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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff - Appellee,<br><br>v.<br><br>ALFREDO NUNEZ-CARRANZA,<br><br>Defendant - Appellant. | No. 22-2100 |

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**Appeal from the United States District Court**
**for the District of New Mexico**
**(D.C. No. 2:22-CR-00394-MIS-1)**

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Grant R. Smith, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Denver, Colorado, for Defendant-Appellant Alfredo Nunez-Carranza.

Tiffany L. Walters, Assistant United States Attorney (Alexander M. M. Uballez, United States Attorney, with her on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee United States of America.

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Before **TYMKOVICH**, **EBEL**, and **EID**, Circuit Judges.

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**EBEL**, Circuit Judge.

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In this direct criminal appeal, Defendant Alfredo Nunez-Carranza, a Mexican citizen, challenges his fifty-one-month sentence for unlawfully reentering the United

States after previously being removed. The fifty-one-month sentence fell at the bottom of Nunez-Carranza's properly calculated advisory guideline range. On appeal, he contends that the district court plainly erred in not explaining why it imposed that sentence instead of a below-guideline sentence that he requested.

We AFFIRM Nunez-Carranza's sentence because he has failed to establish any error, let alone plain error, warranting relief.

## I. BACKGROUND

Nunez-Carranza pled guilty to unlawfully reentering the United States after previously being removed, in violation of 8 U.S.C. § 1326(a) and (b). Using the 2021 sentencing guidelines, the presentence report ("PSR") calculated Nunez-Carranza's total offense level to be 17 and his criminal history category to be VI, resulting in an advisory imprisonment range of 51 to 63 months.

According to the PSR, Nunez-Carranza, who was fifty years old at the time of sentencing, had an extensive and continuing criminal history dating back to age twenty-six. The PSR calculated Nunez-Carranza's criminal history category to be VI, the highest possible category, based on five prior felony convictions, or groups of felony convictions, including:

- 2003 drug trafficking,
- 2008 drug possession,
- 2010 unlawful reentry into the United States after prior removal,
- 2011 drug trafficking and unlawful weapons possession, and
- 2014 possession of drugs in prison.

The PSR further indicated that Nunez-Carranza had previously been removed from the United States four times, usually after serving a prison sentence, and had then unlawfully reentered the United States soon after each removal. This particular case stems from his having been found unlawfully in the United States one month after having been removed, following the completion of a forty-six-month prison sentence for unlawful reentry. Nunez-Carranza does not dispute these facts or the PSR's guideline calculations.

The district court began the sentencing proceeding by noting its concern about Nunez-Carranza's criminal history and serial removals: "I have some concerns that it seems like Mr. Nunez gets removed after serving time in prison and then comes back pretty much immediately." (III R. 30.)

The court then noted, sua sponte, that it was considering imposing a below-guideline sentence because Nunez-Carranza's 2003 drug convictions involved marijuana, which is now "completely legal in New Mexico and many other states." (III R. 31.) The court also indicated its understanding that not counting Nunez-Carranza's 2003 convictions would lower his criminal history category from VI to V, and lower the guideline sentencing range from 61 to 53 months in prison to 46 to 57 months. Ultimately, however, the sentencing court decided not to impose a below-guideline sentence on that basis because the 2003 convictions also involved Nunez-Carranza's possession of methamphetamine for sale.

Nunez-Carranza then requested that the court vary downward and impose a below-guideline sentence,[1] instead, because two of his prior convictions—the 2003 drug-trafficking and 2008 drug-possession convictions—were almost too old to count toward his criminal history category.[2] The United States advocated for a prison sentence at the bottom of the advisory guideline range, fifty-one months. The prosecutor noted that fifty-one months was a few months longer than the forty-six-month sentence imposed on Nunez-Carranza for his previous unlawful reentry conviction, a sentence which did not deter Nunez-Carranza from almost immediately unlawfully returning to the United States after his last removal.

