No. 18-6772

IN THE SUPREME COURT OF THE UNITED STATES

DONOVAN GRANT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on review for plain error, the court of appeals correctly determined that any Rule 11 error during petitioner's plea colloquy did not affect his substantial rights.

2. Whether the court of appeals correctly treated a payment that petitioner received in the course of a planned drug transaction as "proceeds" of an ongoing drug trafficking conspiracy for purposes of his conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(a)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2018. The petition for a writ of certiorari was filed on November 12, 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 District of Massachusetts, petitioner was convicted on one

count of conspiracy to distribute and possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 5a. The district court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Id. at 6a-7a. The court of appeals affirmed. Id. at 1a-4a.

1. Petitioner supplied heroin to a drug trafficking organization led by co-defendant Marvin Antoine in the Brockton and Cape Cod areas of Massachusetts. Presentence Investigation Report (PSR) ¶¶ 8-9; Pet. App. 57a. In October and November 2015, the Drug Enforcement Administration (DEA) intercepted a series of communications between petitioner and Antoine during which the two discussed sales of heroin. PSR ¶¶ 20-42. Petitioner and Antoine engaged in multiple heroin transactions, of which three are principally relevant here.

a. First, on October 11, 2015, petitioner agreed to send Antoine a shipment of heroin. PSR ¶¶ 21-22; Pet. App. 61a. Antoine and petitioner exchanged shipping information, and on October 13, 2015, law enforcement confirmed delivery of a package matching the tracking number petitioner had provided. PSR ¶¶ 24-25; Pet. App. 61a-62a. The next day, Antoine called petitioner to express his satisfaction with the quality of the heroin, noting that he was about to sell it to customers. See Sealed C.A. App. 248-249. Meanwhile, after petitioner instructed Antoine to make

a wire payment, co-defendant Michelle Collins wired petitioner $3300. PSR ¶ 26. Petitioner collected the funds using his real name and social security number. Ibid.

b. Second, on October 15, 2015, Antoine contacted petitioner to place a second order. PSR ¶ 27; Pet. App. 62a. Antoine told petitioner that he was "moving" heroin but was waiting to "get more money" from people who owed him so that he could get "something serious" from petitioner. PSR ¶ 27. Antoine then asked petitioner to send him more heroin, and petitioner agreed. Sealed C.A. App. 76. Later that afternoon, petitioner sent Antoine a text message with the account and routing numbers for a Bank of America account under the name "Orlando smith." PSR ¶ 28. Using that information, $6000 was wired to petitioner for Antoine's purchase of heroin. Ibid. On October 16, 2015, Antoine received an overnight FedEx package from petitioner. PSR ¶ 29.

c. Third, on October 18, 2015, Antoine contacted petitioner to place an additional order. Sealed C.A. App. 257-259. Although Antoine noted that his customers and resellers were complaining about the quality of the second batch of heroin, he nevertheless indicated that he was ready to purchase more. PSR ¶ 30; Sealed C.A. App. 258. Petitioner agreed to send heroin to help Antoine "fix" the last shipment. PSR ¶ 30; Sealed C.A. App. 259. On October 20, 2015, petitioner sent Antoine a text with the same "Orlando [S]mith" Bank of America account and routing numbers.

PSR ¶ 30; Sealed C.A. App. 80. Antoine forwarded the information to Collins, who wired $6400 to petitioner. PSR ¶ 30.

On October 21, 2015, petitioner indicated during an intercepted phone call that the heroin he was preparing to send Antoine was of a particularly high quality. PSR ¶ 33. When Antoine asked if he could dilute it to increase profits, petitioner answered: "Yea. Don't tap it too much. Just put it out there to get back the people." Ibid. Later that day, petitioner provided Antoine with a UPS tracking number, and on October 22, 2015, investigators seized a shipment matching the tracking number and containing noscapine, a derivative of opium but not a controlled substance. PSR ¶¶ 20, 37-38; Sealed C.A. App. 81-84. Antoine promptly informed petitioner that the package had been "lost," and the two changed their phones. PSR ¶ 39.

d. Antoine and petitioner thereafter engaged in at least two more heroin transactions, and petitioner provided Antoine with information regarding two additional Bank of America accounts held under fictitious names. PSR ¶¶ 39-41. On November 22, 2015, shortly after petitioner and Antoine had negotiated another heroin purchase, petitioner was arrested. PSR ¶ 42.

