No. 18-16

In the Supreme Court of the United States

LARONE FREDERICK ELIJAH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that an asserted error in the calculation of petitioner's advisory guidelines range was harmless, where the district court was aware of the alternative guidelines range advocated by petitioner, expressly stated that it would have imposed the same sentence regardless of the correct guidelines range, and discussed the 18 U.S.C. 3553(a) factors at length in imposing sentence.

TABLE OF CONTENTS

Page

Opinion below ... 1
Jurisdiction ... 1
Statement ... 1
Argument ... 6
Conclusion ... 12

TABLE OF AUTHORITIES

Cases:

Bonilla v. *United States*, 555 U.S. 1105 (2009) ... 6
Effron v. *United States*, 565 U.S. 835 (2011) ... 6
Gall v. *United States*, 552 U.S. 38 (2007) ... 6, 7
Mendez-Garcia v. *United States*, 556 U.S. 1131 (2009) ... 6
Molina-Martinez v. *United States*, 136 S. Ct. 1338 (2016) ... 8, 9
Monroy v. *United States*, 138 S. Ct. 1986 (2018) ... 6
Rea-Herrera v. *United States*, 557 U.S. 938 (2009) ... 6
Rosales-Mireles v. *United States*, 138 S. Ct. 1897 (2018) ... 8, 9
Savillon-Matute v. *United States*, 565 U.S. 964 (2011) ... 6
Shrader v. *United States*, 568 U.S. 1049 (2012) ... 6
United States v. *Abbas*, 560 F.3d 660 (7th Cir. 2009) ... 7
United States v. *Anderson*, 517 F.3d 953 (7th Cir. 2008) ... 7
United States v. *Johns*, 732 F.3d 736 (7th Cir. 2013) ... 10, 11
United States v. *Peña-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) ... 11
United States v. *Smalley*, 517 F.3d 208 (3d Cir. 2008) ... 10

Statutes and rule: Page

18 U.S.C. 3553(a) 4, 7, 11
21 U.S.C. 841(a)(1) 1, 2
Fed. R. Crim. P.:
Rule 52(a) 7, 9
Rule 52(b) 9

Miscellaneous:

United States Sentencing Guidelines:
§ 4B1.1 .... 2, 3, 5
§ 4B1.1(a) 2
§ 4B1.1(b) 2
§ 4B1.1, comment. (n.1) 3
§ 4B1.2(b) 2, 3

In the Supreme Court of the United States

No. 18-16

LARONE FREDERICK ELIJAH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 723 Fed. Appx. 191.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2018. A petition for rehearing was denied on April 3, 2018 (Pet. App. 40). The petition for a writ of certiorari was filed on July 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of possession with intent to distribute cocaine, heroin, and 3,4-methylenedioxy-N-ethylcathinone (MDEC), in violation of 21 U.S.C. 841(a)(1). Judgment 1. He was sentenced to 108 months

of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. In 2015, police officers received a report of a suspicious car parked in a residential neighborhood just outside of Greenville, North Carolina. C.A. App. 21-23, 56, 59-61. Two officers arrived on the scene and found petitioner passed out in the still-running vehicle. *Id.* at 22-23, 25, 27, 62. After one of the officers knocked on the driver-side window several times, petitioner woke up. *Id.* at 25-26, 39-40, 64, 88-89. The officers obtained petitioner's consent to search the car and found cocaine, heroin, MDEC, and drug paraphernalia inside. *Id.* at 32, 52, 70-71, 77-78, 91-92.

A federal grand jury in the Eastern District of North Carolina indicted petitioner on one count of possession with intent to distribute cocaine, heroin, and MDEC, in violation of 21 U.S.C. 841(a)(1). Indictment 1. Petitioner pleaded guilty. Judgment 1.

2. Applying the 2016 version of the Sentencing Guidelines, the Probation Office classified petitioner as a career offender under Sentencing Guidelines § 4B1.1. Presentence Investigation Report (PSR) ¶¶ 30, 58, 65. Under Section 4B1.1, a defendant is a "career offender" if (1) he was at least 18 years old at the time of the offense of conviction, (2) the offense of conviction is a felony "crime of violence" or "controlled substance offense," and (3) he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1(a). Section 4B1.2(b) defines a "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohib-

its the manufacture, import, export, distribution, or dispensing of a controlled substance * * * or the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense." *Id.* § 4B1.2(b); see *id.* § 4B1.1, comment. (n.1).

