IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee, vs. CYNTHIA LEON MONTOYA, Defendant and Appellant.	Court of Appeal No. 21-50129 District Court No. 20-cr-02914-LAB

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Honorable Larry Alan Burns, Judge

APPELLANT'S PETITION FOR REHEARING EN BANC

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Defendant-Appellant Cynthia Leon Montoya ("Ms. Montoya"), respectfully submits this petition for rehearing en banc to rehear this Court's published opinion issued on September 13, 2022. *See* Fed. R. App. P. 35 & 40. As noted in Judge Forrest's concurrence, rehearing en banc is necessary to resolve an inter-circuit conflict. *See* Slip. Op. at 20-22.[1]

[1] "Slip. Op." refers to this Court's published opinion, issued on

INTRODUCTION

In sentencing Ms. Montoya for importation of cocaine and methamphetamine, the district court imposed thirteen discretionary conditions of supervised release, labeled "standard conditions."[2] The conditions include numerous restrictions on Ms. Montoya's liberty, restricting various constitutional rights, such as the right to travel, freedom of association, and the right to be free of unreasonable searches and seizures. *See* ER 5. The district court, however, did not reference these conditions at Ms. Montoya's sentencing hearing or provide Ms. Montoya an opportunity to allocute with regard to these discretionary conditions. Rather, the district court imposed the thirteen conditions in its judgment and commitment order.

Ms. Montoya appealed her convictions and sentence to this Court arguing on appeal, *inter alia*, that she was denied the right to allocute and the right to be present at sentencing when the district court imposed these discretionary conditions of supervised release. In support of her argument, Ms. Montoya relied on published opinions

September 13, 2022. "ER" refers to Ms. Montoya's excerpts of record. A copy of this Court's published pinion is included in the Appendix.

[2] The conditions are apparently a reference to the standard discretionary conditions in U.S.S.G. § 5D1.1(c). A copy of the Guideline is included in the Appendix.

from the Fourth, Fifth, and Seventh Circuits, holding that a district court must pronounce discretionary conditions of supervised release at the sentencing hearing. *See United States v. Rogers*, 961 F.3d 291, 296 (4th Cir. 2020) (holding that district courts must pronounce discretionary conditions of supervised release at sentencing); *United States v. Diggles*, 957 F.3d 551, 559 (5th Cir. 2020) (en banc) (same); *United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019) (same). A three judge panel of this Court (Judges Ikuta, Lee, and Forrest) rejected Ms. Montoya's argument in a published opinion. *See* Slip. Op. at 11-14. Specifically, the panel relied on *United States v. Napier*, 463 F.3d 1040 (9th Cir. 2006), concluding that, under *Napier*, a district court need not announce standard conditions of supervised release at the sentencing hearing. *See* Slip. Op. at 11-14.

Judge Forrest concurred in the judgment, but expressed her view that Ms. Montoya's case should be reheard en banc, to resolve a conflict between this Court and the Fourth, Fifth, and Seventh Circuits. *See* Slip. Op. at 22. In Judge Forrest's view, *Napier* was "wrongly decided." Slip. Op. at 20. The better approach – as explained by Judge Forrest in her concurrence – is for this Court to "join the Fourth, Fifth, and Seventh Circuits in holding that all

discretionary conditions, even those labeled 'standard' by the Sentencing Guidelines, must be orally pronounced to comply with a defendant's right to be present at sentencing." Slip. Op. at 20, 22.

ARGUMENT

I. Rehearing En Banc Is Necessary To Resolve A Conflict Between This Court And The Fourth, Fifth, Seventh, And D.C. Circuits

> "We therefore reject the byzantine distinctions we have drawn between standard, mandatory, standard-but-listed-in-the-judgment-as-special, 'true' special, and not-really-special conditions when it comes to pronouncement . . . . If a condition is discretionary, the court must pronounce it to allow for an objection."
>
> --*United States* v. *Diggles*, 957 F.3d 551, 559 (5th Cir. 2020) (en banc)

Relying on *Napier*, 463 F.3d 1040, the panel majority concluded that the district court was not required to pronounce standard conditions of supervised release at sentencing. *See* Slip. Op. at 11-14. More specifically, the majority opinion concluded that standard conditions need not be pronounced because the standard conditions are "'implicit in an oral sentence imposing supervised release'" and are "'necessarily included'" under *Napier*. Slip. Op. at 13 (quoting *Napier*, 463 F.3d at 1043).

As discussed below, rehearing en banc is warranted to bring this Circuit's precedents in line with the Fourth, Fifth, Seventh,

and D.C. Circuits, which correctly recognize that standard conditions – which are discretionary – must be pronounced at sentencing. Doing so comports with a defendant's right to be present at sentencing and provides the defendant with an opportunity to speak as to the conditions.

A. Relevant Statutory And Legal Framework

With the exception of several statutorily mandated conditions of supervised release listed in 18 U.S.C. § 3583(d), the district court has wide discretion in imposing conditions of supervised release. *See United States v. Napulou*, 593 F.3d 1041, 1044 (9th Cir. 2010) (discussing district court's discretion in imposing terms of supervised release). "In determining the conditions to be imposed, however, the court must consider certain factors set forth in 18 U.S.C. § 3553(a), including 'the nature and circumstances of the offense and the history and characteristics of the defendant,' and the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence, to protect the public, and to encourage rehabilitation." *Napulou*, 593 F.3d at 1044 (quoting 18 U.S.C. § 3553(a)); *see also* 18 U.S.C. § 3583(d)(1)-(3) (listing factors to be considered in imposing terms of

supervised release). Among the discretionary sentencing options that a district court has is the imposition of thirteen "standard" conditions of supervised release listed in the Sentencing Guidelines. *See* U.S.S.G. § 5D1.1(c).

"The district court's discretion is further curtailed by 18 U.S.C. § 3583(d), which provides that any condition must: (1) be reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) involve no greater deprivation of liberty than is reasonably necessary to achieve those goals; and (3) be consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)." *Id*. "The government bears the burden of demonstrating that these statutory standards are met." *Id*.

A criminal defendant has both a statutory and constitutional right to be present at sentencing. *See United States v. Reyes*, 764 F.3d 1184, 1188-89 (9th Cir. 2014). Specifically, Federal Rule of Criminal Procedure 43 requires a defendant's presence at sentencing. *See* Fed. R. Crim. P. 43(a)(3). For constitutional purposes, the Supreme Court has recognized that sentencing is a "critical stage" of the proceeding. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977). This Court has

held, however, that the defendant's rights under Rule 43 are broader than those embodied in the constitution. *See Reyes*, 764 F.3d at 1189 ("[T]he scope of Rule 43 is broader than the scope of the constitutional right to be present.").

