No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MCCARARY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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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*, 589 U.S. 169, 174 (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: Does advocating for a particular sentence preserve the *procedural* reasonableness claim that a court failed to adequately explain the sentence when it chooses a sentence higher than that requested? Because there is a divide among the circuit courts on this question even after *Holguin-Hernandez*, this Court should grant certiorari and resolve the issue.

LIST OF PARTIES

1. Anthony McCarary, Petitioner

2. United States of America, Respondent

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Petitioner Anthony McCarary respectfully prays that the Court issue a writ of certiorari to review the order 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 with three different approaches over how to preserve a failure-to-explain claim of error for appellate

review. The first approach in the Fourth and Seventh Circuits, requires 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. Wilcher*, 91 F.4th 864, 870 (7th Cir. 2024).

The second approach seen in 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. 2016).

Finally, the Sixth and the Eleventh Circuits require an objection *after* the imposition of the sentence *only if* the sentencing judge asks defense counsel if there are any objections to the sentence imposed. *United States v. Bostic*, 371 F.3d 865, 872 (6th Cir. 2004); *United States v. Jones*, 899 F.2d 1097, 1102 (11th Cir. 1990), overruled by *United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993) (on other grounds).

The circuits have only solidified the three-way split in the years since this Court clarified how to preserve *substantive* reasonableness claims at sentencing in *Holguin-Hernandez v. United States*, 589 U.S. 169 (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 rule for failure to explain procedural error is consistent with this Court's decision in *Holguin-Hernandez*). *United States v. Ralston*, 110 F.4th 909, 920 (6th Cir. 2024) (applying same standard of review pre and post-*Holguin-Hernandez*); *United States v. Mosely*, 31 F.4th 1332, 1334 (11th Cir. 2022) (same).

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 Court of Appeals affirmed the sentence of Petitioner in an unpublished memorandum on September 20, 2024. *See* Appendix A at 1–2.

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on September 20, 2024. Appendix A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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. McCarary was removed from his mother's care when he was 18 months old, placed in foster care, and eventually lived with his maternal grandmother. During her pregnancy and during the short time she cared for Mr. McCarary, his mother was addicted to cocaine. Mr. McCarary had no stability in his life. He started getting into trouble with the law at a young age. Starting at the age of 14, Mr. McCarary has been in and out of prison.

As an adult, he received a 40-month federal sentence for bank robbery. While serving that sentence, he was also sentenced to a state offense for an additional 12-year prison term.

During this lengthy incarceration for both the federal and state offense, Mr. McCarary tried to prepare himself for when he got out of custody. He took classes and wrote a book. When he was finally paroled from state prison, he commenced his 3-year federal term of supervised release plus a simultaneous six-year term of state parole.

The dual supervision proved to be too difficult for Mr. McCarary. Because he was required to take time off work to meet both the state and federal probation requirements, he lost his job. Soon after losing his job, Mr. McCarary began getting into trouble and was arrested by state police and sentenced to six years. The federal probation officer filed a petition to revoke supervised release. Mr. McCarary admitted to the allegation and the district court revoked his supervised release.

At sentencing for the supervised release violation, Mr. McCarary requested a 12-month concurrent custodial sentence to the six-year state sentence followed by no supervised release. He argued that the six-year state sentence for the new offense was sufficient to address the breach of the court's trust. Mr. McCarary also requested that no term of supervised release be imposed. He argued that dual supervision was not necessary and counterproductive to his rehabilitation. Moreover, state parole has more extensive resources in terms of housing and mental health and substance abuse treatment programs than federal probation.

The court then imposed the sentence without explaining why it rejected Mr. McCarary's arguments for a concurrent custodial sentence and no supervision to follow. The court only stated that it understood federal supervision was tough.

On appeal, Mr. McCarary argued the sentencing court failed to adequately respond to his specific, non-frivolous mitigation arguments. In a memorandum disposition, the Ninth Circuit affirmed Mr. McCarary'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 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. McCarary 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*, 589 U.S. at 174. 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," they have sufficiently preserved procedural sentencing errors 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 failure to explain 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*, 589 U.S. at174. 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 a specific objection to the "reasonableness" of a sentence must be made. Instead, this Court held that substantive reasonableness errors do not require specific objections. *Id.* at 765–67. Instead, whether before or after sentencing is imposed, the "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 divided as to how to preserve many errors under the *first* sentencing consideration—procedural reasonableness.

A. The Fourth and Seventh Circuits do not require an additional post-sentencing objection to preserve failure to explain procedural errors.

The Fourth and Seventh Circuits do not require formal objections after the imposition of a sentence to preserve a procedural reasonableness claim regarding a failure to explain a sentence.

Instead, in the Fourth Circuit, "[b]y 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. The Fourth Circuit has continued to apply this rule 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)).

The Seventh Circuit also does not require that a defendant make an objection after the district court has announced the sentence. *United States v. Wilcher*, 91 F.4th 864, 870 (7th Cir. 2024). The Seventh Circuit reasons Rule 51(a) applies when an error is "created by" the ruling itself. *United States v. Wood*, 31 F.4th 593, 597-98 (7th Cir. 2022). A party need not take "exception" to one of these errors, which means that a party need not complain about the ruling after it has been made. *Wilcher*, 91 F.4th at 870. A party can waive such an error only if, after the ruling, the district court asks if the party has an objection about the specific issue in question, and the party says that it does not. *Id.*; *see, e.g., United States v. Garcia-Segura*, 717 F.3d 566, 569 (7th Cir. 2013).