Next, defense counsel addressed the court's stated concern "that it seems like Mr. Nunez gets removed after serving time in prison and then comes back pretty much immediately" (III R. 30) by acknowledging that that was in fact the case. Nunez-Carranza also addressed the court's concern during his allocution:

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[1] See United States v. Barnes, 890 F.3d 910, 920 n.1 (10th Cir. 2018) (distinguishing between downward variances based on the 18 U.S.C. § 3553(a) sentencing factors and downward departures based on guideline provisions).

[2] Relevant here, a sentence "exceeding one year and one month" that a defendant served for a prior conviction counts toward his criminal history category if it "was imposed within fifteen years of the defendant's commencement of the instant offense," or if the sentence, "whenever imposed, . . . resulted in the defendant being incarcerated during any part of such fifteen-year period." U.S.S.G. § 4A1.2(e)(1). Because the "instant offense" here occurred on November 19, 2021, the fifteen-year period prior to that offense began on November 19, 2006. Nunez-Carranza completed his sentence for the 2003 drug-trafficking convictions within that fifteen-year period, on May 14, 2007, and the sentence for his 2008 drug possession convictions was imposed within fifteen years of the instant offense. Nunez-Carranza does not dispute that these convictions warranted criminal history points that count toward the calculation of his criminal history category.

> I came back so fast this last time because of my [adult] son [who lives in California]. He was involved in an accident and he suffered some head injuries. He has a doctor that is seeing him monthly. Actually, he has three doctors, so he has weekly and monthly appointments. And he's okay now, but he almost died, and that is the reason that I . . . came back.
>
> THE COURT: Mr. Nunez, why did you come back all the other times you have been removed after committing crimes in the United States?
>
> THE DEFENDANT: What I want to say is that the other times, I want to be clear about that, sometimes when I was younger, at that time, people don't think things through so clearly. I had never received such a long term in prison as I did this last time. So, you know, I've changed by now.
>
> THE COURT: Okay. My concern is that some of these crimes you committed when you were in your 40s. You have a possession of drugs in jail when you were 42, right?
>
> THE DEFENDANT: The last sentence I was here [in federal court] was in 2010. And I was released last year, October 23rd[, 2021 ].
>
> THE COURT: Okay.

(III R. 35–36.)

Without further discussion, the court asked Nunez-Carranza if he had a request for where he wanted to be imprisoned and then imposed a fifty-one-month prison sentence:

> The Court adopts the [PSR's] factual findings. It's considered the Sentencing Guideline applications and the factors set forth in 18 U.S.C. § 3553(a).
>
> The Offense Level is 17, the Criminal History Category is VI, so the Guideline range is 15 [sic; should be 51] to 63 months.
>
> The Court notes the defendant illegally reentered the U.S. after having been previously deported, subsequent to a felony immigration conviction, aggravated felony conviction.

> As to the Information [to which Nunez-Carranza pled guilty], the defendant is committed to the custody of the Bureau of Prisons for a term of 51 months. The court will not impose supervised release.
>
> The Court recommends that Immigration and Customs Enforcement begin immediate removal proceedings.

(III R. 37.)

On appeal, Nunez-Carranza argues that the district court erred procedurally by not explaining adequately why the court rejected his request for a downward variance and instead imposed a within-guideline sentence. As relief, he seeks a remand for resentencing "so that the district court can re-examine its sentence and provide sufficient reasoning for why the sentence it ultimately imposes is justified." (Aplt. Br. 1.)[3]

## II. STANDARD OF REVIEW

We review Nunez-Carranza's sentencing challenge for plain error because he did not ask the district court, at sentencing, for a more detailed explanation as to why the court rejected his request for a downward variance. See Fed. R. Crim. P. 52(b); see also United States v. Ruiz-Terrazas, 477 F.3d 1196, 1198–99 (10th Cir. 2007) (reviewing for plain error argument that sentencing court failed to explain why it

[3] Nunez-Carranza makes a second argument on appeal, asserting that the statute under which he was convicted, 8 U.S.C. § 1326, is unconstitutional because it is racially motivated. Nunez-Carranza did not raise this argument to the district court and makes no substantive argument in support of it now on appeal. He further "concedes" that he cannot meet the plain-error standard "under current law," but seeks only to preserve this argument should the law change. (Aplt. Br. 7.) We, therefore, do not address the merits of his constitutional argument.