B. The Fourth, Fifth, Seventh, and D.C. Circuits Correctly Recognize That The Defendant's Right to Be Present At Sentencing, As Guaranteed By The Constitution And Federal Rules Of Criminal Procedure, Mandates Pronouncement Of Standard Conditions Of Supervised Release

The Fourth, Fifth, Seventh, and D.C. Circuits have held that standard discretionary conditions of supervised release must be pronounced at sentencing. At its core, this obligation flows from "a defendant's right to be present at sentencing," as guaranteed by Rule 43 and the constitution. *Diggles*, 957 F.3d at 560; *see also Rogers*, 961 F.3d at 296 ("This conclusion flows naturally from a fundamental precept. A defendant has the right to be present when he is sentenced.") (citing Fed. R. Crim. P. 43(a)(3)). Pronouncement of standard conditions is required because "[i]ncluding a sentence in the written judgment that the judge never mentioned when the defendant was in the courtroom is tantamount to sentencing the defendant *in absentia*." *Diggles*, 957 F.3d at 557 (internal citation and quotation marks omitted). Discretionary conditions of supervised release, such

as the "standard" conditions listed in the Guidelines may only be imposed "after an individualized assessment indicates that they are justified in light of the statutory factors." *Rogers*, 961 F.3d at 297. Accordingly, pronouncement of the conditions ensures that the defendant has an opportunity to speak as to the conditions and that they are appropriately imposed. *See id*. ("We therefore cannot assume that any set of discretionary conditions—even those categorized as 'standard' by the Guidelines—will be applied to every defendant placed on supervised release, regardless of conduct or circumstances.").

In *Diggles*, the Fifth Circuit sitting en banc addressed whether standard conditions of supervised release must be pronounced at the sentencing hearing. *Diggles*, 957 F.3d at 555-56. At the outset, the Court noted that the Due Process Clause and Rule 43 guarantee the right to be present at sentencing. *Id*. at 557-58. As the Court explained, due process requires the defendant's presence at all "critical stages," which includes sentencing hearings. *Id*. at 558. The due process right to presence "'turns on whether a defendant's presence has a relation, reasonably substantial, to the fullnesss of his opportunity to defend against the charge.'" *Diggles*, 957 F.3d at 558

(quoting *Snyder v. Massachussetts*, 291 U.S. 97 (1934)). The Court then reasoned that pronouncement of supervised release conditions is required whenever they are discretionary to give the defendant "sufficient 'opportunity to defend.'" *Diggles*, 957 F.3d at 558 (quoting *Snyder*, 291 U.S. at 105). This is so, the Court explained, because when a condition is discretionary, "the defendant can dispute whether it is necessary or what form it should take." *Diggles*, 957 F.3d at 558. Because standard conditions of supervised release are discretionary, they must be pronounced at sentencing. *See id*. at 558-59.

In reaching its holding, the Court created a "bright line" rule: if a condition is discretionary, it must be pronounced at sentencing. *See id*. at 558 ("Having the pronouncement requirement depend on whether a condition is discretionary under section 3583(d) is a bright-line rule that tracks the defendant's right to be present at sentencing."). Thus, the Court rejected "byzantine distinctions" between "standard, mandatory, standard-but-listed-in-the-judgment-as-special, 'true' special, and not-really-special conditions when it comes to pronouncement . . . . If a condition is required, making an objection futile, the court need not pronounce it. If a condition is

discretionary, the court must pronounce it to allow for an objection." *Diggles*, 957 F.3d at 559.

Similarly, in *Rogers*, the Fourth Circuit considered whether the district court was required to pronounce standard conditions of supervised release at sentencing. *Rogers*, 961 F.3d at 296. Like the Fifth Circuit, the Fourth Circuit in *Rogers* premised its discussion on a defendant's right to be present at sentencing. As the Court explained, "[a] defendant has the right to be present when he is sentenced. In order to protect that right, we require a district court to orally pronounce a defendant's sentence in the defendant's physical presence." *Id*. (internal citation omitted). The Court concluded that pronouncement of mandatory conditions at sentencing is not required because it "would not provide the customary 'opportunity to defend' against a contemplated sentence or condition: 'When a condition is mandatory, there is little a defendant can do to defend against it.'" *Id*. at 297 (quoting *Diggles*, 957 F.3d at 558). But "[d]iscretionary conditions are different." *Id*. at 297. The Court noted that discretionary conditions may be imposed only if the district court finds they "'reasonably relate'" to certain sentencing factors under 18 U.S.C. § 3553(a). *Id*. (quoting 18 U.S.C. § 3583(d)). Accordingly,

the Fourth Circuit concluded that pronouncement of standard conditions of supervised release – which are discretionary – is required. *Id*. Failure to do so "will leave defendants without their best chance to oppose supervised-release conditions that may cause them unique harms and thus directly implicate their right to be present at sentencing." *Id*. at 298.

In *Matthews*, the D.C. Circuit recently addressed whether district courts are required to pronounce standard conditions of supervised release at sentencing. *See United States v. Matthews*, No. 22-3021 (D.C. Cir. Sep. 6, 2022), at 5-9. Like the Fourth and Fifth Circuits, the Court premised its discussion on the right to be present at sentencing. *Id*. at 5. The Court explained that "[c]riminal defendants have a right to be physically present at sentencing, which is grounded in the Fifth Amendment and codified in Federal Rule of Criminal Procedure 43(a)(3)." *Id*. "A district court must therefore orally pronounce any sentence within the defendant's presence." *Id*. at 6. The Court held that, because standard conditions of supervised release are discretionary, they must be pronounced at sentencing. *Id*. at 7-8. In reaching this holding, the Court explained that the conditions can only be imposed after making an "individualized assessment" that the

conditions are "'reasonably related'" to various sentencing factors and involve "'no greater deprivation of liberty than is reasonably necessary.'" *Id*. at 8 (quoting 18 U.S.C. § 3583(d)). Accordingly, "the district court must consider whether [standard conditions] are warranted in the circumstances of each case, must allow the defendant an opportunity to contest them, and must orally pronounce them at sentencing." *Id*. at 8.

Finally, in *Anstice*, the Seventh Circuit also considered whether a district court must pronounce standard conditions of supervised release at sentencing. *Anstice*, 930 F.3d at 909-10. There, the district court included two standard conditions of supervised release in the judgment and commitment order that it did not reference at the sentencing hearing. *Id*. at 910. The Seventh Circuit found that the district court erred in not pronouncing these conditions because they were discretionary. *Id*. The Court explained that, "[a]s commonplace and sensible as these . . . conditions may be across federal sentences, Congress has not mandated their imposition." *Id*. Accordingly, "[i]f a district court does choose to impose them, they must be announced at sentencing." *Id*.

In sum, the vast majority of circuits to have addressed this issue have concluded that pronouncement of standard conditions of supervised release is mandated by the Constitution, Federal Rules of Criminal Procedure, and the statute governing supervised release.

II. This Court's Opinion In *Napier*, Which Was Decided A Mere One Year After The Guidelines Were Rendered Advisory, Was Wrongly Decided

As previously discussed, in support of its conclusion that the district court was not required to pronounce standard conditions of supervised release, the panel majority relied on *Napier*, 463 F.3d 1040. *See* Slip. Op. at 11-14. *Napier*, however, was decided a mere one year after the Sentencing Guidelines were rendered advisory, *see United States v. Booker*, 543 U.S. 220 (2005) (rendering Guidelines advisory), and, accordingly, relies on out-dated precedent. It should be overruled.

