No. 18-9692

IN THE SUPREME COURT OF THE UNITED STATES

JODY LANARDO WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reviewed for plain error petitioner's claim that the district court impermissibly relied on a "bare arrest record" at sentencing, when petitioner failed to object on that ground in the district court.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. White, No. 17-CR-263 (June 8, 2018)

United States Court of Appeals (5th Cir.):

United States v. White, No. 18-10733 (Mar. 15, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B3) is not published in the Federal Reporter but is reprinted at 757 Fed. Appx. 405.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2019. The petition for a writ of certiorari was filed on June 13, 2019. 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 Northern District of Texas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A1. He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. Id. at A1-A2. The court of appeals affirmed. Id. at B1-B3.

1. In 2003, petitioner attempted to burglarize a home while two occupants were present. Presentence Investigation Report (PSR) ¶ 63. He fled before the police arrived, entered another home, and pointed a gun at the resident. Ibid. Petitioner then fired twice in the direction of a pursuing police officer. Ibid. He was convicted in state court of aggravated assault on a public servant and sentenced to 15 years in prison. Ibid. He was paroled in October 2016. Ibid.

In September 2017, a state court issued a parole-violation warrant after petitioner removed his electronic ankle monitor, moved from his residence without permission, and committed other violations. PSR ¶ 63. Two months later, state officers found petitioner outside an apartment in Fort Worth, Texas. PSR ¶ 9. When petitioner attempted to flee, the officers pulled their weapons and instructed petitioner to stop, show his hands, and get on the ground. Ibid. Petitioner stopped running but refused to show his hands or get on the ground. Ibid. As an officer grabbed petitioner to handcuff him, a .380-caliber pistol fell from the

pocket of petitioner's jacket. PSR ¶ 10. A search of petitioner revealed eight grams of cocaine base, two grams of methamphetamine, and two grams of heroin, all packaged in baggies for distribution. Ibid.

2. In December 2017, a federal grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g). Indictment 1. Petitioner pleaded guilty. Pet. App. A1.

The Probation Office's presentence report recommended a total offense level of 21 and criminal history category V, resulting in an advisory Sentencing Guidelines range of 70 to 87 months of imprisonment. PSR ¶ 68; C.A. ROA 220 (Second Addendum to the PSR). In addition to petitioner's 2005 conviction for aggravated assault on a public servant, the presentence report identified adult convictions for theft of stolen property, promoting prostitution, aggravated robbery with a deadly weapon, unauthorized use of a vehicle, evading arrest or detention with a vehicle, burglary of a habitation, and failure to identify as a fugitive by providing false information. PSR ¶¶ 58-65. The presentence report also noted several juvenile proceedings in which petitioner had been adjudicated delinquent: (1) theft of $20 to $200 at age 11; (2) burglary of a motor vehicle at age 12; (3) theft of $200 to $750 at age 13; and (4) possession of a controlled substance at age 14. PSR ¶¶ 41-44. In addition, the presentence report listed

13 unadjudicated charges, including theft of under $5 in 1983 (at age 9) and another theft at age 10. PSR ¶¶ 45-57.

At sentencing, the district court adopted the findings in the presentence report, including the guidelines calculations, and tentatively concluded that petitioner "should receive a sentence of imprisonment above the top of the advisory guideline range in order to satisfy the sentencing factors under 18 [U.S.C.] 3553(a)." Sent. Tr. 8-9. After hearing from petitioner's fiancée, defense counsel, and petitioner, the district court imposed a sentence of 120 months in prison, the statutory maximum. Id. at 16. In explaining its sentencing decision, the district court emphasized that petitioner had a lengthy and extensive criminal history:

> Well, as your attorney acknowledged, you have a terrible criminal record. You're now, I think, 43, and it started at age 11 with a theft. Actually, according to the [PSR], it started earlier than that.
>
> You started at age 9 with a theft, and * * * from there to age 10 with a theft, and then to age 11 with a theft, and it's almost been at least once a year or more frequently than that since then. So you've had a 32-year -- or actually a little bit more than that -- over 30-year history of criminal activity, and it's been persistent throughout that period of time.
>
> I think your last conviction -- let's see when that was -- age 42, you pleaded guilty to failure to identify * * * as a fugitive. You gave the officer who arrested you a wrong name. You didn't disclose your true name.