2. On June 15, 2016, a federal grand jury returned an indictment charging petitioner with one count of conspiracy to distribute and possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(i), and 846; and one count of conspiracy to commit money laundering, in

violation of 18 U.S.C. 1956(a)(1)(B) and (h). Second Superseding Indictment 1-2, 11. As to the money laundering count, petitioner was charged with conspiring to conduct financial transactions involving "the proceeds of a specified unlawful activity, that is, the felonious manufacture, distribution, buying, selling, and otherwise dealing in a controlled substance." Id. at 11.

On January 4, 2017, petitioner pleaded guilty to both counts without entering into a plea agreement. See Pet. App. 11a, 41a, 70a. At the change-of-plea hearing, petitioner affirmed that he understood the charges against him and that, by pleading guilty, he would waive the right to have the government prove each element of the charged offenses beyond a reasonable doubt. Id. at 23a-30a, 32a-37a.

At the district court's request, the government briefly summarized the evidence that it would seek to prove if the case were to proceed to trial. Pet. App. 57a-63a. The government explained that, beginning in January 2015, the DEA had identified multiple members of the Antoine drug trafficking organization involved in supplying and purchasing heroin and cocaine. Id. at 57a-58a. The government then related the conduct of two of petitioner's co-defendants, also present at the change-of-plea hearing, who in early 2015 had distributed heroin as part of the organization. Id. at 58a-61a.

Next, the government summarized petitioner's offense conduct. The government stated that petitioner had been identified as one

of Antoine's heroin suppliers through intercepted phone calls. Pet. App. 61a. During their first phone call, the government explained, petitioner agreed to sell Antoine heroin, and Antoine thereafter received a shipment matching the address and tracking number they had exchanged. Id. at 61a-62a. The government then described a subsequent intercepted call in which Antoine again sought to purchase heroin, and petitioner insisted that Antoine pay in advance. Id. at 62a-63a. Finally, the government described a third transaction in which Antoine placed another order for heroin and thereafter instructed Collins to send $6200 to a Bank of America account under the name "Orlando Smith." Id. at 62a. The government explained that when petitioner called Antoine to inquire about the status of the payment, Antoine told petitioner that he had sent the money as advance payment for the drug shipment. Id. at 62a-63a. At this point, the district court asked, "[a]nd that's the money laundering?" Id. at 63a. The government answered, "[i]t is." Ibid.

The district court confirmed that petitioner heard and understood the prosecutor's recitation of the factual basis for his plea. Pet. App. 65a-66a. Petitioner affirmed that, aside from certain objections as to drug quantity and price, the government's factual proffer was true. Id. at 66a. Asked specifically whether he "did do the business about the money transfer and the deposit," petitioner answered "[y]es." Ibid. On these representations, the court found that petitioner had

knowingly, intelligently, and voluntarily exercised his right to plead guilty and accepted the plea. Id. at 66a-67a, 70a. Petitioner at no time objected either to the factual basis or the voluntariness of his plea.

3. After conducting a sentencing hearing to determine the drug quantity attributable to petitioner, the district court found that the government had proved beyond a reasonable doubt that petitioner knew that his first two shipments to Antoine contained heroin, but had failed to prove the same with respect to the third shipment. See Sealed C.A. App.62-63, 192-193.[1] The court accordingly found that petitioner was responsible for 137 grams of heroin, yielding an advisory guidelines range of 51 to 63 months of imprisonment. See id. at 193, 197. The court sentenced petitioner to concurrent terms of 51 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 2-3; Sealed C.A. App. 207-208.

