No. 19-5421

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES EARL DAVIS, 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 district court plainly erred in its determination that a prior state offense by petitioner was not relevant conduct within the meaning of the advisory Sentencing Guidelines and that his federal sentence should run consecutively to any term of imprisonment in the state case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 129.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2019. The petition for a writ of certiorari was filed on July 29, 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) and 924(a)(2), and of possession of a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. A1. He was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. Id. at A2-A3. The court of appeals affirmed. Id. at B1-B2.

1. In July 2016, police officers in Dallas, Texas, investigated a report of a suspicious vehicle driven by petitioner and parked outside a residence. Presentence Investigation Report (PSR) ¶¶ 1, 6. Officers approached petitioner's vehicle and, after smelling marijuana, ordered him out of the car. PSR ¶ 6. As petitioner was exiting the car, the officers saw a black semiautomatic handgun in the door compartment. Ibid. After searching the car, the officers also found a bag containing about 30 ecstasy pills. Ibid.

A grand jury in the United States District Court for the Northern District of Texas charged petitioner with one count of possession of a firearm by a felon, in violation 18 U.S.C. 922(g)(1) and 924(a)(2), and one count of possession of a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. A1. Petitioner

pleaded guilty to both counts. See id. at B1. The presentence report prepared by the Probation Office noted four pending state charges against petitioner. Two of those cases, in Dallas County, stemmed from the same July 2016 traffic stop that led to petitioner's federal charges. PSR ¶ 54. The other two cases stemmed from an arrest in Hunt County in October 2015, in which officers found petitioner in possession of 1.55 grams of marijuana and near a handgun. PSR ¶¶ 52-53.

The Probation Office determined that the base offense level for petitioner's offense conduct under the advisory Sentencing Guidelines was 14, and that the total offense level -- after adjustments for specific offense characteristics and petitioner's acceptance of responsibility -- was 17. PSR ¶¶ 18-28. In determining petitioner's offense level, the Probation Office did not consider petitioner's October 2015 offense to be "relevant conduct" under the Guidelines, which define "relevant conduct" to include acts and omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction." Sentencing Guidelines § 1B1.3(a)(2) (capitalization and emphasis omitted). Based on petitioner's total offense level and criminal history category, the Probation Office determined that his advisory Guidelines sentencing range was 51-63 months of imprisonment. PSR ¶ 85.

2. At sentencing, the government asked the district court to impose a sentence at the high end of the Guidelines range.

Sent. Tr. 4. Petitioner's counsel stated that petitioner "accept[ed]" the PSR, which "has made a reasonable assessment of all his prior criminal history." Id. at 3, 7. Petitioner's counsel nevertheless asked the court to impose a sentence below the Guidelines range. Id. at 11. Citing Sentencing Guidelines § 5G1.3(c), under which a defendant's federal sentence would run concurrently with (rather than consecutively to) any state sentence imposed for "relevant conduct," petitioner's counsel also requested that petitioner's federal sentence run concurrently with any state sentence imposed in the Dallas County prosecution stemming from the same July 2016 conduct that led to the federal offense of conviction. Sent. Tr. 7-8. Petitioner's counsel did not request that petitioner's sentence run concurrently with any state sentence imposed in the Hunt County cases involving his October 2015 conduct.

The district court stated that, after considering the factors set forth in 18 U.S.C. 3553(a), it "determined that a sentence of 57 months, which is at the midpoint of the advisory guideline range" is "sufficient but not greater than necessary to comply with the statutory purposes" of sentencing. Sent. Tr. 16. In reaching that determination, the court recognized that it had the authority to vary downward, and that the Guidelines are advisory. Ibid. But the court concluded that a sentence below the Guidelines range would not be sufficient to comply with the statutory purposes of sentencing, particularly in light of petitioner's lengthy

criminal history and the fact that "at the time he committed the offense the presentence report reflects that he was out on bond for the offense of unlawful possession of a firearm and possession of marijuana." Id. at 17, 18.