The Probation Office determined that petitioner had two prior felony convictions for a controlled substance offense, PSR ¶¶ 30, 65—namely, a 1997 North Carolina conviction for possession with intent to sell or deliver cocaine, PSR ¶ 16; and a 2007 federal conviction for possession with intent to distribute cocaine, heroin, and methylenedioxymenthamphetamine, PSR ¶ 23. The Probation Office accordingly classified petitioner as a career offender under Section 4B1.1(b) and assigned him an offense level of 32 and a criminal history category of VI. PSR ¶¶ 30, 65. It then applied a three-level decrease for acceptance of responsibility. PSR ¶¶ 66-67. Based on a total offense level of 29 and a criminal history category of VI, the Probation Office calculated an advisory guidelines range of 151 to 188 months of imprisonment. PSR ¶ 70.

Petitioner objected to classification as a career offender, arguing that his 1997 North Carolina drug conviction did not qualify as a felony conviction for a controlled substance offense. C.A. App. 251, 253-254. Petitioner contended that the state court had erred in calculating the applicable sentencing range for that conviction, and that if the court had not erred, the offense would not have been punishable by imprisonment for a term exceeding one year and thus would not have been a felony for purposes of Section 4B1.1. *Id.* at 4-5. Petitioner argued that, absent classification as a career offender and other asserted errors made by the Probation Office, see *id.* at 2-3, he should have been assigned an

advisory guidelines range of 10 to 16 months of imprisonment, *id.* at 6; see Pet. App. 21, 24, 25 (urging the district court to calculate an advisory guidelines range of 10 to 16 months).

3. The district court overruled petitioner's objection to classification as a career offender, explaining that petitioner could not collaterally attack his prior state conviction or sentence in a federal sentencing proceeding. Pet. App. 18-19. The court also adopted the Probation Office's calculation of an advisory guidelines range of 151 to 188 months. *Id.* at 26.

After hearing argument from both petitioner and the government on the 18 U.S.C. 3553(a) sentencing factors, Pet. App. 28-32, the district court granted a downward variance from the advisory guidelines range and imposed a sentence of 108 months of imprisonment, *id.* at 35-36. The court explained that it viewed that sentence as "sufficient but not greater than necessary to comply with the purposes set forth in the statute." *Id.* at 32; see *id.* at 35 ("[T]he sentence I'm going to impose is going to be sufficient but not greater than necessary, and I think it's going to be just punishment."). The court also explained its consideration of the Section 3553(a) sentencing factors. *Id.* at 32-35. The court emphasized, for example, that petitioner had pleaded guilty to a "serious offense." *Id.* at 33. The court also observed that while petitioner had committed many of his prior offenses as a "younger man," he had continued to engage in criminal activity even after getting married and having a daughter. *Id.* at 34. Citing the fact that petitioner has "had issues with drugs for a long time," *ibid.*, the court emphasized the need for a sentence that is "going to have an appropriate level of incapacitation and deterrence," *id.* at 35; see *id.* at 34 ("The Court has

taken into account the need to deter and to incapacitate."). The court explained, in particular, that the lower sentence requested by petitioner would not "be a sentence that would promote respect for the law." *Id.* at 35.

The district court stated that, while it believed that it had "properly calculated" the advisory guidelines range, "if it were to be determined that [it had] miscalculated th[at] range," it would "impose the same sentence as an alternative variant sentence." Pet. App. 37. The court emphasized that it found the sentence it had imposed to be "sufficient but not greater than necessary for [petitioner] in light of the totality of the record and [the court's] discussion of the 3553(a) factors." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-6.

On appeal, petitioner argued that the district court had erred in determining that his 1997 North Carolina drug conviction qualified as a felony conviction for a controlled substance offense under Section 4B1.1. Pet. C.A. Br. 28-29. The court of appeals determined that, "even assuming for the sake of argument that the district court erred in its Guidelines calculations, in light of the district court's alternative variant sentence, such error is harmless." Pet. App. 6.

In making that determination, the court of appeals observed that the district court had "explicitly stated that it would have imposed the same 108-month sentence even if it miscalculated [petitioner's] advisory Guidelines range." Pet. App. 5. The court of appeals also determined that petitioner's "sentence would be reasonable even if the Guidelines issues were decided in [petitioner's] favor." *Ibid.* The court found that "the district court [had] carefully reviewed the 18 U.S.C. § 3553(a) (2012) sentencing factors." *Ibid.* And the

court of appeals emphasized that the district court had "expressly rejected" petitioner's "argument for a 10- to 16-month sentence, finding that a 108-month sentence was sufficient, but not greater than necessary, to promote respect for the law and provide just punishment." *Id.* at 5-6.