4. The court of appeals summarily affirmed in an unpublished order. Pet. App. 1a-4a.

As relevant here, petitioner argued for the first time on appeal that the district court had violated Federal Rule of Criminal Procedure 11(b)(3) by failing to assure that there was an adequate factual basis for his plea to the money laundering count.

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[1] The district court that sentenced petitioner requires as a matter of course that the government prove any sentencing enhancements not admitted by the defendant beyond a reasonable doubt. See Sealed C.A. App. 60.

Pet. C.A. Br. 23-29. Specifically, petitioner argued that the government's proffer at sentencing identified only the advance payment for the third shipment as the basis for the money laundering charge. Id. at 25. Petitioner further argued that the third transaction did not "involv[e] funds from a prohibited drug transaction," and therefore could not support a money laundering charge, because the government at sentencing had not established beyond a reasonable doubt petitioner's knowledge that the third shipment contained heroin. Id. at 26-27.

The government responded, inter alia, that petitioner's knowledge of the contents of the third shipment was irrelevant to the Rule 11 inquiry, because the classification of Antoine's advance payment for that shipment as "proceeds" of unlawful activity for purposes of the money laundering statute was not based on the payment's relationship to the third shipment. Gov't Sealed C.A. Br. 18-19. The government argued that the classification of the payment as "proceedings" was adequately supported because a rational factfinder could infer from the government's proffer that petitioner knew that the money Antoine used for the payment derived from Antoine's profits from prior drug transactions undertaken in furtherance of the Antoine drug trafficking conspiracy. Id. at 20-21. The government also contended that petitioner had failed to preserve his objection, the court of appeals was permitted to review the entire record for facts supporting petitioner's guilty

plea, and the unobjected-to portions of the presentence report did in fact support the plea. Id. at 22-23.

The court of appeals affirmed. The court assumed without deciding that the government's proffer at the change-of-plea hearing provided an insufficient factual basis to support petitioner's plea to the conspiracy-to-commit-money-laundering count. Pet. App. 3a. But the court determined that plain-error relief was not warranted because he had not established that he was prejudiced by any such error. Id. at 3a-4a. The court found that the unobjected-to portions of the PSR and the district court's finding at sentencing that petitioner believed that the second shipment contained heroin together "support[ed] a finding that [petitioner] knew that the October 15, 2015 transfer of funds, as an advance payment for the second shipment, represented proceeds of specified unlawful activity: the conspiracy to possess with intent to distribute and distribute heroin." Ibid. In view of that factual basis for the plea, the court of appeals found no reasonable probability that, but for the alleged Rule 11 error, petitioner would not have entered his guilty plea. Ibid.

ARGUMENT

Petitioner contends (Pet. 7-12) that the court of appeals erred by upholding the factual basis of his plea in reliance on a crime other than that to which he pleaded guilty. But the court neither affirmed the sufficiency of the factual basis of his plea nor relied on a different crime. Instead, consistent with the

uniform practice of the courts of appeals, the court of appeals here properly looked to separate conduct underlying the offense to which petitioner pleaded guilty to support the determination that any error in the district court did not affect petitioner's substantial rights. And petitioner does not challenge that prejudice determination -- which is the sole ground of the decision below -- in his petition.

Petitioner further contends (Pet. 12-16) that the court of appeals erred in holding that an advance payment in an unlawful transaction may constitute "proceeds" of that same transaction under 18 U.S.C. 1956(a)(1). The court of appeals did not so hold. Instead, the court correctly determined that a rational factfinder could have concluded that Antoine's payment for the second shipment derived from prior, completed drug sales by the Antoine drug trafficking organization. That factbound determination does not conflict with any decision of this Court or of another court of appeals, and the unpublished decision below does not warrant further review.