rejected defendant's request for below-guideline sentence). To obtain relief here, therefore, Nunez-Carranza must "establish 1) error 2) that was plain, and 3) that affected his substantial rights. . . . If [he] can make such a showing, [this court then] would have discretion to grant relief if [4] 'the error had a serious effect on "the fairness, integrity or public reputation of judicial proceedings."'" United States v. Leib, 57 F.4th 1122, 1128 (10th Cir. 2023) (quoting Greer v. United States, 141 S. Ct. 2090, 2096–97 (2021)).

## III. LEGAL DISCUSSION

As we explain, Nunez-Carranza's challenge to his sentence fails at the first step of the plain-error analysis because the sentencing court did not err by failing to explain adequately why the court rejected his request for a below-guideline sentence. Furthermore, even if we could say that the sentencing court erred (we cannot), Nunez-Carranza also has failed to establish the remaining requirements for relief under the plain-error analysis.

### A. Nunez-Carranza failed to establish error.

Because the parties dispute the governing law, we address that question first.

#### 1. Governing law

##### a. United States v. Booker, 543 U.S. 220 (2005)

We begin with Booker, which made the sentencing guidelines advisory, rather than mandatory. 543 U.S. at 227, 245. Before Booker, a sentencing court generally only considered the mandatory guideline sentencing range. After Booker, a sentencing court must consider the sentencing factors set forth in 18 U.S.C.

§ 3553(a); one of those factors is the now advisory guideline range, id. § 3553(a)(4). See Booker, 543 U.S. at 245, 259–60; see also United States v. Lopez-Flores, 444 F.3d 1218, 1220 (10th Cir. 2006). Thus, "after Booker, every sentence that a district court ultimately imposes must reflect its determination of what is reasonable in light of the . . . § 3553(a) factors, whether that sentence is within or outside the [now advisory] Guidelines range." United States v. Sanchez-Juarez, 446 F.3d 1109, 1114 (10th Cir. 2006). (There is a rebuttable presumption, however, that a sentence within a properly calculated guideline range is reasonable. See Rita v. United States, 551 U.S. 338, 341, 347 (2007).) After Booker, then, reviewing courts must ensure that the sentencing court both treated the guidelines as advisory and considered the § 3553(a) factors before imposing sentence. See Sanchez-Juarez, 446 F.3d at 1117.[4]

**b. The authority on which Nunez-Carranza relies.**

Nunez-Carranza contends that the sentencing court erred by not expressly explaining on the record why it rejected his non-frivolous argument for a downward variance. In support of that contention, he relies on 18 U.S.C. § 3553(c) and United

[4] The district court, in this case, met both of these requirements. First, the court was clearly aware that the guidelines are advisory. It was the court itself that initially indicated that it was considering imposing a below-guideline sentence because Nunez-Carranza's 2003 drug convictions involved marijuana. (The court ultimately did not vary downward on this basis.) Second, the district court clearly considered the § 3553(a) factors. The court both stated that it had considered those factors, see United States v. Chavez-Caldron, 494 F.3d 1266, 1269 (10th Cir. 2007) (holding that sentencing court's statement that it had considered the § 3553(a) actors "confirms that the sentencing decision was tethered to the § 3553(a) factors"), and stated that it had considered the PSR, which itself analyzed the § 3553(a) factors before recommending a within-guideline sentence, see United States v. Traxler, 477 F.3d 1243, 1250 (10th Cir. 2007).

States v. Sanchez-Juarez, 446 F.3d 1109 (10th Cir. 2006). We disagree that these authorities obligated the sentencing court to do more than it did here to reject Nunez-Carranza's request for a below-guideline sentence.