ARGUMENT

Petitioner contends (Pet. 8-17) that the court of appeals erred in determining that an asserted error in the calculation of his advisory guidelines range was harmless. That contention lacks merit, and the court's decision does not conflict with any decision of this Court or another court of appeals. This Court has repeatedly denied petitions for writs of certiorari that have raised similar issues. See *Monroy* v. *United States*, 138 S. Ct. 1986 (2018) (No. 17-7024); *Shrader* v. *United States*, 568 U.S. 1049 (2012) (No. 12-5614); *Savillon-Matute* v. *United States*, 565 U.S. 964 (2011) (No. 11-5393); *Effron* v. *United States*, 565 U.S. 835 (2011) (No. 10-10397); *Rea-Herrera* v. *United States*, 557 U.S. 938 (2009) (No. 08-9181); *Mendez-Garcia* v. *United States*, 556 U.S. 1131 (2009) (No. 08-7726); *Bonilla* v. *United States*, 555 U.S. 1105 (2009) (No. 08-6668). The same result is warranted here.

1. The court of appeals correctly applied the principles of harmless-error review in determining that any error in the district court's calculation of petitioner's advisory guidelines range was harmless. Pet. App. 4-6.

a. In *Gall* v. *United States*, 552 U.S. 38 (2007), this Court stated that under the advisory Sentencing Guidelines, an appellate court reviewing a sentence, within or outside the guidelines range, must make sure that the sentencing court made no significant procedural error, such as by failing to calculate or incorrectly calculating

the guidelines range, treating the Guidelines as mandatory, failing to consider the sentencing factors set forth in 18 U.S.C. 3553(a), making clearly erroneous factual findings, or failing to explain the sentence. 552 U.S. at 51. The courts of appeals have consistently recognized that ordinary appellate principles of harmless-error review nonetheless apply, so that errors of the sort described in *Gall* do not automatically require a remand for resentencing. As the Seventh Circuit has explained,

> [a] finding of harmless error is only appropriate when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights (here—liberty). To prove harmless error, the government must be able to show that the Guidelines error "did not affect the district court's selection of the sentence imposed." [*United States* v. *Anderson*, 517 F.3d 953, 965 (7th Cir. 2008)] (quoting *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (applying harmless error pre-*Gall*)).

United States v. *Abbas*, 560 F.3d 660, 667 (2009); see Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

A sentencing court may confront a dispute over the application of the Sentencing Guidelines. When the court resolves that issue and imposes a sentence within the resulting advisory guidelines range, it may also explain that, had it resolved the disputed issue differently and arrived at a different advisory guidelines range, it would nonetheless have imposed the same sentence in light of the factors enumerated in 18 U.S.C. 3553(a). Under proper circumstances, that permits the reviewing court to affirm the sentence (applying harmless-

error principles) even if it disagrees with the sentencing court's resolution of the disputed guidelines issue.

Applying ordinary principles of harmless-error review to the circumstances of this case, the court of appeals correctly determined that any error in calculating petitioner's advisory guidelines range was harmless. Pet. App. 4-6. The district court expressly stated that it would have "impose[d] the same sentence" even "if it were to be determined that [it had] miscalculated the advisory guidelines range." *Id.* at 37. And to the extent that harmless-error review entails asking whether the court was aware of the alternative guidelines range advocated by the defendant, the record here satisfied that inquiry. Petitioner filed objections to the presentence investigation report contending that the correct guidelines range was "10-16 months," C.A. App. 255; petitioner reiterated that the correct guidelines range was "10 to 16" months at the sentencing hearing, Pet. App. 21, 24, 25; the court stated that it had "reviewed [petitioner's] objections," *id.* at 26, and "considered all [his] arguments" before imposing sentence, *id*. at 32; and it explained that a sentence in the guidelines range advocated by petitioner would fail to "promote respect for the law," *id.* at 35. The record thus demonstrates that the court was well aware of the advisory guidelines range that petitioner asserts should have applied when it stated that it would have imposed the same sentence regardless of the correct guidelines range.

b. Petitioner's suggestion (Pet. 10-12) that the court of appeals' decision is in tension with *Molina-Martinez* v. *United States*, 136 S. Ct. 1338 (2016), and *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897 (2018), is misplaced.

