No. 19-5125

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO GALLEGOS-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH 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 neglected to calculate his advisory Sentencing Guidelines range before imposing its sentence, when petitioner failed to object in the district court to the timing of the court's guidelines calculation.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

United States v. Gallegos-Lopez, No. 17-cr-1438 (Nov. 29, 2017)

United States Court of Appeals (9th Cir.):

United States v. Gallegos-Lopez, No. 17-50420 (Dec. 19, 2018)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not reported in the Federal Reporter but is reprinted at 745 Fed. Appx. 679.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2018. A rehearing petition was denied on April 8, 2019 (Pet. App. B1). The petition for a writ of certiorari was filed on July 5, 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 Southern District of California, petitioner was convicted of harboring an alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii). Pet. App. A1. The district court sentenced him to 41 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed in part and vacated and remanded in part. Pet. App. A1-A2.

1. In May 2017, law enforcement officers executed a probation search at the house of petitioner and his nephew. Presentence Investigation Report (PSR) ¶¶ 4-5. During the search, the officers discovered a man named Crecencio Cruz-Calva, who was not legally present in the United States. PSR ¶ 5. Cruz-Calva told the officers that smugglers had helped him climb over a fence near Calexico, California, and hide in a shed until taken to petitioner's house. PSR ¶¶ 8-9. Petitioner had then argued with the smugglers over the amount of money that he was owed for hiding Cruz-Calva. PSR ¶ 9.

In June 2017, petitioner was charged by information with harboring an alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii). C.A. E.R. 45. He pleaded guilty. Id. at 39-44.

2. As part of petitioner's plea agreement, the parties agreed to a total offense level of 12 for purposes of calculating petitioner's advisory Sentencing Guidelines range, but they did

not agree to petitioner's criminal history category. C.A. E.R. 40-42. The Probation Office's presentence report recommended a total offense level of 13 and criminal history category VI, resulting in a guidelines range of 33 to 41 months. PSR ¶ 144. The recommended total offense level reflected an offense level of 16, minus 3 levels for acceptance of responsibility. PSR ¶¶ 25-28. The recommended criminal history included two immigration offenses, see PSR ¶¶ 62, 71, but did not count numerous other convictions, see PSR ¶¶ 33-61. The presentence report further recommended a two-level departure for participation in a "fast-track" program, see Sentencing Guidelines § 5K3.1, which resulted in an adjusted offense level of 11 and an adjusted guidelines range of 27 to 33 months. PSR ¶ 157; see C.A. E.R. 28.[1] Petitioner filed a sentencing memorandum requesting a sentence of 27 months based on his family circumstances, including the recent death of the mother of his children. C.A. E.R. 31-34.

At the sentencing hearing, the district court began by stating that it had read petitioner's sentencing memorandum and noting that the parties had no objections to the presentence report. C.A.

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[1] The plea agreement's total offense level of 12 had accounted for the fast-track departure but had applied only a 2-level adjustment for acceptance of responsibility, rather than the 3-level adjustment that the presentence report applied. Compare C.A. E.R. 40, with PSR ¶¶ 26-27. Both parties, however, adopted the presentence report's calculations in their sentencing memoranda and agreed on an adjusted guidelines range of 27 to 33 months. See C.A. E.R. 28, 30.

E.R. 7. Petitioner agreed that "[t]here are no disputes about the guidelines in this case" because the "government and defense counsel agree on the guideline calculation." Id. at 8. But petitioner repeated his request for a lenient sentence based on his prior drug addictions, the sudden death of the mother of his children, and his efforts to get a better job and to overcome his drug addiction. Id. at 8-11. The government, meanwhile, recommended a sentence of 33 months of imprisonment. Id. at 11.

After hearing from the parties, the district court determined that the adjusted guidelines range did not adequately account for petitioner's extensive criminal history, including his numerous uncounted prior convictions. C.A. E.R. 12; see id. at 12-16. The court found that petitioner had "a bit of a violent streak to him" and that he was "someone that the public needs to be protected from." Id. at 16. The court then explained that the 27-month sentence petitioner had requested would be insufficient, as petitioner had previously been sentenced to 41 months for an immigration offense and then later had committed the underlying offense here. Id. at 16-17. The court imposed a sentence of 41 months of imprisonment, above the adjusted guidelines range, to be followed by three years of supervised release. Id. at 17.

After the district court explained its sentence, the courtroom deputy stated that he "need[ed] some guidelines" from the court. C.A. E.R. 19. The court apologized for its oversight

and stated that petitioner's guidelines range was 27 to 33 months, based on an adjusted offense level of 11 and criminal history category VI. Ibid. The court then explained that it had "imposed a sentence that's higher than the 33 months which is the high end of the guideline range which was agreed upon between the parties," but that the 41-month sentence "was the appropriate sentence to impose" and was "sufficient but not greater than necessary." Id. at 19-20.

Petitioner objected to the substantive reasonableness of the sentence, contending that the district court had relied on legally improper factors and had not responded to his non-frivolous mitigation arguments. C.A. E.R. 20. The court asked petitioner to identify the asserted mitigating factors, and petitioner noted the death of the mother of his children. Id. at 21. The court explained that he did not consider that a mitigating factor. Id. at 22. It asked defense counsel for "anything else you want me to address," and she reiterated her objection to "the substantive reasonableness of the sentence." Id. at 23.