1. Petitioner asserts (Pet. 7-12) that the court of appeals "essentially adjudicated [him] guilty on appeal of a different crime than the one to which he pled without a factual basis." Pet. 10. This assertion is incorrect for three independent reasons.

a. First, the court of appeals decision in fact rests on a determination that petitioner does not challenge -- namely, that he failed to demonstrate any effect on his substantial rights.

Because petitioner did not raise his Rule 11 objection before the district court, his claim is reviewable only for plain error. See United States v. Vonn, 535 U.S. 55, 58 (2002). To satisfy that standard, petitioner must demonstrate that (1) the district court committed an "error"; (2) the error was "clear" or "obvious"; (3) the error affected his "substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted). In the Rule 11 context, to demonstrate an effect on his substantial rights, petitioner was required to show a "reasonable probability," based on the entire record, "that, but for the error, he would not have entered the plea." United States v. Dominguez Benitez, 542 U.S. 74, 80, 83 (2004).

Focusing on that prejudice requirement, the court of appeals did not assess the district court's compliance with Rule 11, nor did it adjudicate petitioner's factual guilt. Rather, the court of appeals held that, regardless of any error at the change-of-plea hearing, the record evidence supporting the money laundering charge undercut any inference that, "but for the [alleged Rule 11] error," petitioner "would not have entered the plea." Pet. App. 3a (quoting United States v. Rosado-Pérez, 605 F.3d 48, 56 (1st Cir. 2010)) (brackets in original). Accordingly, petitioner's claim could not "withstand plain error review." Id. at 3a-4a.

Petitioner does not acknowledge, let alone challenge, that determination. He offers no argument that the alleged error affected his substantial rights, and he has never, either here or in the courts below, argued that he would not have pleaded guilty but for the alleged Rule 11 error. That failure is fatal to his claim. See, e.g., United States v. London, 568 F.3d 553, 560 (5th Cir. 2009) (holding that defendant who did not "allege on appeal that he would not have entered the guilty plea but for the error" could not demonstrate effect on substantial rights), cert. denied, 562 U.S. 1078 (2010); United States v. Taylor, 627 F.3d 1012, 1018-1019 (6th Cir. 2010) (same); United States v. Arenal, 500 F.3d 634, 639 (7th Cir. 2007) (same).

b. Second, in any event, the court of appeals did not rely on a "different crime than the one to which [petitioner] pled." Pet. 10. Petitioner pleaded guilty to a conspiracy to commit money laundering. Pet. App. 70a. That conspiracy involved multiple financial transactions. See Second Superseding Indictment 11. Consistent with the indictment, the government at petitioner's change-of-plea hearing recited multiple transactions and never agreed that only one could have supported the charged conspiracy. See Pet. App. 61a-63a.

But even if the government had described the money laundering conspiracy as limited to the third transaction, the court of appeals still could have considered the second transaction on plain error review. That is because petitioner, like all defendants,

pleaded guilty to a charging instrument, not a factual proffer. See McCarthy v. United States, 394 U.S. 459, 467 (1969) ("The judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.") (citation and internal quotation marks omitted). Because the indictment here charged petitioner with engaging in multiple illicit transactions, the court did not "convert[]" petitioner's guilty plea into "one based on a different crime." Pet. 10. Instead, on plain error review, the court properly surveyed the entire record for conduct that independently supported the charged offense. That is consistent with the uniform practice of the courts of appeals.[2]

Contrary to petitioner's assertion (Pet. 11-12), the Fifth Circuit's decision in United States v. Broussard, 669 F.3d 537 (2012), is no different. In reviewing the factual basis for a