In *Molina-Martinez*, this Court recognized that when the "record" in a case shows that "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range," the reviewing court may determine that "a reasonable probability of prejudice does not exist" for purposes of plain-error review, "despite application of an erroneous Guidelines range." 136 S. Ct. at 1346; see *id*. at 1348 (indicating that a "full remand" for resentencing may be unnecessary when a reviewing court is able to determine that the sentencing court would have imposed the same sentence "absent the error"). Although *Molina-Martinez* concerned the requirements of plain-error review under Rule 52(b), the principle it recognized applies with equal force here, in the context of harmless-error review under Rule 52(a).

This Court's decision in *Rosales-Mireles* does not suggest otherwise. *Rosales-Mireles* concerned the circumstances under which an error may "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings" for purposes of plain-error review. 138 S. Ct. at 1906 (citation omitted). The Court in that case did not address the circumstances under which an error may affect the defendant's substantial rights.

2. Contrary to petitioner's contention (Pet. 15-16), the court of appeals' decision does not conflict with any decision of another court of appeals. To the extent that some formal differences exist in the articulated requirements for harmless-error review when a district court has offered an alternative sentencing determination, those differences in approach do not reflect any meaningful substantive disagreement about when an alternative sentence can render a guidelines-calculation error harmless. Petitioner has failed to identify any court of

appeals that would have declined to affirm the sentence imposed in this case under harmless-error review.

Petitioner errs in contending (Pet. 15) that the court of appeals' decision conflicts with the Third Circuit's decision in *United States* v. *Smalley*, 517 F.3d 208 (2008). In *Smalley*, the Third Circuit declined to find a guidelines-calculation error harmless where the district court "did not explicitly set forth an alternative Guidelines range" and "nothing in the record suggest[ed] that the District Court properly determined the alternative Guidelines range." *Id.* at 214. The Third Circuit, however, has never relied on *Smalley* to require resentencing where, as here, the record demonstrates that the district court was well aware of the alternative sentencing range, see p. 8, *supra*; the court expressly stated that it would have "impose[d] the same sentence" regardless of that range, Pet. App. 37; and the court explained that its chosen sentence was "sufficient but not greater than necessary * * * in light of the totality of the record and [its] discussion of the 3553(a) factors," *ibid.*

Petitioner also errs in asserting (Pet. 15) a conflict between the decision below and the Seventh Circuit's decision in *United States* v. *Johns*, 732 F.3d 736 (2013). In *Johns*, the Seventh Circuit declined to find a guidelines-calculation error harmless where the district court's "statement that it 'would impose the same sentence for the reasons stated . . . ' came only on prompting by the Assistant U.S. Attorney" and "appear[ed] to have been 'just a conclusory comment tossed in for good measure.'" *Id.* at 740-741 (citations omitted). Here, by contrast, the district court's statement that it would have imposed the same sentence even if it had miscal-

culated the advisory guidelines range was not an afterthought prompted by the government, but a statement that the court itself decided to make following a "detailed explanation," *id.* at 741 (citation omitted), of its consideration of the Section 3553(a) factors—including an explanation of why the sentence requested by petitioner was too low, see Pet. App. 32-37; pp. 4-5, *supra*.

Petitioner is likewise mistaken (Pet. 15-16) in asserting a conflict between the decision below and the Tenth Circuit's decision in *United States* v. *Peña-Hermosillo*, 522 F.3d 1108 (2008). In *Peña-Hermosillo*, the Tenth Circuit did not address "when, if ever, an alternative holding based on the exercise of *Booker* discretion could render a procedurally unreasonable sentence calculation harmless." *Id.* at 1117-1118. Instead, the Tenth Circuit resolved the case on a different ground—that the district court's "alternative" sentence itself did "not satisfy the requirement of procedural reasonableness" because the court "offer[ed] no more than a perfunctory explanation" for it. *Id.* at 1118. In this case, by contrast, the district court stated that it had "considered all [the Section 3553(a)] factors," Pet. App. 33, and discussed several factors at length, see *id.* at 32-36; pp. 4-5, *supra*. Thus, unlike in *Peña-Hermosillo*, the district court adequately explained the chosen sentence. No basis exists to conclude that the Tenth Circuit would have found reversible error in the particular circumstances of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
THOMAS E. BOOTH
Attorney

NOVEMBER 2018