trial, he was acquitted of Count Nineteen but convicted of the other counts.

A. Trial Evidence Relevant to the Counts of Conviction

After determining that co-defendant Jerriod Sivels (who ultimately pled guilty) may have been involved in cocaine trafficking in the Chattanooga area, the Drug Enforcement Agency ("DEA") conducted a controlled buy from Mr. Sivels in October 2018. Afterwards, the DEA obtained a toll register for Mr. Sivels' phone and found frequent contact with Mr. Parker's phone number. Over the course of the investigation, the DEA also obtained wiretaps for Mr. Sivels' phones and set up a pole camera to observe locations of interest, including the building on Hoyt Street in Chattanooga.

The wiretaps allowed the DEA to overhear Mr. Sivels discuss drug transactions, some of which were conducted out of the Hoyt Street location. Mr. Parker's truck was often seen there, including during an apparent drug transaction in January 2019.

On March 2, 2019, the DEA requested that the Georgia State Police ("GSP") conduct a traffic stop of Mr. Parker as he was headed back to Chattanooga from a location in Atlanta. Based upon its investigation, the DEA believed that Mr. Parker had gone to Atlanta to pick up drugs.

The GSP initiated the traffic stop of the vehicle that Mr. Parker was driving with one passenger. Mr. Parker initially pulled over but then sped off. A chase on the interstate ensued. Eventually, the GSP made Mr. Parker crash into a guardrail, and Mr. Parker fled on foot carrying a bookbag. A trooper was ultimately able to tackle Mr. Parker and placed him under arrest. Inside the bookbag, law enforcement discovered 4 kg of cocaine.

While Mr. Parker was being pursued on foot, another officer approached the vehicle that Mr. Parker had been driving. It was still occupied by a female passenger, who was seated in the passenger seat. The trooper directed her onto the ground, placed her under arrest, and searched the vehicle. Inside, on the driver's floorboard, the trooper found a handgun.

B. Jury Deliberations

The jury deliberations spanned the afternoon of June 7 and the morning of June 8, 2022.

As Mr. Parker was being escorted from the jail to the courtroom before the resumption of deliberations on June 8, one trial juror and both alternates saw Mr. Parker "in his prison fatigues and shackles." [21a]. At Mr. Parker's request, under the unfortunate circumstances, the district court inquired of the jurors before they resumed deliberations "whether they had seen or heard anything that would impair their fairness in evaluating the evidence at trial. None of the jurors indicated that they had." [21a (footnote omitted)]. Although the district court would have allowed Mr. Parker "to move to strike the [trial] juror who saw [Mr. Parker] and proceed with an eleven-person jury," [21a n.1], Mr. Parker decided that he did not want to forfeit his constitutional right to have a jury of twelve, nor did he move for a mistrial and thus acquiesced to the trial juror's continued participation in deliberations.

C. The Denial of the Motion for New Trial

Mr. Parker timely filed a motion for new trial, as to Count Eight only (under 18 U.S.C. § 924(c)). As relevant here, he requested a new trial on that count in the interests of justice, because a trial juror had seen Mr. Parker in jail attire and restraints.

Via written opinion, the district court decided that the trial juror's exposure to Mr. Parker in shackles and jail garb did not merit a new trial on Count Eight because no legal prejudice had been shown:

> […] "Defendants are required to show actual prejudice where 'the conditions under which defendants were seen were routine security measures rather than situations of unusual restraint such as shackling of defendants during trial." *United States v. Moreno*, 933 F.2d 362, 368 (6th Cir. 1991) (*quoting Payne v. Smith*, 667

> F.2d 541, 544–45 (6th Cir. 1981)). In this case, Defendant was brought upstairs to the courtroom holding cell through public hallways, as is necessitated by the layout of the courthouse. Following the incident, the Court questioned the jurors. When asked if they had seen or heard anything that would impair their impartiality, the jurors uniformly remained silent and did not answer in the affirmative. Further, the jury ultimately acquitted Defendant of the money-laundering charge, bolstering the Court's confidence that they deliberated fairly and impartially. Accordingly, Defendant has not demonstrated actual prejudice as required, and the Court will not grant his Rule 33 motion on this basis.