The district court ordered that the sentences on the two federal counts run concurrently with one another. Sent. Tr. 20. It further ordered that the 57-month federal sentence run concurrently with any sentence imposed in the Dallas County cases involving the same July 2016 conduct, and consecutively to any sentences imposed in the Hunt County cases related to petitioner's October 2015 offense. Ibid. Petitioner's counsel did not object to the sentence or to the court's decision to run that sentence consecutively to any state sentences imposed for the October 2015 offense.

3. The court of appeals affirmed. Pet. App. B1-B2. On appeal, petitioner argued for the first time that his October 2015 offense constitutes "relevant conduct" under Section 5G1.3 of the Guidelines, and that the district court erred in ordering that his federal sentence run consecutively to any sentence imposed for his October 2015 offense. Ibid. The court of appeals reviewed that argument for plain error. See id. at B2; Fed. R. Crim. P. 52(b). The court observed that petitioner's "unpreserved arguments challenging the consecutiveness of his sentence under [Sentencing Guidelines] § 5G1.3 raise fact questions pertaining to whether the conduct underlying his previous arrest was sufficiently connected

or related to the underlying offense to qualify as relevant conduct under" the Guidelines. Pet. App. B2. And the court stated that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." Ibid. (quoting United States v. Lopez, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam), cert. denied, 500 U.S. 924 (1991)).

ARGUMENT

Petitioner contends (Pet. 7-17) that the court of appeals erred in its application of plain-error review to his unpreserved claim that the district court should have directed that his federal sentence run concurrently with any state sentences for the October 2015 offenses. The judgment of the court of appeals is correct, and its unpublished per curiam decision does not warrant further review. Petitioner is not entitled to plain-error relief under any possible approach to such review, so the objection he raises here to the court of appeals' approach has no bearing on the ultimate outcome of the case. This Court has denied petitions for writs of certiorari in other cases involving the argument that petitioner presents, see Ables v. United States, 139 S. Ct. 1259 (2019) (No. 18-6092); Wright v. United States, 138 S. Ct. 115 (2017) (No. 16-9348); Carlton v. United States, 135 S. Ct. 2399 (2015) (No. 14-8740); Goodley v. United States, 571 U.S. 1133

(2014) (No. 13-6415); Laver v. United States, 571 U.S. 1074 (2013) (No. 13-5996), and it should follow the same course here.*

1. Petitioner does not dispute that, because he did not raise his current sentencing claim in the district court, that claim is reviewable only for plain error on appeal. Pet. App. B2; see Fed. R. Crim. P. 52(b). Under plain-error review, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" United States v. Marcus, 560 U.S. 258, 262 (2010) (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)) (brackets in original). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (citation omitted).

Petitioner challenges (Pet. 7-12) the rationale on which the court of appeals denied him plain-error relief -- that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error" on

* A similar issue is presented by the pending petitions for writs of certiorari in Bazan v. United States, No. 19-6113 (filed Sept. 26, 2019), and Bazan v. United States, No. 19-6431 (filed Oct. 23, 2019).

appeal. Pet. App. B2 (quoting United States v. Lopez, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam), cert. denied, 500 U.S. 924 (1991)). Petitioner contends (Pet. 7-12) that Federal Rule of Criminal Procedure 52 does not distinguish between factual and legal errors, and that the court of appeals should have performed a case-specific analysis of the prerequisites for plain-error relief. No need exists to address that contention, however, because petitioner would not be entitled to relief under any approach to plain-error review.

Sentencing Guidelines § 5G1.3(c) provides that, if "a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment." Section 1B1.3, in turn, describes "relevant conduct" -- i.e., "conduct that a sentencing court may consider in determining the applicable guideline range," including conduct that is not formally charged or for which the defendant was acquitted.