In *Napier*, this Court considered whether the district court erred in imposing several conditions of supervised release in the judgment and commitment order without referencing the conditions at sentencing. 463 F.3d at 1041-42. On appeal, the defendant argued that the district court erred in imposing six nonstandard conditions of supervised release not mentioned at the sentencing hearing. *Id*. at

1042. Although not challenged by the defendant, the *Napier* Court also discussed the district court's inclusion of standard conditions in the judgment and commitment order. *Id*. at 1042-43. Relying on a Second Circuit case decided when the Guidelines were still mandatory, the *Napier* Court found that district courts need not pronounce standard conditions of supervised release at sentencing. *Id*. at 1043 (citing *United States v. Truscello*, 168 F.3d 61, 62 (2d Cir. 1999)). Specifically, the *Napier* Court described standard conditions as "boilerplate," and reasoned that they need not be pronounced at sentencing because they are "implicit" and "necessarily included" in the sentence:

> Numbers of these conditions are mandatory under 18 U.S.C. § 3583(d) or recommended by the Guidelines as standard, boilerplate conditions of supervised release, and they are sufficiently detailed that many courts find it unnecessarily burdensome to recite them in full as part of the oral sentence. For that reason, imposition of these mandatory and standard conditions is deemed to be implicit in an oral sentence imposing supervised release. When those standard conditions are later set forth in a written judgment, the defendant has no reason to complain that he was not present at this part of his sentencing because his oral sentence necessarily included the standard conditions.

Id. at 1043 (internal citations omitted).

Ms. Montoya submits that *Napier* was wrongly decided and should be reconsidered en banc for three reasons.

First, *Napier* was decided a mere one year after the Guidelines were rendered advisory and accordingly, relies on out-dated precedent. Its sole citation to support its holding is a 1999 Second Circuit case, decided when the Guidelines were mandatory. *See id*. at 1043 (citing *Truscello*, 168 F.3d at 62). But *Booker's* holding in 2005, which rendered the Guidelines advisory, produced a sea-change in federal sentencing law. Post-*Booker*, district courts must carefully consider various factors under 18 U.S.C. §§ 3553(a) & 3583(d) before imposing conditions of supervised release. *See Napulou*, 593 F.3d at 1044. The Second Circuit case relied on by *Napier*, of course, treats the Sentencing Guidelines as mandatory, an error in and of itself in an Advisory Guidelines Regime. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (noting that it would be a "procedural error" for a district court "to treat the Guidelines as mandatory instead of advisory"). Indeed, it is difficult to see how a 1999 sentencing opinion could provide persuasive authority in an era in which the Guidelines are discretionary.

Moreover, because *Napier* was decided a mere one year after *Booker* was decided, it lacks any consideration of this Court's en banc precedents on the procedure to be followed under an Advisory

Guideline Regime. It could not consider *Carty*, 520 F.3d 984, and *United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012) (en banc), both of which clarify the procedure to be followed in an Advisory Guidelines System. It similarly could not consider the Supreme Court's significant post-*Booker* decisions, such as *Gall v. United States*, 552 U.S. 38 (2007) and *Rita v. United States*, 551 U.S. 38 (2007). Thus, the *Napier* Court could not consider the interplay between: (1) this Court's and the Supreme Court's pronouncements on the need to calculate the appropriate Guidelines Range and explain the extent of a variance with (2) the need to impose supervised release conditions that are appropriately tailored under 18 U.S.C. §§ 3553(a) & 3583(d).

Second, *Napier* does not distinguish between mandatory and standard conditions, but rather, uses these terms interchangeably. In concluding that standard conditions need not be pronounced, the Court explained that "imposition of these mandatory and standard conditions is deemed to be implicit in an oral sentence imposing supervised release." *Napier*, 463 F.3d at 1043. The distinction, however, between mandatory and standard conditions is significant, as standard conditions are discretionary. As the Fourth Circuit explained

in *Rogers*, "[w]e may—indeed must—assume that every oral sentence of supervised release imposes the conditions mandated by statute. But the same is not true of discretionary conditions. A district court may impose those conditions only after an individualized assessment indicates that they are justified in light of the statutory factors." *Rogers*, 961 F.3d at 297.

Finally, because the defendant in *Napier* did not challenge his standard conditions of supervised release, *Napier* lacks a full discussion of this issue. Rehearing en banc, with argument by both parties, is necessary to resolve this issue.

In sum, *Napier's* reliance on antiquated caselaw and summary analysis mandate rehearing en banc.

CONCLUSION

For the foregoing reasons, Ms. Montoya respectfully requests that this Court grant her petition.

Dated: September 26, 2022

Respectfully submitted,

/*s/Kent D. Young*
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Attorney for Appellant
Cynthia Leon Montoya

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. CYNTHIA LEON MONTOYA, *Defendant-Appellant.*	No. 21-50129 D.C. No. 3:20-cr-02914- LAB-1 OPINION

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted March 10, 2022
Pasadena, California

Filed September 13, 2022

Before: Sandra S. Ikuta, Kenneth K. Lee, and
Danielle J. Forrest, Circuit Judges.

Opinion by Judge Lee;
Concurrence by Judge Forrest

SUMMARY*

Criminal Law

The panel affirmed a criminal judgment in a case in which Cynthia Leon Montoya, who pleaded guilty to importing cocaine and methamphetamine, entered a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(B).

Montoya argued that she should be able to withdraw her guilty plea at the sentencing hearing because the district court "rejected" the non-binding sentencing recommendation under Rule 11(c)(1)(B). She asserted that the district court erred by not allowing her to withdraw her guilty plea because it supposedly treated her plea agreement as a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). Reviewing for plain error, the panel held that Montoya had no right to withdraw her plea. Explaining that the district court's use of "reject" in the context of a Rule 11(c)(1)(B) plea agreement has no legal effect, the panel wrote that the "rejection" of a recommended sentence under a Rule 11(c)(1)(B) agreement could logically mean only that the court rejected the recommendation itself, and the district court thus did not plainly err in not providing Montoya an opportunity to withdraw her plea. The panel wrote that Montoya was permitted to withdraw her guilty plea before sentencing only if she could show a fair and just reason for requesting the withdrawal, and that she has not done so.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Montoya argued that the district court erred by not orally announcing her standard conditions of supervised release at sentencing. Reviewing de novo, the panel held that the district court did not err. The panel explained that under *United States v. Napier*, 463 F.3d 1040 (9th Cir. 2006), the district court need *not* orally pronounce conditions that are mandatory under 18 U.S.C. § 3583(d) or recommended by the Sentencing Guidelines as "standard, boilerplate conditions of supervised release." The panel wrote that here the written judgment does not conflict with the oral pronouncement of the sentence, the court's oral sentence necessarily included the standard conditions, and the district court did not violate Montoya's right to be present when it imposed the standard conditions in the written judgment. The panel rejected Montoya's contention that the discussion of standard conditions in *Napier* was dicta. Recognizing that the *Napier* framework conflicts with three other circuits' analysis, the panel wrote that it cannot ignore circuit precedent even if it disagrees with it.

The panel held that Montoya's remaining arguments fail. The magistrate judge's failure to specifically mention a "jury" trial during the plea colloquy, as required by Federal Rule of Criminal Procedure 11(b)(1)(C), did not affect Montoya's substantial rights. The magistrate judge properly determined that Montoya was competent and that her guilty plea was voluntary. The district court properly considered and explained its reasons for rejecting Montoya's variance requests. The district court did not abuse its discretion by imposing a 100-month sentence.