[23a-24a].

D. The Sentencing Hearing

Although the Guideline imprisonment range was 248 to 295 months, Mr. Parker asked the district judge to vary downward to the statutory minimum of 180 months' imprisonment. Included among the arguments in mitigation that are relevant to this appeal were the following.

Counsel noted that unlike defendants who go to trial without a good reason or the co-defendants who pleaded in this case, Mr. Parker had valid reasons to go to trial. He was acquitted on the money-laundering count, and the evidence for the § 924(c) count was, in counsel's estimation, close because the gun may have belonged to the car passenger, who had been alone in the car before it was searched. Thus, counsel asked the district court to not hold the decision to proceed to trial against Mr. Parker.

A second mitigation argument relevant to this appeal was that Mr. Parker's pre-trial incarceration was more punitive than normal due to the COVID-pandemic lock-downs that had been in effect. Specifically, at the sentencing hearing, counsel argued:

> Mr. Parker had the misfortune of having pretrial detention during the COVID pandemic. Now, you probably remember how terrible it was being sort of locked up in your house when you had Netflix and everything else, but he was locked in a jail cell, can't get out, you know, in a tiny little box. And I would submit that that time is more punitive than it would have been otherwise… [F]or BOP purposes, it's – it's the same pretrial credit. But as you try to decide what's, quote-unquote, 'just punishment' for the offense, the fact that he had to suffer more punitive conditions of confinement should give him some credit in your mind as you figure out those 3553(a) factors.

Third, counsel noted that the Government's decision to charge the § 924(c) inflated the Guideline range. Had the § 924(c) Count not been charged, Mr. Parker's offense level for the drug count would have increased by 2 levels under U.S.S.G. § 2D1.1(b)(1), to account for his possession of a firearm in connection with the drug offense. At sentencing, counsel argued that because the Guidelines are meant to encompass actual offense conduct, rather than the vagaries of charging decisions, the district court ought to consider the lower Guideline range that would have applied but for the presence of the § 924(c) count. That alternate range, for the exact same conduct, would have been 235-293 months' imprisonment, instead of the 248 to 295 months' imprisonment that resulted due to the happenstance of how the Government chose to charge the conduct.

Finally, counsel noted defendants convicted of § 924(c) are excluded from the earned-time credit available under the First Step Act. *See* 18 U.S.C. § 3632(d)(4)(D)(xxii). Accordingly, counsel argued that the Government's charging decision, rather than the underlying offense conduct, will render Mr. Parker's more punitive than it would have otherwise been, meriting some leniency.

When pronouncing sentence, the district court at length focused on what it saw as aggravating conduct. It specifically mentioned the length of time of drug distribution, the flight from law enforcement, the quantity of drugs at issue, the profit motive rather than a need to feed a personal addiction, the lack of prison time imposed in his previous state-court convictions, and the need for specific deterrence and incapacitation. The district court did not, however, explicitly state why it rejected the mitigation arguments presented above. It imposed a sentence near the high end of the Guidelines: a total term of 290 months' imprisonment (plus supervised release and the required special assessment).

After the pronouncement of sentence, Mr. Parker did not take exception to the failure to have addressed all his arguments in mitigation.

II. Proceedings in the Sixth Circuit

After oral argument, the Sixth Circuit affirmed the conviction and sentence via an unpublished opinion. [1a-18a].