**i. 18 U.S.C. § 3553(c)**

Section 3553(c) provides that "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." The Tenth Circuit, in applying this statutory requirement across a broad spectrum of sentencing scenarios, has adopted some general rules. First, at one end of the spectrum, when the defendant does not raise any "substantial" arguments for a sentence outside the advisory guideline range and the court imposes a sentence within that range, "our post-Booker precedents do not require the court to explain on the record how the § 3553(a) factors justify the sentence." Lopez-Flores, 444 F.3d at 1222. Instead, "Section 3553(c) requires the court to provide only a general statement of 'the reasons for its imposition of the particular sentence.'" Ruiz-Terrazas, 477 F.3d at 1199 (quoting § 3553(c)). That is in part because "the Guidelines themselves seek, in some measure, to give meaning to the considerations embodied in Section 3553(a)." Id. at 1200.

At the other end of the spectrum of sentencing scenarios, when the sentencing court imposes a sentence outside the advisory guideline range, 18 U.S.C. § 3553(c)(2) "requires that the district court give 'the specific reason for the imposition' of the sentence." Lopez-Flores, 444 F.3d at 1222 (quoting § 3553(c)(2)).

This case involves a situation closer to the middle of the sentencing spectrum, where the defendant requested a below-guideline sentence for a not-insignificant reason but the district court imposed a sentence within (and at the bottom) of the properly calculated advisory range. That was the same situation this court addressed in Sanchez-Juarez.

**ii. Sanchez-Juarez**

In Sanchez-Juarez, decided after Booker, the sentencing court heard the parties' arguments for and against a below-guideline sentence, but imposed a sentence at the bottom of the properly calculated guideline range, giving "no reasons for the sentence it imposed." 446 F.3d at 1115. Furthermore, and different from this case, the sentencing court in Sanchez-Juarez also never indicated that it had considered the § 3553(a) factors. Id. Under those circumstances, the Tenth Circuit declined to "presume the district court weighed a party's arguments in light of the § 3553(a) factors where the record provides no indication that it did so and no clear explanation of the sentence imposed." Id. at 1116.

There were, then, two deficiencies in the district court's imposition of the sentence in Sanchez-Juarez: the court gave no reasons for the sentence it imposed and gave no indication that it had considered the § 3553(a) factors. See United States v. Martinez-Barragan, 545 F.3d 894, 903 (10th Cir. 2008) (noting these two sentencing deficiencies were at issue in Sanchez-Juarez); see also Ruiz-Terrazas, 477 F.3d at 1202. It is in this context that Sanchez-Juarez noted that,

> [b]efore Booker, we addressed the district court's obligation to consider § 3553(a) factors when exercising its discretion in regard to sentencing decisions that were, even then, not subject to mandatory Guidelines. We held that although "the district court is not obligated to expressly weigh on the record each of the factors set out in § 3553(a)," it must "state its reasons for imposing a given sentence."

446 F.3d at 1116 (quoting United States v. Rose, 185 F.3d 1108, 1111 (10th Cir. 1999)). Sanchez-Juarez then ruled:

> We are . . . persuaded that our pre-Booker requirement that district courts provide sufficient reasons to allow meaningful appellate review of their discretionary sentencing decisions continues to apply in the post-Booker context. In particular, where a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence and has expressly requested such a sentence, we must be able to discern from the record that "the sentencing judge [did] not rest on the guidelines alone, but . . . consider[ed] whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors."

446 F.3d at 1117 (emphasis added) (quoting United States v. Cunningham, 429 F.3d 673, 676 (7th Cir. 2005)).

Based on this language, Nunez-Carranza argues that Sanchez-Juarez required the sentencing court, in this case, to address expressly his argument for a below-guideline sentence and to explain explicitly on the record why the court rejected that argument. Based on subsequent Tenth Circuit case law applying Sanchez-Juarez, we disagree.