Id. at 14-15. The court also observed that petitioner's drug use had "[a]pparently * * * caused [petitioner] to have some problems." Id. at 15. It further observed that criminal activity had "become a part of [petitioner's] second nature" and that, because there

was no "realistic chance that * * * when [petitioner is] released from prison, [he will] be a law-abiding member of society," a statutory-maximum sentence was necessary to "protect society as long as it can be protected in this case." Id. at 15-16. The court thus found that "any less than 120 months imprisonment" would not "satisfy all of the factors the Court should consider in sentencing under 18 [U.S.C.] 3553(a)." Id. at 15. The court added that, "if the statutory maximum were significantly more than that, the Court would be considering a sentence of imprisonment significantly more than 10 years." Ibid.

At the end of the hearing, petitioner objected to "the substantive and procedural unreasonableness of the sentence for the reasons stated in [his] fifth objection" to the presentence report to "and the Court's reliance on substance abuse rehabilitation." Sent. Tr. 19. The fifth objection to the presentence report challenged the use of petitioner's prior aggravated-assault conviction as a basis for an offense-level enhancement. See C.A. ROA 205-209. Petitioner did not object to the district court's reference to petitioner's arrest for theft in 1983.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. B1-B3.

Petitioner contended for the first time on appeal that the district court had erroneously relied on the "bare arrest record" of petitioner's 1983 theft arrest. Pet. C.A. Br. 7-13. Petitioner

acknowledged that "[n]o objection was lodged below" on that ground, "compelling [the court of appeals] to review for plain error." Id. at 7. But he argued that the asserted error satisfied all the requirements of plain-error review. Id. at 7-13.

The court of appeals agreed that, because petitioner had "failed to challenge" the district court's alleged reliance on his 1983 theft arrest at sentencing, review was "for plain error only." Pet. App. B1-B2. The court then stated that the 1983 incident "constitute[d] a bare arrest record that the district court arguably considered during sentencing." Id. at B2. The court found, however, that petitioner had failed to show that "the consideration of prior arrests in conjunction with other, permissible, factors affected [petitioner's] substantial rights," as required to establish plain error. Ibid. (citation omitted).

The court of appeals observed that the district court had considered "a number" of other factors, including petitioner's "'over 30-year history of criminal activity'"; his "most recent conviction for failure to identify as a fugitive and providing officers with a false name"; and the "fact that the instant offense occurred while [petitioner] was on parole for aggravated assault against a public servant and burglary of a habitation." Pet. App. B2-B3. And the court of appeals further observed that the district court "sought to impose the maximum possible sentence to 'protect society as long as it can be protected in this case'" because petitioner "continued [to] participat[e] in criminal activity."

Id. at B3. The court of appeals thus determined that "the [district] court gave significant weight to several valid 18 U.S.C. § 3553(a) factors," and "the record does not show it gave weight" to petitioner's 1983 theft arrest. Ibid.[1]

ARGUMENT

Petitioner contends (Pet. 6-7) that the court of appeals erred in applying plain-error review to his claim that the district court improperly considered his 1983 theft arrest at sentencing, after he failed to object in the district court to its consideration. Petitioner requests (Pet. 7) that this Court hold his petition for a writ of certiorari pending its disposition of Holguin-Hernandez v. United States, cert. granted, No. 18-7739 (oral argument scheduled for Dec. 10, 2019). That request is unsound. The court of appeals correctly applied plain-error review to petitioner's forfeited procedural claim -- that the district court considered an improper factor -- and this petition does not present the same question pending before the Court in Holguin-Hernandez.

1. The court of appeals correctly determined that petitioner's forfeited claim was subject to plain-error review, as petitioner acknowledged below. See Pet. C.A. Br. 7.

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[1] In the court of appeals, petitioner also argued that his prior conviction for Texas aggravated assault did not qualify as a crime of violence under Sentencing Guidelines §§ 2K2.1(a)(4) and 4B1.2 (2016). Pet. C.A. Br. 13-16. The court found that claim foreclosed by circuit precedent, Pet. App. B3, and petitioner does not renew it in this Court.