With respect to the denial of the motion for new trial, the Sixth Circuit affirmed. It do so for reasons that the Government had not advanced in its brief. Below, Mr. Parker asked the Sixth Circuit to hold that, contrary to the district court's written order, actual prejudice was not a precondition to the grant of a new trial. Thus, he asked for a remand, for the district court to decide whether it would exercise its discretion to grant a new trial in the absence of actual prejudice. In the Opposition brief below, the Government acknowledged that the law is unclear about whether a defendant seeking a new trial in the interests of justice must show legal error that

would be reversible on appeal. But the Government argued that a new trial was not authorized. In its view, a new trial is prohibited "where there has been no injustice—i.e., where the defendant has received a fair trial and not actually been prejudiced." And because Mr. Parker had not shown actual prejudice, the Government argued that the denial of the motion for new trial was proper. For its part, the Sixth Circuit ultimately avoided deciding whether the interests of justice require error and/or prejudice and instead decided that the district court *would* not have granted a new trial even if the district court *could* have done so, even though the district court had not expressly stated how it would have exercised its discretion if it were wrong about the need to show actual prejudice:

> Parker is correct that the district court stated that a new trial was not warranted because Parker had not shown actual prejudice from the shackles incident. But the court said more than that. It explained why it concluded that Parker's jury remained unbiased notwithstanding the shackles incident: no one indicated any bias when questioned and the jury acquitted Parker of the money-laundering count. The district court would not have awarded a new trial on fairness grounds when it expressed confidence that the jury "deliberated fairly and impartially." R.436, PID 3752; *see also United States v. Lattner*, 385 F.3d 947, 959 (6th Cir. 2004) (affirming denial of motion for new trial based on juror's view of defendant in shackles). We accordingly find no error in the district court's denial of a new trial based on the interest of justice.

[14a].

With respect to the insufficiency of the district court's explanation of the sentence, the Sixth Circuit agreed that "[t]he district court did not specifically address the four arguments Parker raise[d] on appeal during its explanation of Parker's sentence." [15a]. But because Mr. Parker did not object to the failure to address those arguments

after the sentence had been pronounced, the Sixth Circuit applied plain-error review. [15a]. It held that Mr. Parker could not satisfy that test given the lengthy explanation of the sentence and the Sixth Circuit's belief that the district court was subjectively aware of Mr. Parker's arguments in mitigation. [16a].

No petition for rehearing was filed.

REASONS FOR GRANTING THE PETITION

Mr. Parker respectfully requests that the Court grant *certiorari* to consider both questions presented.

I. The Circuits Are Divided About When District Courts Can Grant New Trials in the Interests of Justice.

By rule, district courts are expressly vested with the power to grant a new trial upon timely motion of a defendant "if the interest of justice so requires." Fed. R. Crim. Pro. 33(a). The Courts of Appeals are divided about whether a new trial can ever be granted due to an irregularity in the trial that would not result in a reversal on appeal. Some Circuits say that a district court's discretion to grant a new trial to a defendant exceeds the power of an appellate court to order it for the defendant. Other Circuits say the opposite.

A. Some Circuits Do Not Require any Trial Error at All, Much Less One Reversible on Appeal, If the District Court Concludes that the New Trial Would Be in the Interest of Justice.

As the Eleventh Circuit has noted, in affirming a grant of a new trial, "[t]he basis for granting a new trial under Rule 33 is whether it is required 'in the interest of justice.' That is a broad standard." *United States v. Vicaria*, 12 F.3d 195, 198 (11th

Cir. 1994). Consequently, in the Eleventh Circuit, district courts have discretion to grant a new trial even though they committed no error at trial, much less one that would be reversed on appeal. *Id.* (affirming grant where the district court decided that it was not satisfied with its jury instructions, even though the defendant's refused instructions had been improper statements of the law).

Other Circuits agree as to the breadth of the district court's discretion. Both the Fifth and the Tenth Circuits have held that the absence of a witness can be grounds for a new trial, even if the district court committed no error in having allowed the trial to proceed in the witnesses' absence originally. *See United States v. Scroggins*, 379 F.3d 233, 255 (5th Cir. 2004) ("A miscarriage of justice warranting a new trial in certain circumstances may occur even when there has been no specific legal error." (citations and footnote omitted)); *United States v. Patterson*, 41 F.3d 577, 579 (10th Cir. 1994) (rejecting claim that a new trial was prohibited where the district court had not concluded that the denial of a continuance was wrong and holding that "[t]he government should be aware that a trial judge is not obliged to review his past trial rulings and make an independent judgment that he himself has 'abused his discretion' before granting a new trial.").