**c. The Tenth Circuit's application of Sanchez-Juarez**

After the Tenth Circuit decided Sanchez-Juarez in 2006, a number of defendants have made the same argument that Nunez-Carranza makes here. The Tenth Circuit, however, has consistently rejected that argument. In doing so, we

have clarified that Sanchez-Juarez does not require a sentencing court to address every argument a defendant asserts for a more lenient sentence. See United States v. Jarrillo-Luna, 478 F.3d 1226, 1229–30 (10th Cir. 2007), overruled on other grounds by United States v. Lopez-Macias, 661 F.3d 485, 489 (10th Cir. 2011). We explained:

> Properly understood, . . . [Sanchez-Juarez] merely stands for the proposition that a sentencing judge confronted with a nonfrivolous argument for leniency must somehow indicate that he or she did not "rest on the guidelines alone, but considered whether the guideline sentence actually conforms, in the circumstances, to the statutory [§ 3553(a)] factors." [446 F.3d] at 1117 (quoting United States v. Cunningham, 429 F.3d 673, 676 (7th Cir. 2005)) (internal modifications omitted) . . . . Accordingly, we have subsequently noted in an unpublished case that "[e]xplaining why, in light of the factors, the court rejected a defendant's arguments for a below-guidelines sentence is one way " the district court can show it considered the § 3553(a) factors. United States v. Vaca–Perez, 178 Fed. Appx. 841, 843 (10th Cir. 2006) [(unpublished)] (emphasis added).
>
> We have never held, however, that the district court must list the reasons why it could have chosen a different sentence and then explain why it rejected them. As noted, the purpose of requiring a statement of reasons is to facilitate meaningful appellate review of the district court's determination that the given sentence is reasonable. Sanchez–Juarez, 446 F.3d at 1116 . . . . The fact that one sentence is reasonable does not, however, indicate that all other possible sentences are unreasonable. Indeed, a range of possible sentences might be upheld as reasonable on appeal. Thus, the district court is not required to convince us that all other sentences are unreasonable or even that the sentence chosen is the best of the reasonable sentences. To affirm, we must simply be satisfied that the chosen sentence, standing alone, is reasonable. Booker, 543 U.S. at 261. Lest any doubt remain about the meaning of Sanchez–Juarez, we hold that a district court's duty to explain why it chose the given sentence does not also require it to explain why it decided against a different sentence.

Jarrillo-Luna, 478 F.3d at 1229–30 (footnote omitted); see also United States v. Algarate-Valencia, 550 F.3d 1238, 1244 (10th Cir. 2008) (explaining that "Sanchez-Juarez does not require a sentencing judge to address explicitly all of a defendant's arguments"; the sentencing judge need "only ' . . . somehow indicate that he or she did not rest on the guidelines alone'" (quoting Jarrillo-Luna, 478 F.3d at 1230)).

In sum,

> if the defendant's sentence is within the applicable Guidelines range, the district court may satisfy its obligation to explain its reasons for rejecting the defendant's arguments for a below-Guidelines sentence by "entertain[ing] [the defendant's] . . . arguments," United States v. Ruiz–Terrazas, 477 F.3d 1196, 1202–03 & n.4 (10th Cir. 2007) (emphasis added), and then "somehow indicat[ing] that [it] did not rest on the guidelines alone, but considered whether the guideline sentence actually conforms, in the circumstances, to the [18 U.S.C. § 3553(a)] statutory factors," United States v. Martinez–Barragan, 545 F.3d 894, 903 (10th Cir. 2008) (second alteration in original) (internal quotation marks omitted). Such a "functional rejection" of a defendant's arguments—as opposed to an explicit rejection—is entirely proper. Martinez–Barragan, 545 F.3d at 903 (internal quotation marks omitted).

United States v. Wireman, 849 F.3d 956, 958–59 (10th Cir. 2017).[5]

[5] Nunez-Carranza argues that this court's later cases conflict with Sanchez-Juarez and, because it was decided earlier, Sanchez-Juarez controls. See generally United States v. Suggs, 998 F.3d 1125, 1137 (10th Cir. 2021) ("In cases of conflicting circuit precedent our court follows earlier, settled precedent over a subsequent deviation therefrom." (quoting United States v. Sabillon-Umana, 772 F.3d 1328, 1334 n.1 (10th Cir. 2014))). But this is not a situation where different Tenth Circuit panels decided the same question in different ways. See Sabillon-Umana, 772 F.3d at 1334 n.1. Instead, the later cases relevant here—a significant body of authority—expressly recognized that Sanchez-Juarez was the law of the circuit; applied it; and in doing so interpreted, explained and clarified Sanchez-Juarez. See United States v. Hargrove, 911 F.3d 1306, 1329 n.13 (10th Cir. 2019) (noting stare decisis requires later court to recognize earlier precedent and harmonize its decision with that earlier case law).