B. Four courts of appeal require an additional objection after the imposition of sentence to preserve failure to explain procedural errors.

In contrast, the Third, Fifth, Ninth, and the 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.

C. The Sixth and the Eleventh Circuits require an additional objection after the imposition of sentence to preserve most procedural errors but only if the party declines a specific invitation by the district court to object to the sentencing.

The Sixth and Eleventh Circuits takes an even different approach from the circuits above. These circuits apply plain error review *only* when the sentencing courts specifically invite the parties to object and the parties fail to do so.

The Sixth Circuit "wrestled with the difficulty of 'parsing a sentencing transcript to determine whether a party had a meaningful opportunity to object' and of determining whether plain-error review should apply." *United States v. Vonner*, 516 F.3d 382, 385 (6th Cir. 2008) (cleaned up and quoting *United States v. Bostic*, 371 F.3d 865, 873 n.6 (6th Cir. 2004)). Sitting en banc, the Sixth Circuit explained that "to ensure that plain-error review applied only when parties fairly were given a chance to object to the sentencing procedure," the sentencing court must "'ask the parties whether they have any objections to the sentence that have not previously been raised.'" *Id.* (cleaned up and quoting *Bostic*, 371 F.3d at 873). "If a sentencing judge asks this question and if the relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court." *Id.* Conversely, if the sentencing judge fails to ask this question, the Sixth Circuit does not apply plain error.

The Eleventh Circuit also requires the district court to "elicit fully articulated objections, following imposition of sentence, to the court's ultimate findings of fact and conclusions of law." *Jones*, 899 F.2d at 1102. When the district court fails to do so, the Eleventh Circuit will ordinarily "vacate the sentence and remand to the district court to give the parties an opportunity to present their objections." *United States v. Campbell*, 473 F.3d 1345, 1347 (11th Cir. 2007). But if the district court does give the parties the opportunity to object and no objection is made, the Eleventh Circuit review the procedural errors for plain error. *United States v. Steiger*, 99 F.4th 1316, 1322 (11th Cir. 2024) (en banc).[1]

Post- *Holguin-Hernandez*, both the Sixth and the Eleventh Circuits continue to apply plain error only where the appellant failed to object following an invitation by the sentencing court. *See Ralston*, 110 F.4th at 920 (applying plain error where

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[1] Adding to the confusion to how the circuits review failure-to-explain error, there is also a three-way-split even among the circuits that apply plain error on how to evaluate the plain error prongs. The D.C. Circuit holds that a court's failure-to-explain the sentence by its nature implicates the defendant's substantial rights and seriously affect the fairness, integrity, or public reputation of judicial proceedings. *In re Sealed Case*, 527 F.3d 188 (D.C. Cir. 2008) (citing to the third and fourth plain error prongs of *United States v. Olano*, 507 U.S. 725 (1993) and finding "[t]he absence of a statement of reasons is "prejudicial in itself."). By contrast, in the Ninth Circuit, an appellant is required to prove a "reasonable probability that the sentence would have been different absent" the error. *United States v. Dallman*, 533 F.3d 755, 762 (9th Cir. 2008); *United States v. Casteneda*, 555 Fed. App'x 689 (9th Cir. 2014) (must establish reasonable probability of a different result when a district court fails to explain the sentence given). And contrary to the Ninth, the Eleventh Circuit holds an appellant is not required to show that his sentence would have been lower had the court not failed to explain. *Steiger*, 99 F.4th at 1325. Instead, the Eleventh Circuit concludes that a failure-to-explain "error warrants reversal under plain error review only when the district court's reasoning is unclear on the face of the record." *Id.*

the district court satisfied its obligation to ask for objections at sentencing hearing and no objection followed); *Mosely*, 31 F.4th at 1334 (remanding for purposes of allowing district court to address procedural error issues in the first instance).

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 the 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." 589 U.S. at 174. 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.

Second, whether 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. *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. McCarary's case presents the right vehicle to resolve the circuit split on preserving procedural sentencing errors.

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

At the sentencing hearing, Mr. McCarary argued vigorously and repeatedly that the district court should not reimpose any additional term of supervised release and should not impose any consecutive imprisonment to his six-year state sentence. Specifically, the defense argued that because he will already be supervised by state officials, the simultaneous federal supervision added nothing but additional random testing requirements that made his reintegration into the community more difficult and counterproductive to the purpose of supervised release. He also argued that, because the conditions he violated were imposed over 10 years ago, the significant sentence he received in state court was sufficient to address any breach of trust. The district court failed to explain why it was rejecting Mr. McCarary's nonfrivolous arguments.

Yet, because he did not object again after the district court had already imposed sentence, the Ninth Circuit reviewed his procedural reasonableness argument for plain error. Had Mr. McCarary been sentenced in the Fourth, Sixth, Seventh, or Eleventh Circuits, by contrast, his claim would have been preserved.

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 Seventh 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 forms 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; *See also Wood*, 31 F.4th at 597 (same).

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*, 589 U.S. at 174. "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.'" *Lynn*, 592 F.3d at 578–79. The Fourth went on to say that "[w]hen 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." *Id.*

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. McCarary'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 Seventh Circuits' approach would also be the right result under the reasoning of *Holguin-Hernandez*. As the 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." 589 U.S. at 174. 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 failure to explain 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 these reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

December 19, 2024

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