B. Other Circuits Require Prejudicial Error Before the District Court Can Exercise Its Discretion to Grant a New Trial.

Despite the broad language used in Fed. R. Crim. Pro. 33(a), other Circuits have blue-penciled in a prejudice requirement before a district court can decide whether to grant a new trial. For example, the First Circuit reversed a grant of a new trial that

issued after a district court determined that it had erroneously admitted a piece of evidence and had had significant concerns about trial counsel's lack of preparation that raised ineffectiveness concerns. *United States v. Wilkerson*, 251 F.3d 273, 279 (1st Cir. 2001). In the First Circuit's view, even if counsel had failed to live up to the standards expected of attorneys in federal court and even if the judge made a mistake in an evidentiary ruling, it would not matter absent a showing of actual prejudice, and none was shown. *Id.* ("[E]ven if counsel's poor handling of the receipt of stolen property evidentiary issue led the court into error, that fact alone is also insignificant. What matters is whether that evidentiary ruling was prejudicial to the defendant pursuant to the harmless error standard.").

Likewise, the Second Circuit in *United States v. Sanchez* reversed a grant of a new trial that had issued where the district court determined that a witness had committed perjury in the courtroom. 969 F.2d 1409 (2nd Cir. 1992). In its view, mere perjury is not enough to order a retrial "unless [an appellate court] can say that the jury probably would have acquitted in the absence of the false testimony," and the Second Circuit did not believe that the defendant had met that standard *Id.* at 1413-14.

Finally, the Seventh Circuit reversed a grant of a new trial in *United States v. Kuzniar*, 881 F.2d 466 (7th Cir. 1989). Although the district court had granted the new trial after concluding that it had erred in allowing certain witness testimony, the Seventh Circuit held that the judge had not erred at all in admitting the evidence, making the grant of the new trial inappropriate; the defendant could not have been harmed by a correct legal ruling. *Id.* at 471.

C. *The Sixth Circuit Below Was Wrong to Have Prevented the District Court from Deciding Whether to Grant a New Trial Once It Was Told that a Lack of Prejudice Was Not a Prerequisite.*

Contrary to the views of the First, Second, and Seventh Circuit, a defendant need not show an error reversible on appeal before the district court can exercise its discretion to decide whether to grant a new trial. Nothing in the plain text of the rules requires that result, and the courts of appeals should not be permitted to blue pencil the text to avoid the statutory procedure for amending the Rules. A lack of prejudice may be relevant to whether a district court wants to grant a new trial and, if it does, whether that grant of a new trial can be sustained on appeal. But it should not preclude a district court's exercise of discretion in the first instance. If a busy district judge believes that the interests of justice necessitate retrial, appellate judges ought to be reluctant to second guess that result.

Here, the district court expressly indicated that it was denying the motion for a new trial because "Defendant has not demonstrated actual prejudice as required," [24a]. If the district court was wrong as to the need for actual prejudice, the proper course should have been to remand for the district court to apply the correct standard. *See generally*, *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) ("If the judge could, without abusing his discretion, have ruled in the defendant's favor, the defendant is entitled to insist that the judge exercise discretion, though he cannot complain if the exercise goes against him." (citations omitted)).

It would not have been an abuse of discretion for the district court to have granted the requested retrial on Count Eight. Mr. Parker had been placed in an unpalatable

situation at his trial through no fault of his own. On the one hand, he could have asked the district court to dismiss the trial juror who saw him. Because the alternates also saw him, however, he would have had to accept a jury of only 11, as there would have been no untainted alternate to fill the spot of the dismissed juror. That would raise his odds of conviction. "[S]tatistical studies suggest that the risk of convicting an innocent person (Type I error) rises as the size of the jury diminishes." *Ballew v. Georgia*, 435 U.S. 223, 234 (1978) (footnote omitted). Furthermore, even apart from social-science considerations, he would have had to risk conviction by a jury of fewer than 12–an anathema to anyone in the English common-law tradition. *See, e.g.*, *Thompson v. Utah*, 170 U.S. 343, 349 (1898) ("When [the] Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." (quotation omitted)).

