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

Kent D. Young (argued), Law Offices of Kent D. Young, San Diego, California, for Defendant-Appellant.

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.