Timely objections are central to the "focused, adversarial resolution" of sentencing disputes. Burns v. United States, 501 U.S. 129, 137 (1991). In order to preserve a claim for appellate review, a defendant must object to an allegedly erroneous district court ruling at the time the ruling "is made or sought," and must inform the district court "of the action the [defendant] wishes the court to take, or the [defendant's] objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). A claim that is not preserved in that manner is subject to review only for plain error. Fed. R. Crim. P. 52(b).

In United States v. Vonn, 535 U.S. 55 (2002), this Court applied plain-error review to a claim that a trial court had failed to conduct an adequate guilty-plea colloquy. The Court explained that "the point of the plain-error rule" is "always" that "the defendant who just sits there when a mistake can be fixed" cannot "wait to see" whether he is satisfied with the judgment and then identify the mistake in the first instance to the court of appeals if he is not. Id. at 73. Instead, a defendant must raise a contemporaneous objection, which ensures that "the district court can often correct or avoid the mistake." Puckett v. United States, 556 U.S. 129, 134 (2009); see Vonn, 535 U.S. at 72 (noting the benefits of "concentrat[ing] * * * litigation in the trial courts, where genuine mistakes can be corrected easily").

The reasons for requiring a contemporaneous objection under Federal Rule of Criminal Procedure 51(b) apply with full force to

claims like the one at issue here, which challenge the procedural reasonableness of a sentence (i.e., the manner in which it was imposed) rather than the substantive reasonableness of a sentence (i.e., its length or other terms). See Gall v. United States, 552 U.S. 38, 51 (2007). A district court that is alerted to the possibility that it has considered an improper factor may well agree and eliminate the factor from its sentence-determination process. Alternatively, a court that believes the objected-to factor is a permissible sentencing consideration, but would have imposed the same sentence regardless of that factor, may choose to say so, potentially obviating the need for an appeal and remand. Consideration of an improper factor is thus precisely the sort of error that can be, and should be, corrected by the district court in the first instance.

Indeed, in United States v. Booker, 543 U.S. 220 (2005), which rendered the Guidelines advisory and described the appropriate standard of appellate review in that regime, this Court confirmed that the courts of appeals would continue to apply "ordinary prudential doctrines, * * * [such as] whether the issue was raised below and whether it fails the 'plain-error' test," when reviewing an advisory Guidelines sentence for reasonableness. Id. at 268; cf. Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016) (explaining that when a defendant fails to object to a district court's guidelines calculation, "appellate review of the error is governed by Federal Rule of Criminal Procedure 52(b)"); Rosales-

Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018) (applying plain-error review to miscalculation of guidelines range).

2. Contrary to petitioner's assertion (Pet. 6-7), this Court's decision in Holguin-Hernandez is unlikely to provide a basis for reconsidering the Fifth Circuit's application of plain-error review to unpreserved procedural errors like the one petitioner raises.

In Holguin-Hernandez, this Court granted certiorari to consider whether, to preserve a claim that his sentence is substantively unreasonable, a criminal defendant who has requested a shorter term of imprisonment must also object in the district court to the reasonableness of a longer term after it is ordered. Gov't Br. at I, Holguin-Hernandez, supra (No. 18-7739). As explained in the government's brief in Holguin-Hernandez, a criminal defendant who has advocated for a shorter term of imprisonment at sentencing has timely "inform[ed] the court * * * of the action the party wishes the court to take," Fed. R. Crim. P. 51(b), with respect to the court's obligation to select a "sufficient, but not greater than necessary" punishment for the offense, 18 U.S.C. 3553(a). See Gov't Br. at 21-23, Holguin-Hernandez, supra (No. 18-7739). Such a defendant has therefore done all that Rule 51 requires to preserve the claim that a longer term of imprisonment is substantively unreasonable, and he need

not repeat his objection if a longer sentence is imposed. See id. at 15, 20-31.