Concurring in the judgment, Judge Forrest wrote separately to say that to the extent this court's decision in *United States v. Napier*, 463 F.3d 1040 (9th Cir. 2006), holds that any condition of supervised release that is categorized

as "standard" need not be orally pronounced as part of the judgment at sentencing, it was wrongly decided.

COUNSEL

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D. Benjamin Holley (argued), Assistant United States Attorney; Daniel E. Zipp, Chief, Appellate Section, Criminal Division; Randy S. Grossman, Acting United States Attorney; United States Attorney's Office, San Diego, California; for Plaintiff-Appellee.

OPINION

LEE, Circuit Judge:

After a short trip to Tijuana, Cynthia Leon Montoya headed back to the United States with her five young children in her minivan. But this was no family vacation or soccer mom jaunt. Montoya had strapped four bricks of cocaine to her back. And her 15-year-old son had packages of methamphetamine taped to him. U.S. Customs and Border Protection (CBP) agents discovered the cache of drugs, and Montoya ultimately pleaded guilty to importing cocaine and methamphetamine. While the district court sentenced her to 100 months' imprisonment—below the U.S. Sentencing Guidelines range—it refused to follow the parties' agreed-upon sentencing recommendation of 71 months.

Montoya now raises a panoply of challenges, including the novel arguments that (1) she should be able to withdraw her guilty plea at the sentencing hearing because the district court "rejected" the non-binding sentencing recommendation under Federal Rule of Criminal Procedure 11(c)(1)(B), and (2) the district court erred by not orally announcing her standard conditions of supervised release at sentencing. We reject Montoya's arguments and affirm.

BACKGROUND

In August 2020, Montoya—a single-mom of five children between the ages 5 and 15—drove to Tijuana with all her kids in tow. On her return trip, she approached the San Ysidro Port of Entry in San Diego. Unfortunately for Montoya, a CBP agent conducted a search, yielding 4.4 kilograms of cocaine strapped to her. The officer then conducted a search of her 15-year-old sitting in the

passenger seat and discovered that he had methamphetamine taped to him. All together, Montoya and her son were carrying about 20 pounds of drugs.

Montoya admitted that she had agreed to smuggle these drugs from Mexico for $4,000. She said she knew that drugs were placed on her minor son's back. She also admitted that she had successfully transported drugs across the border multiple times.

Although Montoya initially entered a plea of not guilty, she agreed to plead guilty to two counts of 21 U.S.C. §§ 952 and 960 for knowingly and intentionally importing 500 grams or more of methamphetamine and cocaine in violation of the statute. The written plea agreement provided that Montoya's sentence was "within the sole discretion of the sentencing judge who may impose the maximum sentence provided by the statute." *See* FED. R. CRIM. P. 11(c)(1)(B). The parties agreed to jointly request the Base Offense Level, Specific Offense Characteristics, and Adjustments and Departures, among other recommendations. In exchange, Montoya waived her right to appeal every aspect of the conviction and sentence, except that she could appeal her custodial sentence if it was greater than 71 months or she received ineffective assistance of counsel.

A magistrate judge held the change of plea hearing, and Montoya conveyed that she wanted to plead guilty. Throughout the proceeding, Montoya had help from an interpreter. The magistrate judge advised Montoya of her right to a "speedy and public trial," right to confront witnesses, and right against self-incrimination, and he explained the consequences of pleading guilty. Montoya acknowledged that she understood her rights and the consequence of pleading guilty.

The magistrate asked whether Montoya's plea was knowing and voluntary and free of force, threats, or undisclosed promises. She also questioned Montoya about her understanding of the proceedings, her level of education and proficiency in English, and any recent drug or alcohol use. Satisfied with Montoya's and her counsel's responses, the magistrate judge found that Montoya's plea was knowing, voluntary, and made with full understanding of the nature of the charge, her constitutional rights, and the consequences of her guilty plea.

At the sentencing hearing, the district court accepted Montoya's guilty plea and calculated Montoya's Sentencing Guidelines range as 135 to 168 months after reviewing the Presentence Report (PSR); Montoya's sentencing memorandum, requests for departure, psychological evaluation, and psychologist's report; the mitigation letters written by and for Montoya; the parties' sentencing summary charts; and the plea agreement. The court extensively questioned Montoya's counsel about the number of times Montoya crossed the border with drugs, the inconsistency between her post-arrest and presentence interviews, and details of her encounters with the drug traffickers. The court found that Montoya did not play a minor role, was not coerced into trafficking drugs, and was thus not entitled to an eight-level reduction to her Guidelines range.

Given the "very aggravated" facts—mainly Montoya's "complicity" in the "involv[ement]" of her children with drug traffickers—the court "reject[ed]" the joint sentencing recommendation in the plea agreement. It explained that the sentencing recommendation was "outrageous" and "unsupported" because Montoya "watch[ed] the architects of this drug importation scheme put almost five kilos,

10 pounds of drugs on [her] 15-year-old" and had imported drugs "several" times before. The court explained that "for whatever reasons the defendant may have to appeal, they're broadened to include all of those that are implicated by the Court's rejection of the plea agreement in this case."

The district court then imposed a below-Guidelines sentence of 100 months' imprisonment plus five years of supervised release, after considering the factors provided in 18 U.S.C. § 3553(a). It found that mitigating factors, including Montoya's mental health prognosis, justified a 35-month downward variance from the Guidelines. But the court would not give a larger downward variance because "[t]o do more would be antithetical, . . . with other important 3553 factors, including just punishment, deterrence, and promoting respect for the law." When explaining the terms of Montoya's supervised release, the court imposed only special conditions of supervisory release. The written judgment, however, also included "mandatory" conditions of supervised release under 18 U.S.C. § 3583(d) and "standard" conditions recommended by the Guidelines, *see* USSG § 5D1.3(c).

Montoya timely appeals the legality of her plea and sentence. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STANDARD OF REVIEW

When a defendant does not object below, we review for plain error. *United States v. Ferguson*, 8 F.4th 1143, 1145 (9th Cir. 2020). "To establish plain error, a defendant must show '(1) error, (2) that is plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of the judicial proceedings.'" *Id.* at 1145–46 (citation omitted). The third prong requires that

Montoya establish "a reasonable probability that, but for the error, [s]he would not have entered the plea." *Id.* at 1146 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)). We review the legality of Montoya's sentence de novo, *United States v. Napier*, 463 F.3d 1040, 1042 (9th Cir. 2006), and its reasonableness for abuse of discretion, *United States v. Carty*, 520 F.3d 984, 988 (9th Cir. 2008) (en banc).

ANALYSIS

I. Montoya could not withdraw her plea at the sentencing hearing.

Montoya entered a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(B) (known as a "type-B" agreement), which does *not* bind the district court. Montoya raises the novel argument that the district court erred by not allowing her to withdraw her guilty plea because it supposedly treated her plea agreement as binding on the court. *See* FED. R. CRIM. P. 11(c)(1)(C). And because the district court did not offer her an opportunity to withdraw her guilty plea, Montoya reasons that her convictions must be reversed. Montoya did not raise this issue below, so we review for plain error. *Ferguson*, 8 F.4th at 1145. We hold that Montoya had no right to withdraw her plea.