Petitioner contends (Pet. 13-15) that his October 2015 offenses constitute "relevant conduct," and that the district court therefore should have ordered his federal sentence to run currently with, rather than consecutively to, any state sentences

imposed in connection with those offenses. That contention lacks merit for multiple independent reasons.

First, courts have explained that a prior offense is not "relevant conduct" within the meaning of Section 5G1.3 unless it is "used to determine the appropriate offense level for the instant offense." United States v. Heard, 359 F.3d 544, 549 (D.C. Cir. 2004). That is because Section 5G1.3's provisions regarding consecutiveness of sentences are intended to "protect petitioner against having the length of his sentence multiplied by duplicative consideration of the same criminal conduct." Witte v. United States, 515 U.S. 389, 404-405 (1995). No such double-counting occurred here, because the October 2015 offenses were not used to determine petitioner's offense level or Guidelines range. See PSR ¶¶ 18-28.

Second, petitioner's October 2015 offenses were not "part of the same course of conduct or common scheme or plan as the offense of conviction," let alone plainly so. Sentencing Guidelines § 1B1.3(a)(2). "Offenses qualify as part of the same course of conduct if they are 'sufficiently connected or related to each other to warrant a conclusion that they are part of a single episode, spree, or ongoing series of offenses.'" United States v. Ocana, 204 F.3d 585, 589-590 (5th Cir.) (citation omitted), cert. denied, 531 U.S. 880 (2000). "The factors that are appropriate to weigh in making the determination as to whether the offenses are sufficiently connected or related include 'the degree of

similarity of the offenses, the regularity of the offenses, and the time interval between the offenses.'" Id. at 590 (citation omitted). "When one of the factors is absent, a stronger presence of at least one of the other factors is required." Ibid.

The Fifth Circuit has "generally used a year as the benchmark for determining temporal proximity," United States v. Rhine, 583 F.3d 878, 886-887 (5th Cir. 2009) (citation omitted), and the October 2015 offense occurred less than one year before the July 2016 offense of conviction. But the other two factors -- the similarity of the offenses and the regularity of the offenses -- support the determination that the October 2015 offenses were not part of the same course of conduct as the July 2016 offense.

With respect to that similarity, "the mere fact that two separate offenses involve the same type of drug is generally not sufficient to support a finding of similarity." Rhine, 583 F.3d at 889; see United States v. Culverhouse, 507 F.3d 888, 896 (5th Cir. 2007) ("The fact that [both offenses] involved methamphetamine is not enough."). Here, the two offenses involved different drugs: In October 2015 petitioner was found with 1.55 grams of marijuana, while in July 2016 he was found with approximately 30 ecstasy pills. PSR ¶¶ 6, 52. In addition, "there is no evidence of similar accomplices," in the two offenses. Ocana, 204 F.3d at 590. In October 2015, petitioner was one of four passengers in the car that was stopped, and all of those accomplices were found with contraband. PSR ¶ 52. In July 2016,

petitioner was found alone, and "nothing indicates that [he] had accomplices." United States v. Wall, 180 F.3d 641, 646 (5th Cir. 1999). Nor, for that matter, is there any evidence that the ecstasy pills at issue in petitioner's July 2016 offense of conviction "shared a common source, supplier, or destination with the marijuana involved in the" October 2015 offense. Ibid. Although petitioner points (Pet. 16) to the fact that on both occasions a gun was found in the car, the offenses involved different types of guns and, in any event, "to describe the defendant's conduct at such a level of generality" as merely involving firearms would "eviscerate the evaluation of whether uncharged activity is part of the same course of conduct" as the offense of conviction. Rhine, 583 F.3d at 889 (citation omitted).

