No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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MARCUS ORLANDO ARMSTRONG,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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Marisa L. D. Conroy
Law Office of Marisa L. D. Conroy
P.O. Box 232726
Encinitas, CA 92023
(858)449-8375
Attorney for Petitioner
Marcus Orlando Armstrong

QUESTION PRESENTED

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?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Central District of California, *United States v. Marcus Orlando Armstrong,* 19cr00195-ODW. The district court entered the judgment on March 20, 2023. *See* Appendix B.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Marcus Orlando Armstrong,* No. 23-466. *See* Appendix A.

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Petitioner, Marcus Orlando Armstrong, respectfully petitions for a writ of certiorari to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit issued on April 8, 2024.

OPINION BELOW

In an unpublished memorandum decision, the United States Court of Appeals for the Ninth Circuit affirmed the sentence imposed by the district court.

The Ninth Circuit reviewed Mr. Armstrong's four claims of procedural error for plain error. Appendix A.

JURISDICTION

The Court of Appeals issued a memorandum decision on April 8, 2024. No petition for rehearing was filed. This petition is being filed within the 90-day time limit for certiorari petitions. The Court has jurisdiction under 28 U.S.C. §1254(1).

INVOLVED FEDERAL LAW

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.

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. Despite the government, probation, and Mr. Armstrong all requesting a within or below Guidelines sentence, the district court doubled the sentence by imposing the two counts to run consecutive for a total of 114 months. The district court did not

provide advance notice of its intention to run the counts consecutive, nor its reasons for doing so. After the district court pronounced its sentence, it then ended the hearing. Mr. Armstrong was never invited to make additional objections. But the Ninth Circuit held the district court's failure to invite post-sentencing objections made no difference to the standard of review. Rather, Mr. Armstrong forfeited his objections to the claimed procedural errors in his sentence. Because in the Ninth Circuit, 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.

STATEMENT OF THE CASE

On November 21, 2019, the government charged Mr. Armstrong and three co-defendants in a 49 count indictment alleging violations of: 18 U.S.C. § 1347(a), Health Care Fraud; 42 U.S.C. § 1320a-7b(b)(2)(A), Illegal Remunerations in Connection with Federal Health Care Programs; 18 U.S.C. § 1341, Mail Fraud; 18 U.S.C. § 1516(a), Obstructing a Federal Audit; 18 U.S.C. §§ 981 and 982, 28 U.S.C.

§ 2461(c), Federal Forfeiture. [2-ER-272.][1] On October 25, 2022, Mr. Armstrong entered a plea of guilty to two counts of 42 U.S.C. § 1320a-7b(b)(2)(A) (Counts 25 and 26). [CR-254; 2-ER-266-67.] There was no plea agreement.

The government, probation, and Mr. Armstrong were in agreement as to the guidelines calculations. The parties all agreed to the following calculations:

Base Offense Level (§ 2B4.1(a))	8
Value of improper benefit (§ 2B4.1(b)(1)(B)	+16
Role (§ 3B1.1(b))	+3
Adjusted Offense Level	27
Acceptance of Responsibility (§ 3E1.1)	-3
Total Offense Level	24
Criminal History Category	II
Resulting Guidelines Range	57-71 months

[Revised PSR at 9-15; 2-ER-118, 144.] Probation did not identify any factors that would warrant a departure or variance and recommended a sentence of 57 months as to each count to run concurrent. [CR-307 Rec. Letter at 2, CR-308 Revised PSR at 27.] The government recommended a sentence of 60 months. [2-ER-118.]

[1]Citations to the "ER" are to the Excerpts of Record filed in the Court of Appeals, "CR" refers to the Clerk's Record.

Mr. Armstrong requested a sentence of 24 months custody. [2-ER-144.] He requested a variance based on his incredibly difficult childhood and his substantial health issues. [2-ER-144.] He also filed a supplemental sentencing memorandum regarding the events leading to the sale of his home. [2-ER-60.] In summary, after Mr. Armstrong's arrest in this case and due to the restrictions of the pandemic, his family was no longer financially able to afford their home. [2-ER-60.] They sought forebearance in April 2020, which was denied in February 2021. [2-ER-60.] On June 23, 2021, the family was sued for foreclosure for failure to pay their mortgage. [2-ER-60.] In the interim, Mr. Armstrong and his wife attempted to refinance the property, which failed. [2-ER-60.] As a result of their inability to obtain relief, the Armstrongs sold the home in March 2022, and paid off the outstanding mortgage for $1,510,166.55 and an outstanding federal tax lien for $919,604.32. [2-ER-60.] The remaining balance was used to pay off other debt. [2-ER-60.]