A type-B plea agreement provides that, if the defendant pleads guilty, the government will "recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply," though "such a recommendation or request does not bind the court." FED. R. CRIM. P. 11(c)(1)(B). Even when the parties make a joint recommendation for a sentence, the district court may still

reject the joint recommendation. *See United States v. Camarillo-Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001). Relevant here, "the defendant has *no right* to withdraw the plea if the court does not follow the recommendation or request." FED. R. CRIM. P. 11(c)(3)(B) (emphasis added); *see also* FED. R. CRIM. P. 11 advisory committee's note to 1979 amendment (a type-B plea is an "agreement to recommend" that need not be accepted or rejected because it "is discharged when the prosecutor performs as he agreed to do").

Because the district court noted that it "reject[ed]" Montoya's plea agreement, Montoya argues that it actually found the plea agreement to be a Rule 11(c)(1)(C) agreement (known as a "type-C" agreement). A type-C agreement—unlike a type-B agreement—requires the court to "give the defendant an opportunity to withdraw the plea" if it rejects the specific sentence or sentencing range agreed to by the parties. FED. R. CRIM. P. 11(c)(5)(B). In other words, Montoya argues that the district court had to treat the plea agreement as "binding" with the opportunity to withdraw it (*i.e.*, a type-C plea deal)—even though it was non-binding without the right to withdraw (*i.e.*, a type-B plea agreement)—because the district court purportedly "rejected" the plea deal as if it were binding.

But the district court's use of "reject" in the context of a type-B plea agreement has no legal effect. Simply put, a court cannot transform a non-binding type-B plea agreement (with no right to withdraw) into a binding type-C plea agreement (with the right to withdraw) just because it used the word "reject." The district court's "rejection" of a type-B plea agreement to a recommended sentence could logically mean only that the court rejected the recommendation itself. The district court thus did not

plainly err in not providing Montoya an opportunity to withdraw her plea. *See United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003) ("An error is plain if it is clear or obvious under current law . . . . An error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results.").

Montoya was permitted to withdraw her guilty plea before sentencing only if she could "show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2)(B); *see also United States v. Minasyan*, 4 F.4th 770, 778–79 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 928 (2022). She has not done so, and it is only after Montoya's sentencing that she argues the court had to offer her the opportunity to withdraw her guilty plea. We do not, however, permit defendants to withdraw their guilty pleas when they are merely unhappy with the bargain they struck. *See United States v. Briggs*, 623 F.3d 724, 728, 729 (9th Cir. 2010) (upholding denial of motion to withdraw plea where the defendant "only wanted to change his plea once he was face-to-face with the full consequences of his conduct").

II. The district court was not required to orally pronounce standard conditions of supervised release.

Montoya also challenges the district court's imposition of standard conditions of supervised release. She argues that the court erred by imposing standard conditions in a written judgment without orally pronouncing them at the sentencing hearing. That error, according to Montoya, violated her right to be present at the sentencing hearing and her right to

allocute at the sentencing hearing.[1] We review the legality of her sentence de novo, *Napier*, 463 F.3d at 1042, and hold that the district court did not err.[2]

The imposition of a sentence occurs at the sentencing hearing, so the district court must orally pronounce a sentence. *United States v. Aguirre*, 214 F.3d 1122, 1125 (9th Cir. 2000); FED. R. CRIM. P. 43(a)(3). If the district court orally pronounces an unambiguous sentence, the oral sentence controls over the written sentence when the two conflict. *Napier*, 463 F.3d at 1042; *United States v. Munoz-Dela Rosa*, 495 F.2d 253, 256 (9th Cir. 1974) (per curiam).

Under our precedent, the district court need *not* orally pronounce conditions that are mandatory under 18 U.S.C. § 3583(d) or recommended by the Guidelines as "standard, boilerplate conditions of supervised release." *Napier*, 463 F.3d at 1042–43; *see* USSG § 5D1.3(c). Instead, the court's imposition of mandatory and standard conditions is

[1] The right to allocution is not implicated here. That right requires the district court to give the parties the opportunity to speak. FED. R. CRIM. P. 32(i)(4)(A); *see also United States v. Gunning*, 401 F.3d 1145, 1147 (9th Cir. 2005). Montoya does not argue that the court barred her from speaking or presenting information to mitigate her sentence, so the court did not violate her right to allocute.

[2] The government argues that we should review Montoya's claim for either plain error or abuse of discretion. Montoya did not have a chance to object to the standard conditions, so plain-error review is not appropriate. *See United States v. Vega*, 545 F.3d 743, 747 (9th Cir. 2008); FED. R. CRIM. P. 51(b) ("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."). We also decline to review Montoya's claim for abuse of discretion. We use the abuse of discretion standard when we review the merits of nonstandard conditions and remand for resentencing. *Napier*, 463 F.3d at 1044. Neither situation is present here.

"implicit in an oral sentence imposing supervised release." *Id.* at 1043. So the court's failure to itemize the mandatory or standard conditions does not create a conflict with the written judgment. *Id.* If conditions are "neither mandatory nor standard," however, they are not implicit in the court's oral pronouncement. *Id.* The district court thus must orally pronounce "nonstandard" conditions. *Id.*

Here, the written judgment does not conflict with the oral pronouncement of the sentence. While the district court did not pronounce its imposition of Montoya's standard conditions, the court's oral sentence "necessarily included" them under *Napier*. *Id.* We do not hold that the district court's oral imposition of other conditions of supervised release unambiguously asserted that it intended to impose only those conditions. Thus, Montoya's sentence at the hearing was unambiguous, and the district court did not violate Montoya's right to be present when it imposed standard conditions in the written judgment.

Montoya contends that our discussion of standard conditions in *Napier* was dicta and asks us to adopt the framework of the Fourth, Fifth, and Seventh Circuits' recent decisions. *See United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019); *United States v. Diggles*, 957 F.3d 551, 557–59 (5th Cir. 2020) (en banc); *United States v. Rogers*, 961 F.3d 291, 297–98 (4th Cir. 2020). Those circuits distinguish between mandatory/required and discretionary conditions, rather than standard and nonstandard conditions, tying the distinction to 18 U.S.C. § 3583(d). *See Anstice*, 930 F.3d at 910; *Diggles*, 957 F.3d at 557–559; *Rogers*, 961 F.3d at 297–98. Because the district court has the discretion to impose standard conditions, those circuits require the court to orally pronounce them.

We are not, however, writing on a clean slate. In *Napier*, our analysis of standard conditions was vital to our reasoning in resolving the dispute over nonstandard conditions. *See* 463 F.3d at 1043. We held that the district court's oral judgment was "ambiguous" because the court "indicated that the written judgment would include conditions of supervised release not specified in the oral sentence." *Id.* Despite that ambiguity, we upheld the application of the standard conditions in the written judgment. *Id.* In reaching that conclusion, we explained the legal principle that standard conditions are "deemed to be implicit in an oral sentence imposing supervised release." *Id.* We supported this conclusion by reasoning that many conditions are "standard, boilerplate conditions of supervised release" recommended by the Sentencing Guidelines; that those recommended conditions "are sufficiently detailed that many courts find it unnecessarily burdensome to recite them in full as part of the oral sentence"; and that as a result, those standard conditions are implicit in an oral sentence of supervised release as long as they are set forth in a written judgment. *Id.* We then reasoned that because nonstandard conditions lack these characteristics, they "cannot be deemed to have been implicit in the oral imposition of supervised release." *Id.* Our analysis of standard conditions was thus necessary to our holding and has precedential authority.