On the other hand, Mr. Parker could have asked for a mistrial rather than accept a jury of 11. That, however, would have meant that he would have had to be tried twice for these charges—even though it is undisputed that, at least as to the money laundering charge, he was not guilty. Choosing that path would have required him to forgo his constitutional right to be tried only once. *Abney v. United States*, 431 U.S. 651, 660-61 (1977) ("[T]his Court has long recognized that the Double Jeopardy

Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense." (footnote omitted)). A mistrial would have given the Government a do-over, with the benefit of having heard Mr. Parker's cross-examinations and closing arguments.

Especially given that the original trial was short—and a retrial on one count would have been even shorter—the district court could have decided that the trial failed to live up to the standards of justice expected in the federal courts and ordered a new trial. *Cf. Indiana v. Edwards*, 554 U.S. 164, 177 (2008) ("[P]roceedings must not only be fair, [but] they *must appear fair* to all who observe them." (quotation omitted) (emphasis added)).

The Sixth Circuit wrongly deprived Mr. Parker of his ability to invoke the district court's discretion. The Government's Opposition Brief below argued that prejudice was required, not that the district court would have denied a new trial even under Mr. Parker's view of the law. The principle of party presentation suggests that the Sixth Circuit should not have created arguments that the parties themselves do not make. *See generally Greenlaw v. United States*, 554 U.S. 237, 244 (2008) ("[W]e normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us." (quotation omitted)).

Further, the Sixth Circuit was wrong. If the district court had wanted to hold, in the alternative, that the motion for new trial would be denied regardless as to

whether a showing of prejudice was required, the district court would have said so. It did not.

If the district court erred in believing the prejudice were required, it abused its discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law." (citation omitted)). This Court ought to accept this Petition, clarify the standards for when a district court has discretion to grant a new trial, and then direct the district court to exercise its discretion under those clarified standards.

II. The Circuits Are Divided About Whether a Defendant Must Object After Pronouncement of Sentence to Preserve a Challenge to the Insufficiency of the District Court's Explanation of Its Sentence.

When selecting a sentence, the district court must "impose a sentence sufficient, but not greater than necessary" to satisfy the sentencing goals that Congress has statutorily enumerated. 18 U.S.C. § 3553(a). On appeal, the sentence is reviewed for reasonableness. *United States v. Booker*, 543 U.S. 220, 264 (2005).

Reasonableness review has both procedural and substantive elements. *E.g.*, *Gall v. United States*, 552 U.S. 38, 51 (2007) ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."). This Petition implicates procedural reasonableness.

Various procedural requirements exist at sentencing, including a requirement for the district court to "state in open court the reasons for its imposition of the particular

sentence, and, if the sentence [involves a Guideline range of more than 24 months], the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1). In that explanation, this Court has already determined that the district judge "should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). Where non-frivolous arguments in mitigation have been offered but were insufficient to merit a lower sentence, the district judge will "explain why he has rejected those arguments." *Id.* at 357.

The Circuits are split about when a party has preserved for appeal the insufficiency of the district judge's sentencing explanation.

A. Some Circuits Do Not Require a Party to Complain After the Sentence Is Pronounced Because the Federal Rules of Criminal Procedure Expressly Disavow a Need for Parties to Take Exceptions to Rulings.

Under the Federal Rules of Criminal Procedure, "[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. Pro. 51(b). Further, after the court has ruled, "[e]xceptions to rulings or orders of the court are unnecessary." Fed. R. Crim. Pro. 51(a).

Given the express language of the Federal Rules, both the Fourth and the Seventh Circuit have held that a party need only request a lower sentence than was ultimately imposed, to preserve challenges to the insufficiency of the reasons given to justify that

higher sentence. *United States v. Wilcher*, 91 F.4th 864, 870 (7th Cir. 2024) ("[A] party need not complain about the ruling after it has been made [under Fed. R. Crim. Pro. 51(a). The defendant] did not need to take exception to the judge's decision to preserve [the] argument on appeal [that the judge failed to address his arguments in mitigation]." (citations omitted)); *United States v. Lynn,* 592 F.3d 572, 578 (4th Cir. 2010) ("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.").