Petitioner, however, does not challenge the Fifth Circuit's application of plain-error review to a substantive-reasonableness claim. Petitioner expressly objected in the district court to the substantive and procedural reasonableness of his sentence only to the extent that it accounted for a prior aggravated-assault conviction or weighed the need for rehabilitation for petitioner's substance abuse. See Sent. Tr. 19. Yet on appeal he asserted a distinct procedural claim relating to the consideration of the 1983 theft arrest. See Pet. App. B1-B2. The arguments asserted by the petitioner in Holguin-Hernandez lend no support to petitioner's contention (Pet. 7) that a generalized argument in favor of a shorter term of imprisonment preserves a claim that the district court considered a specific improper factor in imposing its sentence.

As discussed above, a request for a lesser sentence does not in itself provide the district court with "the opportunity to consider and resolve" the propriety of the procedures it employed, including the factors that it viewed as relevant, in deciding on that sentence. Puckett, 556 U.S. at 134; see pp. 8-10, supra. Consistent with that view, the petitioner in Holguin-Hernandez has acknowledged that "procedural reasonableness is different from substantive reasonableness" and that "[w]hen a defendant has not asked the district court to take a certain procedural step, it

might be necessary to object after the district court engages in a purported procedural irregularity to preserve such a claim for appeal." Pet. Br. at 20-21, Holguin-Hernandez, supra (No. 18-7739). Because no party in Holguin-Hernandez urges a position that would suggest a different approach in a case like this, it is unlikely that this Court's decision in Holguin-Hernandez will affect the proper disposition here.

Petitioner nonetheless contends that this Court should hold his petition for Holguin-Hernandez because the Fifth Circuit treats claims like his as a "species of 'substantive reasonableness.'" Pet. 6 (citing United States v. Cooks, 589 F.3d 173, 186 (5th Cir. 2009), cert. denied, 559 U.S. 1024 (2010); United States v. Broussard, 669 F.3d 537, 551 (5th Cir. 2012)). But in the court of appeals, petitioner challenged his sentence only on "'procedural unreasonableness'" grounds, contending that the district court's reliance on a "bare arrest record" does not satisfy the "standard of reliability" imposed by "due process." Pet. C.A. Br. 7-8. Indeed, petitioner acknowledged below that his reasonableness objection at sentencing did not encompass his claim that the district court had relied on an improper factor. See id. at 5, 7 (noting both that petitioner had objected on substantive-reasonableness grounds and that his improper-factor claim was reviewable for plain error). The court of appeals accordingly relied on circuit precedent involving forfeited procedural errors, rather than on circuit precedent involving substantive-

reasonableness claims, in determining that petitioner's claim was subject to plain-error review. See Pet. App. B2 (citing United States v. Neal, 578 F.3d 270, 272 (5th Cir. 2009)).

In any event, petitioner's belated attempt to recast his claim in substantive-reasonableness terms is unavailing. As this Court explained in Gall, 552 U.S. at 56, a claim that a sentence is substantively unreasonable asserts that "the District Judge abused his discretion in determining that the § 3553(a) factors supported [the] sentence." In other words, it challenges the result of the sentencing court's evaluation process. Petitioner's claim that the court relied on an impermissible factor, in contrast, is an objection to the court's evaluation process itself. Cf. id. at 51 (explaining that procedural errors include "failing to consider the § 3553(a) factors" and "selecting a sentence based on clearly erroneous facts").[2]

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[2] The Fifth Circuit decisions on which petitioner relies (Pet. 6), which state that "giv[ing] significant weight to an irrelevant or improper factor" can render a sentence substantively unreasonable, Cooks, 589 F.3d at 186; see Broussard, 669 F.3d at 551, do not support a different outcome here. A holding that arguing for a lower sentence in the district court is enough to preserve the claim at issue in Holguin-Hernandez -- a claim challenging the reasonableness of the length of a prison term, in light of the circumstances presented to the district court -- would not indicate that such an argument would also preserve petitioner's distinct claim that the district court considered an improper factor. Even if petitioner's claim could be labeled as "substantive," that is not how he presented it to the court of appeals, see p. 12, supra, and irrespective of labels, a challenge to a factor as impermissible is different in kind from a challenge to the length of a sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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