3. The court of appeals affirmed in part and reversed in part in an unpublished memorandum opinion. Pet. App. 1-2.

As relevant here, petitioner contended for the first time on appeal that the district court had committed a procedural error by imposing a sentence before calculating the applicable guidelines range. Pet. App. A1. The court of appeals rejected that

contention. It explained that plain-error review applied to petitioner's claim of procedural error because petitioner had "failed to preserve the issue properly at the sentencing hearing." Ibid. And it determined that no plain error had occurred. Ibid. The court explained that petitioner had "informed the [district] court at the start of the [sentencing] hearing that the parties agreed upon the Guidelines range, and the court noted both that it had reviewed the sentencing memoranda and that there were no objections to the presentencing report." Ibid. The court of appeals further observed that the district court's discussion of the statutory sentencing factors under 18 U.S.C. 3553(a) demonstrated that it had considered "whether and why to vary from the agreed-upon Guidelines range." Ibid. The court of appeals thus determined that, despite the district court's "failure to calculate the Guidelines range at the outset of the hearing, the record reflects that it was aware of the range and had the correct range in mind throughout the proceeding." Ibid.

The court of appeals separately rejected petitioner's claim that his sentence was substantively unreasonable. Pet. App. A1. Pursuant to the government's concession, however, the court remanded the case to the district court because that court had erred by imposing three non-standard conditions of supervised release after the sentencing hearing without notice to petitioner. Id. at A1-A2.

ARGUMENT

Petitioner contends (Pet. 9-23) that the court of appeals erred in applying plain-error review to his claim that the district court committed procedural error in failing to provide its Sentencing Guidelines calculation before imposing his sentence. That contention lacks merit, and this case does not implicate the minimal circuit division that exists on the question whether a contemporaneous objection is required to preserve a claim that a district court did not adequately explain a sentence. In addition, this case would be a poor vehicle for addressing the question presented, because the application of plain-error review did not affect the outcome of petitioner's case. Nor should the Court hold this 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), because this petition does not present the same question pending before the Court in that case.

1. The court of appeals correctly determined that petitioner's forfeited procedural claim was subject to plain-error review.

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). Contrary to petitioner's suggestion (Pet. 19-20), a district court that is alerted to a defendant's argument that it has improperly imposed a sentence before stating its guidelines calculations can reaffirm its sentencing decision after stating those calculations. That sort of perceived deficiency 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. And this Court has previously indicated 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)." Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016); see Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018) (applying plain-error review to miscalculation of guidelines range).

2. Petitioner also contends (Pet. 11-16) that the court of appeals' application of plain-error review to an unpreserved claim

of procedural sentencing error conflicts with decisions of other courts of appeals. Although some disagreement exists in the courts of appeals about whether an unpreserved challenge to the adequacy of a district court's explanation of a sentence is reviewed for plain error, that disagreement is narrower than petitioner suggests and does not implicate the claimed procedural error at issue here.

A clear majority of the courts of appeals agree that plain-error review applies when a defendant does not object to the district court's failure to explain a sentence. See United States v. Flores-Mejia, 759 F.3d 253, 256 (3d Cir. 2014) (en banc); United States v. Rice, 699 F.3d 1043, 1049 (8th Cir. 2012); United States v. Rangel, 697 F.3d 795, 805 (9th Cir. 2012), cert. denied, 568 U.S. 1182 (2013); United States v. Corona-Gonzalez, 628 F.3d 336, 340 (7th Cir. 2010); United States v. Wilson, 605 F.3d 985, 1034 (D.C. Cir.) (per curiam), cert. denied, 562 U.S. 1116, and 562 U.S. 1117 (2010); United States v. Mondragon-Santiago, 564 F.3d 357, 361 (5th Cir.), cert. denied, 558 U.S. 871 (2009); United States v. Vonner, 516 F.3d 382, 385-386 (6th Cir.) (en banc), cert. denied, 555 U.S. 816 (2008); United States v. Mangual-Garcia, 505 F.3d 1, 15 (1st Cir. 2007), cert. denied, 553 U.S. 1019 (2008); United States v. Villafuerte, 502 F.3d 204, 211 (2d Cir. 2007).

Petitioner's contention (Pet. 11-16) that the decision below conflicts with decisions from the Seventh and Eighth Circuits is

incorrect. Petitioner relies (Pet. 13) on the Seventh Circuit's conclusion that a defendant's argument for a lower sentence before the district court preserves a claim on appeal that the sentence was substantively unreasonable. See United States v. Bartlett, 567 F.3d 901, 910 (7th Cir. 2009), cert. denied, 558 U.S. 1147 (2010). But that court has made clear that, where a defendant "did not object to [an] alleged procedural deficiency at the time of sentencing, [it] review[s] for plain error." Corona-Gonzalez, 628 F.3d at 340 (emphasis added). Similarly, although the Eighth Circuit has concluded that an argument for a lower sentence preserves a substantive-reasonableness claim, see United States v. Swehla, 442 F.3d 1143, 1145 (8th Cir. 2006), it requires a specific contemporaneous objection to preserve a procedural-reasonableness claim, see Rice, 699 F.3d at 1049.