Synthesizing our precedent, we will uphold a sentencing court's decision to reject a defendant's non-frivolous request for a downward variance if we can determine from the record that the sentencing court 1) entertained the defendant's argument for a downward variance; 2) considered the 18 U.S.C. § 3553(a) sentencing factors, which include the calculation of the advisory sentencing range under the guidelines; and 3) concluded that a within-guideline sentence is appropriate in light of the § 3553(a) factors. As explained next, the sentencing record in this case satisfies those three requirements.

**2. Applying this governing law to Nunez-Carranza's case**

Although the sentencing court here did not expressly state why it rejected Nunez-Carranza's argument for a below-guideline sentence, the court adequately complied with its obligations to explain the within-guideline sentence it imposed. The district court clearly treated the guidelines as advisory and knew it could impose a sentence below the advisory guideline range. The court "entertained" Nunez-Carranza's argument for a below-Guideline sentence. See Wireman, 849 F.3d at 958–59. In addition, the court indicated its understanding that if it did not count one of Nunez-Carranza's prior convictions or groups of convictions, his criminal history category and resulting advisory guideline range would be lowered.

Moreover, it is clear from the sentencing proceeding that the district court's sentencing decision "did not rest on the guidelines alone, but considered whether the

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There is here no conflict that requires us to reject or overrule a significant body of cases expressly applying Sanchez-Juarez.

guideline sentence actually conforms, in the circumstances, to the [18 U.S.C. § 3553(a)] statutory factors." Id. (quoting Martinez-Barragan, 545 F.3d at 903). The district court stated that it considered the § 3553(a) factors. See Chavez-Calderon, 494 F.3d at 1269. The court further stated that it had considered the PSR, which itself analyzed the § 3553(a) factors before recommending a within-guideline sentence. See Traxler, 477 F.3d at 1250.

Furthermore, the sentencing court's stated concerns, and the discussion during sentencing between the parties and the court, implicated several of the § 3553(a) factors. For example, the sentencing court several times expressed its concern with Nunez-Carranza's extensive and continuing criminal history and his ongoing pattern of quickly and unlawfully returning to the United States each time he was removed. That concern implicated, among others, Nunez-Carranza's history and characteristics (§ 3553(a)(1)), as well as the need for a sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public (§ 3553(a)(2)(A), (B), and (C)). Although the sentencing court did not explicitly identify the specific subsections of § 3553(a) that it considered, the court was not required to do so. See Martinez-Barragan, 545 F.3d at 903. It was sufficient if the facts and circumstances the district court considered were plainly relevant to many of the § 3553(a) factors. See id. They were.[6]

[6] Having reviewed the PSR and the sentencing transcript, we disagree with Nunez-Carranza's characterization of the district court as "unfamiliar with the actual circumstances of this case and . . . ill-equipped to weigh those circumstances under the rubric created by [18 U.S.C.] § 3553(a)" (Aplt Br. 10). Nunez-Carranza bases

The sentencing court, therefore, met its obligation of adequately explaining why it imposed a sentence at the bottom of the advisory guideline range and in the process inevitably rejecting Nunez-Carranza's request for a downward variance. See United States v. Reyes-Alfonso, 653 F.3d 1137, 1140–41, 1145 (10th Cir. 2011). We, therefore, conclude that the district court did not err by failing to explain adequately why it imposed a within-guideline sentence instead of the below-guideline sentence Nunez-Carranza requested.

**B. Even if we could say that the district court erred, Nunez-Carranza has failed to establish the remaining requirements for relief under the plain-error analysis.**

Even if the sentencing court erred by failing to explain adequately why it rejected Nunez-Carranza's request for a downward variance (which it did not), Nunez-Carranza has failed to establish the remaining requirements for plain-error relief. Briefly, to meet the second requirement—that the error was plain—Nunez-Carranza must show that any error was "clear or obvious under current law."