[2] See, e.g., United States v. Garcia, 587 F.3d 509, 519-521 (2d Cir. 2009); United States v. Solonichnyy, 718 Fed. Appx. 174, 176-177 (3d Cir. 2017); United States v. Martinez, 277 F.3d 517, 527, 531-532 (4th Cir.), cert. denied, 537 U.S. 899 (2002); United States v. Trejo, 610 F.3d 308, 316-318 (5th Cir. 2010); United States v. Mobley, 618 F.3d 539, 547-548 (6th Cir.), cert. denied, 562 U.S. 1097 (2010); Arenal, 500 F.3d at 639; United States v. Orozco-Osbaldo, 615 F.3d 955, 958 (8th Cir. 2010); United States v. Valensia, 299 F.3d 1068, 1076-1077 (9th Cir. 2002); United States v. Landeros-Lopez, 615 F.3d 1260, 1263-1264 (10th Cir. 2010); United States v. Davis, 708 Fed. Appx. 649, 649-650 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 2643 (2018); cf. United States v. Moore, 703 F.3d 562, 569-570 (D.C. Cir. 2012) (looking to entire record on plain error review for evidence that defendant entered plea knowingly), cert. denied, 571 U.S. 894 (2013).

guilty plea in Broussard, the Fifth Circuit declined to consider evidence of the defendant's conduct involving a separate victim as to whom all charges had been dismissed. Id. at 549 n.7. As for those charges to which the defendant had pleaded guilty, however, the Fifth Circuit in Broussard, like the First Circuit here, reviewed the defendant's presentence report and sentencing transcript to consider whether the conduct described there would have supported the defendant's guilty plea, and sustained the conviction on plain-error review. Id. at 549-550. Broussard is accordingly on all fours with the court of appeals' decision here.

c. Third, and finally, even if the court of appeals' review were limited to the materials available at the change-of-plea hearing, the government's factual proffer itself set forth an adequate basis to support petitioner's guilty plea. Rule 11's factual basis requirement entails only a "fairly modest" showing: The government need not "establish guilt beyond a reasonable doubt, but instead must 'show a rational basis in fact for the defendant's guilt.'" United States v. Laracuent, 778 F.3d 347, 350 (1st Cir.) (citation omitted), cert. denied, 135 S. Ct. 2875 (2015); see 1A Charles Alan Wright et al., Federal Practice and Procedure - Criminal § 179 (4th ed. 2008) ("The quantum of evidence needed to supply a factual basis is not specified in the rule, but it is clear that it takes less evidence than would be needed to sustain a conviction at trial."). To that end, the government "need not

support every element of the charge with direct evidence." Laracuent, 778 F.3d at 350.

As the government argued in the court of appeals, the government's proffer supported a rational inference that petitioner received payment for the third shipment with knowledge that the funds were proceeds of prior drug transactions by the Antoine organization. See Gov't Sealed C.A. Br. 20-21. In particular, petitioner admitted knowing (1) that Antoine's line of business was selling drugs, (2) that Antoine transmitted his payment indirectly through an associate to a bank account held under a fictitious name, and (3) that the funds were used to purchase distribution quantities of heroin. Pet. App. 61a-63a, 66a. A rational factfinder was entitled to draw from these facts the same inference that the court of appeals thought permissible from the facts surrounding the second transaction: that petitioner knew that the payment he received from Antoine constituted proceeds of the Antoine organization's drug trafficking conspiracy. Accordingly, the district court did not err, plainly or otherwise, in accepting petitioner's plea.

2. Petitioner argues in the alternative (Pet. 12-16) that the court of appeals erred in holding that an advance payment for a drug transaction may constitute "proceeds" of that same transaction. That argument likewise misapprehends the court's decision. The court did not hold that an advance payment may constitute proceeds of the transaction to which it is applied.

Rather, the court determined that the record supported a finding that the advance payment for the second transaction derived from prior unlawful activity -- namely, the Antoine organization's drug trafficking conspiracy. And that holding was consistent with every allegedly conflicting decision that petitioner cites.

The money laundering provision to which petitioner pleaded guilty of conspiring to violate requires proof, inter alia, that the defendant engaged in a financial transaction that "involve[d] the proceeds of specified unlawful activity." 18 U.S.C. 1956(a)(1). Petitioner contends (Pet. 12-16) that the court of appeals considered Antoine's advance payment for the second transaction to be the "proceeds" of that same transaction, thereby erasing any distinction between predicate unlawful activity and money laundering transactions.