Petitioner also incorrectly asserts (Pet. 15) that the Sixth Circuit has a "hybrid, quasi-waiver solution" to the issue of preserving a challenge to a sentence. Although the Sixth Circuit automatically considers a claim preserved when a district court does not invite objections after announcing a sentence, it has done so through a "new procedural rule" imposed on district courts as an "exercise [of its] supervisory powers over the district courts," not an interpretation of the Federal Rules of Criminal Procedure. United States v. Bostic, 371 F.3d 865, 872 (2004). As this Court has recognized, such variation among the courts of

appeals' procedural practices, pursuant to the individual exercise of their supervisory authority, does not warrant this Court's review. See, e.g., Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993). And in any event, the district court's procedure in this case would be compliant with the Sixth Circuit's procedural rule because the court asked whether petitioner had any objections to his sentence. See C.A. E.R. 23.

Petitioner correctly notes (Pet. 14) that the Fourth Circuit has not required a contemporaneous objection to preserve a claim that the district court provided an inadequate explanation of its sentence. See United States v. Lynn, 592 F.3d 572, 578 (2010) ("By drawing arguments from § 3553 for a sentence different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim.").[2] But this Court has repeatedly declined to review that issue following the decision in Lynn. See, e.g., Rangel v. United States, 568 U.S. 1182 (2013) (No. 12-8088); Reyes v. United States, 568 U.S. 1030 (2012) (No. 12-5032); Villarreal-

[2] The Eleventh Circuit has also stated that challenges to a district court's compliance with 18 U.S.C. 3553(c)'s explanation requirement are reviewed de novo, but has done so in decisions that pre-date Gall v. United States, 552 U.S. 38 (2007), and Rita v. United States, 551 U.S. 338 (2007). See United States v. Bonilla, 463 F.3d 1176, 1181 (11th Cir. 2006) (citing United States v. Williams, 438 F.3d 1272, 1274 (11th Cir.) (per curiam), cert. denied, 549 U.S. 891 (2006)).

Pena v. United States, 565 U.S. 1236 (2012) (No. 11-7084); Satchell v. United States, 565 U.S. 1204 (2012) (No. 11-6811); McClain v. United States, 565 U.S. 1159 (2012) (No. 11-5738); Alcorn v. United States, 565 U.S. 1159 (2012) (No. 11-5024); Mora-Tarula v. United States, 565 U.S. 1156 (2012) (No. 10-11209); Williams v. United States, 565 U.S. 931 (2011) (No. 10-9941); Hoffman-Portillo v. United States, 565 U.S. 918 (2011) (No. 11-5656); Wilson v. United States, 562 U.S. 1116 (2010) (No. 10-7456). And this case does not even implicate that limited division, as petitioner does not assert an inadequate-explanation claim but rather a Guidelines-calculation claim.

3. In any event, this case would be a poor vehicle to address the question presented because, under any standard of review, the procedural error that petitioner asserts was nonprejudicial. See Fed. R. Crim. P. 52(a). At the start of the sentencing hearing, petitioner informed the district court that the parties had agreed on the guidelines range and that "[t]here are no disputes about the guidelines in this case." C.A. E.R. 8. And as the court of appeals explained, the district court's subsequent discussion of the Section 3553(a) factors showed that it considered varying from the undisputed guidelines range. Pet. App. A1.

When the district court realized that it had forgotten to explicitly state its guidelines calculations, it gave those

calculations and reiterated that it believed a sentence of 41 months of imprisonment "was the appropriate sentence to impose" and was "sufficient but not greater than necessary" to address the Section 3553(a) factors. C.A. E.R. 20; see id. at 19-20. At that point, the court gave petitioner the opportunity to raise any objections. Id. at 20-23. The record thus makes clear that if the district court had recited the undisputed guidelines calculations before applying the Section 3553(a) factors, it would have arrived at the same 41-month sentence.

4. Finally, this petition should not be held pending the Court's decision in Holguin-Hernandez.

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 court of appeals' application of plain-error review to a substantive-reasonableness claim. Petitioner expressly objected to the substantive reasonableness of his sentence in the district court, C.A. E.R. 20, 23, and the court of appeals did not apply plain-error review when it addressed that issue, Pet. App. A1. The court of appeals instead applied plain-error review only to petitioner's previously unraised procedural-reasonableness claim, which concerned the timing of the district court's formal guidelines calculations. See Pet. App. A1. The arguments asserted by the petitioner in Holguin-Hernandez lend no support to petitioner's contention (Pet. 19-20) that a generalized argument in favor of a shorter term of imprisonment preserves a claim that the sentence, even if substantively reasonable, involved a procedural error.

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 adequacy of the procedures it employed in deciding on that sentence. Puckett, 556 U.S. at 134; see pp. 8-9, 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 lends support to petitioner's view, it is unlikely that this Court's decision in Holguin-Hernandez will affect the proper disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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