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this characterization of the district court on two misstatements the court made during sentencing: 1) In asserting it might vary downward because Nunez-Carranza's 2003 drug convictions involved marijuana, the court was initially unaware that those convictions also included Nunez-Carranza's possession of methamphetamine for sale. That was clarified during sentencing and led the court to decide not to vary downward. 2) In response to Nunez-Carranza's explanation that he unlawfully returned to the United States and committed additional crimes when he was young, the court asked him about the "convictions" he incurred in his 40s, when in fact he had only one conviction, for possessing drugs in prison, at age 42. Even if the sentencing court initially misstated that Nunez-Carranza had multiple convictions in his forties, the court immediately identified the single conviction he had at age 42. These two misstatements, then, were each corrected at the sentencing hearing. These misstatements do not indicate that the sentencing court was unfamiliar with the actual circumstances of Nunez-Carranza's case.

United States v. Griffith, 65 F.4th 1216, 1218 (10th Cir. 2023) (quoting United States v. Rosales-Miranda, 755 F.3d 1253, 1258 (10th Cir. 2014)), petition for cert. filed, (U.S. July 14, 2023) (No. 23-5105). In light of the significant case law applying Sanchez-Juarez contrary to Nunez-Carranza's interpretation, even if the district court erred, such an error was not clear and obvious under current law.

Furthermore, Nunez-Carranza has failed to meet the third plain-error showing—that plain error affected his substantial rights. See Leib, 57 F.4th at 1128.[7] At the third inquiry, Nunez-Carranza must show that, but for the error, there is a reasonable probability that the outcome of the proceeding would have been different. See United States v. Booker, 63 F.4th 1254, 1262 (10th Cir. 2023). Nunez-Carranza

[7] Nunez-Carranza asserts that, because the procedural error at issue here is "structural," he need not establish either the third or fourth plain-error requirements. See United States v. Trujillo, 960 F.3d 1196, 1201–02 (10th Cir. 2020) (noting that, when plain error is structural, an appellant need not show prejudice as is otherwise required under the third plain-error inquiry). We need not definitively address that argument because, even if that were so, Nunez-Carranza has failed to establish the first two requirements—plain error. But Nunez-Carranza has not made a persuasive argument that the error he asserts in this case rises to the level of structural error. The Supreme Court has identified structural error "only in a very limited class of cases," id. at 1205 (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)), like when a criminal defendant is deprived of counsel or a jury in a criminal case is not instructed properly on reasonable doubt, see id. (citing cases). Nunez-Carranza cites no case holding that the failure to explain a sentence adequately amounts to structural error.

In his reply brief, Nunez-Carranza relies on United States v. Clark, 981 F.3d 1154, 1167–71 (10th Cir. 2020). Clark, however, is inapposite. Clark addressed the unusual situation where, because the federal offense for which the defendant was sentenced was actually a state-law offense that had occurred in Indian Country, there was no applicable sentencing guideline provision and, thus, no advisory guideline sentencing range. 981 F.3d at 1169.

contends that, had the district court better explained why it rejected his request for a downward variance, the court would have ultimately decided to impose a below-guideline sentence. See Ruiz-Terrazas, 477 F.3d at 1203. But there is no evidence that that is the case.

Because Nunez-Carranza has failed to establish the first three requirements for plain-error relief, this court lacks discretion to grant him the relief he seeks. Thus, we do not get to the fourth plain-error inquiry. Although if we did, nothing in this case suggests that the district court's failure to explain explicitly why it rejected his request for a below-guideline sentence had a serious effect on the fairness, integrity or public reputation of judicial proceedings. See Leib, 57 F.4th at 1128.

## IV. CONCLUSION

In sum, Nunez-Carranza has failed to establish that the sentencing court erred in explaining why it rejected his request for a below-guideline sentence and, instead, imposed a sentence at the bottom of his advisory guideline range. We, therefore, AFFIRM his sentence.