That argument misreads the court of appeals' decision. The court found a factual basis that "the October 15, 2015 transfer of funds, as an advance payment for the second shipment, represented proceeds of specified unlawful activity: the conspiracy to possess with intent to distribute and distribute heroin, as charged in Count One." Pet. App. 3a. The court thus described the "payment" as "proceeds" not of the "second shipment" itself, but of the "conspiracy to possess with intent to distribute and distribute heroin." Ibid. (emphasis added). Indeed, the government itself argued below, see Gov't Sealed C.A. Br. 16-21, as petitioner does before this Court, see Pet. 15, that "predicate offenses must

produce proceeds before anyone can launder those proceeds." United States v. Mankarious, 151 F.3d 694, 705 (7th Cir.), cert. denied, 525 U.S. 1056 (1998). The decision below thus did not "expand[] the scope of the money-laundering statute." Pet. 12 (capitalization altered).

The predicate offense here -- the Antoine drug trafficking conspiracy -- produced proceeds long before Antoine and petitioner's second transaction. See Second Superseding Indictment 1-2 (charging that the Antoine drug trafficking conspiracy operated in January 2015); Pet. App. 60a-61a (describing drug sales in February 2015); PSR ¶ 11 (describing drug sales between January and April 2015). Antoine's payment in turn represented proceeds of that prior unlawful activity. See Pet. App. 3a.

Petitioner's alleged circuit conflict therefore does not exist. Petitioner focuses (Pet. 13) on a parenthetical quotation from a prior First Circuit decision, United States v. Castellini, 392 F.3d 35, 48 (2004), that "[i]t is not a requirement that the underlying crime must be fully completed before any money laundering can begin." But the very language the court of appeals quoted from Castellini -- which, unlike the decision here, was published, and with which petitioner does not disagree (see Pet. 13 n.1) -- was itself derived from the very Seventh Circuit decision petitioner cites as allegedly setting forward a conflicting rule. See Castellini, 392 F.3d at 48 ("It is not a

requirement that the underlying crime must be fully completed before any money laundering can begin"; "the non-simultaneity principle means that 'money laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds.'" (quoting Mankarious, 151 F.3d at 705). And the uncompleted crime in this case was the overall drug conspiracy, not the second drug sale. See Pet. App. 3a.

The two remaining decisions petitioner cites are equally consistent with the decision below. In United States v. Harris, the Fifth Circuit recognized that funds derived from prior drug sales may constitute proceeds of specified unlawful activity. 666 F.3d 905, 907-910 (2012). And in United States v. Gross, the Eleventh Circuit reached essentially the same conclusion as the court of appeals here, holding that although a separate conspiracy remained "ongoing" at the time of an alleged money laundering transaction, "it is sufficient that a portion or phase of the [separate conspiracy] had been completed and had produced the proceeds used in the subsequent transaction." 661 Fed. Appx. 1007, 1023 (2016) (per curiam).[3] The court of appeals' decision

[3] See also, e.g., United States v. Szur, 289 F.3d 200, 213-214 (2d Cir. 2002) ("[F]unds become proceeds when they are 'derived from an already completed offense, or a completed phase of an ongoing offense.'") (citation omitted); United States v. Yusuf, 536 F.3d 178, 186 (3d Cir. 2008) (same), cert. denied, 556 U.S. 1281 (2009); United States v. Singh, 518 F.3d 236, 247 (4th Cir. 2008) (same); United States v. Kerley, 784 F.3d 327, 344 (6th Cir.) (same), cert. denied, 136 S. Ct. 350 (2015); United States v. Seward, 272 F.3d 831, 837 (7th Cir. 2001) (same).

therefore is correct and does not conflict with any decision of any other court of appeals. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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