With respect to regularity, petitioner errs in suggesting (Pet. 15) that the district court was required to find his October 2015 offenses relevant conduct on the theory that his "gun and drug offenses were regularly repeated." He cites (ibid.) the July 2016 and October 2015 offenses as well as four others dating back to 2002, but various offenses spread out over more than a decade "cannot be considered repetitious or regular conduct to a degree significant enough to constitute sufficient connection under the [G]uidelines." Rhine, 583 F.3d at 890 (quoting Culverhouse, 507 F.3d at 897) (brackets in original). This was recidivism, not a continuous course of conduct, and distinct sentences for the July 2016 federal crimes was appropriate. The district court did not

err -- much less commit any error that was "clear or obvious," Puckett, 556 U.S. at 135 -- in finding that the October 2015 offense was not "relevant conduct" under Guidelines Section 1B1.3, or in ordering that petitioner's federal sentence run concurrently with any state sentence imposed in connection with the July 2016 offenses, and consecutively with any sentence imposed in connection with the October 2015 offense.

Third, even if the district court had erred, petitioner would still not be entitled to plain-error relief, because he cannot show that any such error "affected the outcome of the district court proceedings," or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Puckett, 556 U.S. at 135 (citations omitted). "Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." Setser v. United States, 566 U.S. 231, 236 (2012). Judges have that same discretion "in the context here, where a federal judge anticipates a state sentence that has not yet been imposed." Ibid. Section 5G1.3 of the Guidelines did nothing to diminish that discretion. See United States v. Lynn, 912 F.3d 212, 217 (4th Cir.) ("[B]ecause the Guidelines are advisory, a district court is not obligated to impose a concurrent sentence pursuant to USSG § 5G3.1."), cert. denied, 140 S. Ct. 86 (2019). Petitioner therefore cannot show

that any error by the district court in interpreting the Guidelines' relevant-conduct provisions in fact affected the district court's exercise of its discretion to impose consecutive sentences here.

2. No other basis exists for this Court's review. Although petitioner asserts that different courts of appeals (Pet. 8-12) have stated the plain-error standard differently, petitioner does not contend that any other court of appeals would have awarded plain-error relief under the circumstances here. Indeed, other circuits have emphasized that unpreserved assertions of factual error will rarely warrant or result in appellate relief under any approach. See, e.g., United States v. Ahrendt, 560 F.3d 69, 76-77 (1st Cir.) ("With respect to factual determinations, an error cannot be clear or obvious unless the desired factual finding is the only one rationally supported by the record below.") (brackets and citation omitted), cert. denied, 557 U.S. 913 (2009); United States v. Saro, 24 F.3d 283, 291 (1994) ("[S]ince the obviousness of an error is assessed from the sentencing court's perspective, factual errors in pre-sentence reports may well tend to survive plain-error review more readily than legal errors.").

Contrary to petitioner's suggestion (Pet. 8), denying the petition for a writ of certiorari in this case would be consistent with Justice Sotomayor's statement respecting the denial of certiorari in Carlton, supra. In Carlton, as in this case, the Fifth Circuit quoted its prior decision in Lopez for the

proposition that "questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." United States v. Carlton, 593 Fed. Appx. 346, 349 (2014) (per curiam) (quoting Lopez, 923 F.2d at 50) (brackets omitted), cert. denied, 135 S. Ct. 2399 (2015). Justice Sotomayor noted that "no other court of appeals has adopted the per se rule outlined by the Fifth Circuit in Lopez," which she viewed to be incorrect, and cited cases from nine circuits that had applied plain-error review to an asserted factual error. 135 S. Ct. at 2400 & n.* (emphasis omitted). Justice Sotomayor nevertheless concluded that certiorari was unwarranted, noting that the Fifth Circuit had not uniformly followed Lopez, and explaining that "the ordinary course of action is to allow the court of appeals the first opportunity to resolve the disagreement." Id. at 2401; see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner here did not seek rehearing en banc in the court of appeals in order to give the Fifth Circuit an opportunity to revisit the plain-error issue that he raises. Moreover, unlike Carlton, where the government "conceded" that the district court had made a factual error, 135 S. Ct. at 2399, petitioner here has not demonstrated any error in the district court's relevant-conduct determination that he now challenges. See pp. 8-13, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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