We recognize that our current framework conflicts with three other circuits' analysis, and those other circuits' decisions may be easier to apply and perhaps more true to the statutory text. But we cannot ignore our precedent even if we disagree with it. While it is better practice for the district court to orally advise defendants of standard conditions of supervised release, the district court did not have to do so under our precedent. *Id.*

III. Montoya's remaining arguments fail.

A. The magistrate judge did not specifically mention a "jury" trial during the plea colloquy, but that error did not affect Montoya's substantial rights.

Before accepting a defendant's guilty plea, Federal Rule of Criminal Procedure Rule 11(b)(1) requires the district court to "inform the defendant of, and determine that the defendant understands," various rights and consequences during a personal address in open court. That includes the right to a jury trial. FED. R. CRIM. P. 11(b)(1)(C). Here, the magistrate judge informed Montoya of her right to a "speedy and public trial" during the plea colloquy, but she omitted the words "by jury." Montoya argues that she was prejudiced and that we should overturn her convictions. Because Montoya did not raise an objection at the plea colloquy, we review her challenges for plain error. *United States v. David*, 36 F.4th 1214, 1217 (9th Cir. 2022).

Under plain-error review, Montoya is not entitled to a reversal of her convictions. *See Ferguson*, 8 F.4th at 1145 (reaffirming that "a Rule 11 error doesn't automatically lead to reversal" and "a defendant must continue to show a Rule 11 violation's impact on substantial rights before we will undo a guilty plea"). She has not shown that, but for the error, she would have pleaded differently. *See Dominguez Benitez*, 542 U.S. at 76. In fact, on appeal, Montoya does not even contend that she would not have entered a guilty plea if the magistrate judge had explicitly told her about the right to a jury trial. *See United States v. Delgado-Ramos*, 635 F.3d 1237, 1241 (9th Cir. 2011) ("[B]ecause [the defendant] does not assert on appeal that he would not have entered the plea 'but for the [district court's alleged] error,' he has not demonstrated the 'probability of a different result'

and thus cannot show that the district court's action affected his 'substantial rights.'" (second alteration in original) (quoting *Dominguez Benitez*, 542 U.S. at 83)).

The record also contains evidence showing that Montoya knew she had a right to a jury trial. Montoya read and signed a plea agreement that informed her that she was giving up "a speedy and public trial by jury," and she later told the magistrate judge that she understood her plea agreement and did not have any questions about it. Montoya thus failed to show that her substantial rights were affected. *See United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008) ("Because [the defendant] knew the reasonable doubt standard applied, he cannot establish 'a reasonable probability that, but for the [Rule 11] error, he would not have entered the guilty plea.'" (second alteration in original) (citation omitted)).

B. The magistrate judge properly determined that Montoya was competent and that her guilty plea was voluntary.

Rule 11(b)(2) requires the district court to "determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)" before accepting a guilty plea. Relying on our decision in *United States v. Fuentes-Galvez*, Montoya contends that the magistrate judge violated Rule 11(b)(2) by failing to keep inquiring into her competence, given her mental health prognosis, limited English, and inexperience with the criminal justice system. 969 F.3d 912, 916–17 (9th Cir. 2020). Here, too, we disagree.

The facts in *Fuentes-Galvez* are a far cry from the ones before us. In that case, "we ruled that the magistrate's failure to 'engage in direct inquiries regarding force, threats, or

promises' or 'address competence to enter the plea' was a Rule 11 error 'in light of [the defendant's] significant mental challenges.'" *Ferguson*, 8 F.4th at 1146 (alteration in original) (quoting *Fuentes-Galvez*, 969 F.3d at 916–17). By contrast, the magistrate judge here asked whether Montoya's plea was knowing and voluntary and free of force, threats, or promises. She repeatedly asked Montoya whether she understood her constitutional rights and the consequences of pleading guilty. Montoya answered "yes" each time. The record also does not show that Montoya was incompetent to plead guilty or that she had a "unique susceptibility to coercion." *Id.* at 1147. To the contrary, she told the magistrate judge that she had completed high school and one year of university, could more or less fluently read English, and had not recently used drugs or alcohol. *Cf. Fuentes-Galvez*, 969 F.3d at 916–17 (explaining that the defendant had little schooling, a history of mental health disorders and substance abuse, spoke only Spanish, and was on several medications at his plea colloquy). Though Montoya was diagnosed with major depression after she pleaded guilty, nothing in the record suggests that her mental health prognosis impaired her ability to knowingly and voluntarily plead guilty. Montoya's plea was thus voluntary, and she failed to show a Rule 11(b)(2) error.

C. The district court properly considered and explained its reasons for rejecting Montoya's variance requests.

Montoya further argues that the district court erred when it "summarily rejected" her requested variances for imperfect duress and mental health conditions. Montoya did not object below, so we again review for plain error. *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009). We hold that the district court properly considered and

explained its reasons for rejecting Montoya's variance requests.

The district court is "required to explain the reasons for imposing a particular sentence." *Id.* at 1104. "[W]hen a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, [] the judge should normally explain why he accepts or rejects the party's position." *Carty*, 520 F.3d at 992–93. "The sentencing 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); *see also Carty*, 520 F.3d at 992. But the court "need not tick off each of the § 3553(a) factors to show that it has considered them." *Carty*, 520 F.3d at 992.

The record shows that the district court considered Montoya's arguments. The court reviewed all relevant documents in preparation for the hearing, and it acknowledged Montoya's diagnosis of major depression and recognized that Montoya had suffered physical and emotional abuse in the past. Before imposing its sentence, the court questioned Montoya's counsel about the number of times Montoya smuggled drugs across the border, the inconsistency between her post-arrest and presentence interviews, and the particulars of her encounters with the drug traffickers.

The court explained that it was not persuaded by Montoya's arguments and gave a reasoned basis for exercising its authority. *See Rita*, 551 U.S. at 356. It was not convinced that Montoya was coerced into trafficking drugs and found her claim of duress undermined by the promise of payment, inconsistencies in her story, and the lack of corroboration. The court also told Montoya why it

was granting only a 35-month downward variance from the low end of the Guidelines. The court thus did not err.

D. The district court did not abuse its discretion by imposing a 100-month sentence.

Finally, Montoya challenged the reasonableness of her sentence. She argues that it is substantively unreasonable because the district court allegedly glossed over her history and characteristics, including her lack of criminal history. We review the substantive reasonableness of her sentence for abuse of discretion. *Carty*, 520 F.3d at 988. "Reversal is not justified simply because this court thinks a different sentence is appropriate." *United States v. Laurienti*, 731 F.3d 967, 976 (9th Cir. 2013) (cleaned up). We "only vacate a sentence if the district court's decision not to impose a lesser sentence was 'illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Id.* (citation omitted).