B. Other Circuits Require an Exception After the District Court Pronounces Sentence in the Interest of Efficiency.

Most Circuits subject a party's claim of insufficient explanation at sentencing to plain-error review unless the party took exception after the sentence was pronounced. *United States v. Flores-Mejia*, 759 F.3d 253, 257 (3rd Cir. 2014) (*en banc*) (joining the "First, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuit Courts of Appeals" (collecting cases)). The reason for this approach is less one of the text of the Federal Rules than concerns about efficiency:

> [W]e are satisfied that there are compelling reasons why objecting to procedural error after the sentence is pronounced would promote judicial efficiency. Objecting when sentence is pronounced permits the quick resolution of such errors. As the Supreme Court observed, 'errors are a constant in the trial process,' and when a defendant contemporaneously objects, the district court 'can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome.' *Puckett*, 556 U.S. at 134 (citation and quotation marks omitted)…. Contemporaneous objection also advances the public interest because "[r]equiring the error to be preserved

> by an objection creates incentives for the parties to help the district court meet its obligations to the public and the parties." *United States v. Villafuerte*, 502 F.3d 204, 211 (2d Cir. 2007). By encouraging defendants to make objections before the court which is best equipped to resolve the errors efficiently and effectively, we are promoting better sentencing practices.
>
> [Further] requiring that the procedural objection be made at the time of sentencing prevents 'sandbagging' of the court by a defendant who remains silent about his objection to the explanation of the sentence, only to belatedly raise the error on appeal if the case does not conclude in his favor. *See, e.g., Puckett,* 556 U.S. at 134.

Flores-Mejia, 759 F.3d 253 at 357 (some citations omitted).

C. No Exception Ought to Have Been Required Here.

While efficiency considerations may be relevant when drafting a rule, the plain text controls the rule's meaning after it is promulgated. *See, e.g.*, *Bus. Guides, Inc. v. Chromatic Comm'ns. Enters.*, 498 U.S. 533, 540-541 (1991) ("We give the Federal Rules of Civil Procedure their plain meaning. As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.") (quotation omitted)).

The plain text of Fed. R. Crim. Pro. 51(a) states that "[e]xceptions to rulings or orders of the court are unnecessary." Those Circuits, including the Sixth Circuit below, are thus wrong to blue pencil the text and require an exception if a party is not satisfied with the district court's explanation. Further, the efficiency concerns that those Circuits thought trumped the plain text are overstated. A rule requiring exceptions "could degenerate into a never-ending stream of objections after each sentencing explanation," as defense counsel seeks to assure that the error is preserved. *Lynn*,

592 F.3d at 578 n.3. Repeatedly taking exception to a ruling also runs the risk of defense counsel irritating the judge, to the determinant of that client and counsel's future clients before that judge.

Below, the district court did not address Mr. Parker's mitigation arguments. It is thus unclear what the district court thought of the arguments. One possibility is that it found them legally and factually correct and resulted in a lower sentence than had the mitigation not been present. Another possibility is that the district court overlooked them. And a third possibility is that the district court disagreed with the legal and or factual underpinnings of the mitigation arguments. But because the district court did not say, Mr. Parker's ability to substantively challenge the length of the sentence was hampered on appeal. *See generally United States v. Taylor*, 487 U.S. 326, 336-337 (1988) (addressing the need for clarity when selecting remedies for violations of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*) ("[A] district court must carefully consider [statutory] factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review.").

This Court ought to grant the Petition, correct the Sixth Circuit's misunderstanding about the need to take exceptions to a sentencing explanation to avoid plain-error review, and remand for the Sixth Circuit to reconsider the reasonableness of the sentence imposed.

CONCLUSION

For the forgoing reasons, Mr. Parker requests that the Court reverse the judgment below.

Dated: May 3, 2024

Respectfully submitted,

JAMAAL PARKER

_____

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