The district court began the sentencing hearing by adopting the Guidelines proposed by all parties and found a resulting Guidelines range of 57-71 months. [1-ER-12-13.] The court inquired as to whether Mr. Armstrong could comply with probation's recommendation that he pay $250,000.00 within 90 days of sentencing. [1-ER-14.] When counsel informed the court Mr. Armstrong was financially unable to make the payment, the court responded "It falls in the same category as that

$447,932 and, I think, 9 cents has been outstanding for what, a decade or more; right? Okay? . . . . And then now we add to all of this $3 million." [1-ER-14.]

The court continued:

> I don't have a problem with the 57 months, but it's going to be 57 months each count consecutively. I am not terribly impressed that this $447,932 in restitution has been outstanding for a very, very long period of time and not a single dime has been paid toward that, and you knew that when you were released and placed on supervised release, and you knew that you were supposed to have been making payments while you were on supervised release, and it got to the point where I think everyone in the world realized that your supervision was going to expire before that payment was ever made, and indeed that is exactly what happened, and here we are now, I don't know 13 years later, and not a dime has been played – paid. . . . . in terms of your restitution obligation to people that you've hurt and harmed, have you paid any of those people? No. That hasn't been paid at all.

[1-ER-18.] Counsel then clarified for the court that Mr. Armstrong previously paid $80,000 in restitution in his prior case. [1-ER-25.]

At the conclusion of the hearing, the court again found the advisory guidelines range was 57-71 months. [1-ER-43.] The court imposed a $200 special assessment and ordered restitution in the amount of $3,070,091.66. [1-ER-44.] The court also ordered nominal restitution payments after finding that Mr. Armstrong's economic circumstances did not allow for immediate or future payment of the amount ordered. [1-ER-44.] The court waived interest on the restitution after finding Mr. Armstrong did not have the ability to pay interest. [1-

ER-45.] Lastly, the court did not impose a fine as it found Mr. Armstrong did not have the ability to pay. [1-ER-45.]

The district court sentenced Mr. Armstrong to 57 months custody on counts 25 and 26, to be served consecutively, for a total of 114 months. [1-ER-46.] The court imposed a three year term of supervised release. [1-ER-46.] In addressing the factors under 3553, the court noted in aggravation Mr. Armstrong had a prior offense similar to the instant offense and he still owed $447,932.09 in restitution on that case. [1-ER-52.] The court concluded that the "advisory guidelines range accounts for the nature of the offense and his criminal history." [1-ER-53.]

On March 21, 2023, Mr. Armstrong filed a notice of appeal. [2-ER-302.] On appeal, Mr. Armstrong argued that the district court improperly relied on his ability to pay restitution, failed to provide advance notice of its intent to depart by imposing consecutive sentences, imposed a sentence beyond the total punishment in U.S.S.G. § 5G1.2, and relied on erroneous facts in imposing sentence. The Ninth Circuit reviewed all of Mr. Armstrong's procedural claims for plain error and affirmed. (App. A.)

This petition follows.

REASON TO GRANT 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 "[pjroviding a final opportunity for objections after the pronouncement of sentence, 'will serve the dual purposes] 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.

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); *United States v. Vanderwerfhorst*, 576 F.3d 929, 934 (9th

Cir. 2009). 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 Circuit 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. 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.[2] Many, if not most, likely involved procedural challenges to the sentence: staple arguments in sentencing appeals.[3]

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

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

[3]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.)

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 Mr. Armstrong'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.

CONCLUSION

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

Dated: June 27, 2024

Respectfully submitted,

s/Marisa L. D. Conroy
MARISA L. D. CONROY
Counsel for Petitioner Marcus Armstrong
Law Office of Marisa L. D. Conroy
P.O. Box 232726
Encinitas, CA 92023
(858) 449-8375