Given the district court's broad discretion in imposing a sentence, it did not abuse its discretion. Montoya does not dispute that the district court accurately calculated her Guidelines range as 135 to 168 months. Nor does she argue that the district court treated the Guidelines as mandatory. In those circumstances, we have found that the district court erred. *See United States v. Bendtzen*, 542 F.3d 722, 728 (9th Cir. 2008). Instead, Montoya contests the district court's imposition of a below-Guidelines sentence that considered the § 3553 factors. While we may not necessarily agree with the sentence imposed, a below-Guidelines sentence will usually be reasonable. *See Bendtzen*, 542 F.3d at 729. Montoya thus fails to show how the court's downward variance of 35 months was so insufficient as to constitute an abuse of discretion or make her sentence substantively unreasonable.

CONCLUSION

The district court is **AFFIRMED**.

FORREST, Circuit Judge, concurring in the judgment:

I concur in full in the opinion. I write separately because to the extent our decision in *United States v. Napier*, 463 F.3d 1040, 1043 (9th Cir. 2006), holds that any condition of supervised release that is categorized as "standard" need not be orally pronounced as part of the judgment at sentencing, it was wrongly decided.

Criminal defendants have a right to be physically present at their sentencing. *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016). This right is express in Rule 43(a) of the Federal Rules of Criminal Procedure, and we have recognized that it also has constitutional origins. *See id.* (citing *Illinois v. Allen*, 397 U.S. 337, 338 (1970)). A sentence is imposed at the time that it is orally pronounced in open court. *Napier*, 463 F.3d at 1042; *United States v. Aguirre*, 214 F.3d 1122, 1125 (9th Cir. 2000). Therefore, it is well established that a court's written sentence is simply evidence of the sentence pronounced in court and, if there is a conflict between the two, the oral sentence controls. *Aguirre*, 214 F.3d at 1125.

In *Napier*, we explained that supervised release conditions are "implicit in an oral sentence imposing supervised release"—and therefore are not constitutionally required to be orally announced—when they are (1) mandated by statute or (2) "recommended by the [Sentencing] Guidelines as standard, boilerplate conditions of supervised release." *Id.* at 1042–43. We concluded that

these conditions are "necessarily included" in the defendant's sentence by operation of law. *Id.* at 1043.

While the Sentencing Guidelines classify supervised release conditions as either "mandatory," "discretionary," "standard," or "special," *see* USSG § 5D1.3, the statute governing imposition of supervised release conditions, 18 U.S.C. § 3583(d), distinguishes only between mandatory and discretionary conditions. It further dictates that a condition that is not mandated may be imposed only if it is (1) "reasonably related to the [section 3553 factors]," (2) "involves no greater deprivation of liberty than is reasonably necessary for the purposes [of section 3553]," and (3) "is consistent with any pertinent policy statements issued by the Sentencing Commission." 18 U.S.C. § 3583(d).

Napier correctly concluded that a defendant's right to be present at sentencing is not violated if *mandatory* conditions are not orally imposed. *Napier*, 463 F.3d at 1043. Mandatory conditions are required by law and thus are necessarily part of a defendant's sentence regardless of any objection that the defendant might raise. *United States v. Diggles*, 957 F.3d 551, 558 (5th Cir. 2020) ("When a condition is mandatory, there is little a defendant can do to defend against it."), *cert. denied*, 141 S. Ct. 825 (2020). But when a condition is *discretionary*—meaning the sentencing judge must exercise judgment in determining whether to impose the condition or not—a defendant must be given an opportunity to challenge whether the condition meets the section 3583(d) criteria. *United States v. Rogers*, 961 F.3d 291, 297–98 (4th Cir. 2020). A defendant is deprived of making such a challenge if the sentencing judge does not orally pronounce the discretionary condition giving the defendant notice that it will be imposed as part of the sentence. This is true

regardless of whether the Sentencing Guidelines classify the discretionary condition as "standard." That is, the only meaningful distinction for purposes of the right to be present at sentencing is whether a condition is mandatory versus discretionary, not standard versus special.

As such, I would join the Fourth, Fifth, and Seventh Circuits in holding that *all* discretionary conditions, even those labeled "standard" by the Sentencing Guidelines, must be orally pronounced to comply with a defendant's right to be present at sentencing. *See Rogers*, 961 F.3d at 296 ("[A]ll non-mandatory conditions of supervised release must be announced at a defendant's sentencing hearing."); *Diggles*, 957 F.3d at 558 ("If a condition is required, making an objection futile, the court need not pronounce it. If a condition is discretionary, the court must pronounce it to allow for an objection."); *United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019) ("As commonplace and sensible as these . . . [discretionary] conditions may be across federal sentences, Congress has not mandated their imposition. If a district court does choose to impose them, they must be announced at sentencing."). As the Fourth Circuit persuasively explained: "[C]onditions are mandated by statute, or they are not. And if they are not – if they instead are discretionary and authorized only after individualized assessment and consideration of § 3583(d)'s factors – then we cannot deem them 'implicit' in every oral sentence imposing a term of supervised release, no matter the particular circumstances." *Rogers*, 961 F.3d at 299 (internal quotation marks and citations omitted). Accordingly, we should revisit en banc *Napier*'s holding that standard conditions need not be orally pronounced as part of sentencing.

APPENDIX B

U.S.S.G. § 5D1.1(c)

The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

1. The defendant must report to the probation office in the federal judicial district where they are authorized to reside within 72 hours of their release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.

3. The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.

4. The defendant must answer truthfully the questions asked by their probation officer.

5. The defendant must live at a place approved by the probation officer. If the defendant plans to change where they live or anything about their living arrangements (such as the people living with the defendant), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. The defendant must allow the probation officer to visit them at any time at their home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of their supervision that he or she observes in plain view.

7. The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant

plans to change where the defendant works or anything about their work (such as their position or their job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. The defendant must not communicate or interact with someone they know is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, they must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.

10. The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant notified the person about the risk.

13. The defendant must follow the instructions of the probation officer related to the conditions of supervision.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

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9th Cir. Case Number(s) 21-50129

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◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 3,156.

(Petitions and responses must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/Kent D. Young **Date** September 26, 2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

No. 21-50129

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CYNTHIA LEON MONTOYA,
DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Southern District of California 20CR2914-LAB

UNITED STATES' RESPONSE TO PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

This case should not be heard *en banc* because doing so is neither "necessary to secure or maintain uniformity of the court's decisions" nor does "the proceeding involve[ ] a question of exceptional importance." Fed. R. App. Proc. 35(a). Montoya does not allege a lack of uniformity, but instead says rehearing *en banc* is necessary to align this Circuit's supervised-release law with that of other Circuits. But Montoya overstates the degree of conflict and fails to show the practical significance of any conflict.

The practical difference between Circuits is minimal. Even those Circuits that require oral pronouncement of the standard conditions of supervised release do not require a district court to actually list those conditions. Instead, they define "oral pronouncement" narrowly, allowing references to a presentence report that mentions the conditions or even a brief comment that the sentence includes the standard conditions. That practice, recommended in *Napier*, is generally followed in this Circuit. And here, defense counsel reviewed the presentence report—which mentioned and recommended the standard conditions of supervised release—with Montoya. PSR ¶ 115; ER-42.

Even without specific oral mention of the conditions, then, Montoya (and other defendants like her) had notice and an opportunity to object, the purpose of the oral pronouncement rule. Moreover, requiring a full reading of the standard conditions—a requirement no Circuit has adopted—imposes significant time and attention costs on judges and litigants. Because this case does not provide an opportunity to secure intra-Circuit uniformity and is not of exceptional importance, hearing *en banc* is not warranted.

ARGUMENT

1. *Standard for* en banc *hearing*

Rehearing *en banc* "is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. Proc. 35(a). Proceedings of "exceptional importance" include decisions that "directly conflict[ ] with an existing opinion by another court of appeals and substantially affect[ ] a rule of national application in which there is an overriding need for national uniformity." Fed. R. App. Proc., Circuit Rule 35-1. Montoya says there is a Circuit split on this issue, but does not allege, let alone argue, any "overriding need for national uniformity."

2. *The issue is not one "of exceptional importance"*

This case does not involve "a question of exceptional importance." Fed. R. App. Proc. 35(a)(2). Though supervised release is imposed in many cases, the standard conditions are largely ministerial, requiring, for example, that the defendant "report to the probation office in the federal judicial district where he or she is authorized to reside," U.S.S.G § 5D1.3(c)(1), "answer truthfully the questions asked by the probation officer," § 5D1.3(c)(4), "notify the

probation officer within 72 hours" if "arrested or questioned by a law enforcement officer," § 5D1.3(c)(9), and "follow the instructions of the probation officer related to the conditions of supervision," § 5D1.3(c)(13).

The largely obvious nature of the conditions—and that they are "unnecessarily burdensome to recite," *United States v. Napier*, 463 F.3d 1040, 1043 (9th Cir. 2006)—is what led the Second and Ninth Circuits to declare them implicit boilerplate that need not be orally announced. *See United States v. Truscello*, 168 F.3d 61, 63 (2d Cir. 1999) ("[B]ecause the so-called 'standard conditions' imposed in this case are 'basic administrative requirement[s] essential to the functioning of the supervised release system,' they are almost uniformly imposed by the district courts and have become boilerplate.") (citation omitted); *Napier*, 463 F.3d at 1043 (referencing "standard, boilerplate conditions").

That precedent has not caused meaningful problems over the last sixteen years. Presentence Reports—including the one here, PSR ¶ 115—generally mention the mandatory and standard conditions of release, thereby putting defendants on notice of the conditions and allowing them the opportunity to object. And, pursuant to Fed. R. Crim. P. 32(a)(1), judges confirm that defense counsel has

reviewed the presentence report with the defendant. ER-42 ("The Court: A presentence report was prepared. I have reviewed it. [Defense counsel], have you gone over that with Ms. Montoya? [Defense counsel]: I certainly have, Your Honor."). It is thus no surprise that the written judgment contains those conditions.

Likewise, many judges, following *Napier*'s exhortation that the "the better practice [is] to advise the defendant orally, at least in summary fashion, of the standard conditions," 463 F.3d at 1043, reference the existence of the conditions during sentencing. That brief mention is sufficient even in those Circuits that require "oral pronouncement" of the standard conditions. *See United States v. Diggles*, 957 F.3d 551, 563 (5th Cir. 2020) (*en banc*) ("A sentencing court pronounces supervision conditions when it orally adopts a document recommending those conditions."); *United States v. Matthews*, 47 F.4th 851, 855 n.2 (D.C. Cir. 2022) ("[A] district court may satisfy the pronouncement requirement by referencing and adopting the conditions recommended in a presentence report or by simply saying that it is imposing the 'standard' conditions."); *United States v. Anstice*, 930 F.3d 907, 908 (7th Cir. 2019) (affirming imposition of conditions where the district court said only "I do adopt Condition Nos. 1 through 10 [the standard conditions], and

12 through 14 [the special conditions], as proposed and justified in the presentence report").

Even absent that brief comment here, Montoya had sufficient notice of, and opportunity to object to, the standard conditions of supervised release. The existence of supervised release conditions was mentioned in her plea agreement, ER-13, guilty-plea hearing, ER-32, the presentence report that she reviewed with counsel, PSR ¶ 115, ER-42, and in the Sentencing Guidelines that she reviewed with counsel, U.S.S.G. § 5D1.3(c), ER-32. That she would be subject to conditions of supervised release was not a surprise.

Further diminishing the practical importance of the question presented, Montoya has never challenged the applicability or substance of any of the standard conditions. *See* Appellant's Opening Brief 26–33. Nor did she contend that the court's written explanation for the standard conditions was inadequate. ER-7 ("These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition."). That is, even if remanded, the

district court could satisfy Montoya's objection simply by orally announcing it was imposing the standard conditions, with no further discussion or analysis.

Montoya also overstates the degree of conflict between *Napier* and the decisions of other Circuits. The Fifth Circuit's decision in *Diggles*, for example, involved special conditions, not standard conditions. 957 F.3d at 555–56. And the Fifth Circuit did not require district courts to articulate each condition at sentencing. Instead, it focused on whether the defendant had received "notice" of the conditions through a written document, such as a presentence report, and had been given "an opportunity to object" at sentencing. *Id.* at 560–61. The Court of Appeals found no error on the facts before it, because the presentence report had recommended the challenged conditions and the defendant had been given an opportunity to object when the district court adopted that recommendation, in general terms, at sentencing. *Id.* at 563. Similarly here, Montoya had adequate notice of the standard conditions and an opportunity to object at sentencing.

Montoya's reliance on *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020), and *United States v. Matthews*, 47 F.4th 851 (D.C. Cir.

2022), is likewise misplaced. Both cases involved a revocation re-sentencing hearing, with no plea agreement, Rule 11 plea colloquy, or presentence report. 961 F.3d at 294–95; 47 F.4th at 854–55. The defendants in *Rogers* and *Matthews* therefore did not receive the same degree of notice afforded to Montoya here.

Moreover, as discussed above, no Circuit requires a district court to orally list all the standard conditions. Indeed, the *en banc* Fifth Circuit rejected any requirement for "word-for-word recitation of each condition" because such a practice "may result in a 'robotic delivery' that has all the impact of the laundry list of warnings read during pharmaceutical ads." *Diggles*, 957 F.3d at 562 (quoting *United States v. Cabello*, 916 F.3d 543, 544–45 (5th Cir. 2019) (Higginbotham, J., concurring)). That would impose additional costs, "especially in our border districts where numerous defendants are often sentenced in a day," by "prolonging sentencings with requirements that do not benefit the parties," resulting in "less time for the sentencing court to devote to resolving disputed issues and deciding the critical questions of whether the defendant should go to prison and, if so, for how long." *Id. See also Matthews*, 47 F.4th at 855 n.2 ("We do not suggest that the district court must orally pronounce all discretionary conditions word-for-word … [A] district court may

satisfy the pronouncement requirement by … simply saying that it is imposing the 'standard' conditions.").

Accordingly, even if *Montoya*, by applying *Napier*, "conflicts with an existing opinion by another court of appeals," the practical difference is minimal and does not "substantially affect[ ] a rule of national application in which there is an overriding need for national uniformity." Fed. R. App. Proc., Circuit Rule 35-1. Because defendants generally, and Montoya specifically, are given notice of and an opportunity to object to the standard conditions of supervised release, and because those conditions are largely obvious and ministerial, this case does not present "a question of exceptional importance" necessitating *en banc* review. Fed. R. App. Proc. 35(a)(2).

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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