No. 19-6086

IN THE SUPREME COURT OF THE UNITED STATES

LUIS ALBERTO TORRES, 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 determined that any error in the district court's conclusion that it could not impose a sentence below the statutory minimum term of 180 months of imprisonment for petitioner's child-pornography offenses was harmless, where the district court indicated that it found the 180-month sentence appropriate in any event in light of the sentencing factors specified in 18 U.S.C. 3553(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 732 Fed. Appx. 590.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2018. A petition for rehearing was denied on July 11, 2019 (Pet. App. 6a). The petition for a writ of certiorari was filed on September 25, 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 Central District of California, petitioner was convicted on two counts of production of child pornography, in violation of 18 U.S.C. 2251(a), and one count of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2010). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by a life term of supervised release. Ibid. The court of appeals affirmed. Pet. App. 1a-5a.

1. On November 11, 2010, an employee of a Target store in Gardena, California, contacted the police to report that several customers had complained about a person following young girls around the store and taking pictures of them with his cell phone. Gov't C.A. Br. 3. Two officers responded. Ibid. On the store's security monitors, the officers observed a man, later identified as petitioner, follow a young girl while appearing to take pictures of her with his phone. Ibid. The officers approached petitioner, and he agreed to talk with them inside the store's security office. Id. at 4. Inside the office, petitioner consented to a search of his cell phone. Id. at 6.

The officers searched petitioner's phone and found hundreds of photographs of juvenile girls, including a series of graphic, sexually explicit photos of a girl who appeared to be asleep. Gov't C.A. Br. 7. The police later identified the girl as

petitioner's five-year-old granddaughter. Ibid. In 2011, petitioner pleaded guilty in California state court to two counts of lewd acts upon a child, in violation of California Penal Code § 288(a) (West Supp. 2011), and one count of sexual exploitation of a child, in violation of California Penal Code § 311.3 (West 2008). Revised Presentence Investigation Report (PSR) ¶ 58. Petitioner was sentenced to 60 months of imprisonment and was released on parole in 2015 after serving 51 months. Ibid.

2. After petitioner was arrested and charged in state court, further investigation revealed that his laptop computer contained at least 59 child pornography videos involving other victims. Gov't C.A. Br. 8. On February 13, 2015, a federal grand jury in the Central District of California charged petitioner with two counts of production of child pornography, in violation of 18 U.S.C. 2251(a), and one count of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2010). Indictment 1-5. The production counts were based on the child pornography found on his phone, and the possession count was based on the child pornography found on his laptop. Gov't C.A. Br. 9. Petitioner pleaded guilty to all three charges. Judgment 1.

The default statutory penalty range for a conviction for a violation of Section 2251(a) is "not less than 15 years nor more than 30 years." 18 U.S.C. 2251(e). The Probation Office determined that petitioner's advisory Guidelines sentencing range was 292 to 365 months of imprisonment. PSR ¶ 113. Petitioner

contended that the district court should grant a downward departure of 51 months pursuant to Sentencing Guidelines § 5K2.23 (2016), to reflect the 51 months that he had served in state prison for related offense conduct. D. Ct. Doc. 108, at 17 (Dec. 12, 2016). Petitioner also contended that the court should "subtract" the 51 months "from [his] 15-year mandatory minimum" on the Section 2251(a) convictions. Ibid. The government agreed that a downward departure of 51 months for Guidelines purposes would be appropriate but contended that the court lacked authority to sentence petitioner to a term of imprisonment less than the statutory minimum of 180 months. See Pet. C.A. E.R. 32-33; Gov't C.A. Br. 10-11.

The district court imposed a sentence of 180 months on each of the first two counts and 120 months on the third count, all to run concurrently. Judgment 1. In doing so, the court cited its "obligation to follow the mandatory minimum" prescribed by Section 2251(e). Pet. C.A. E.R. 40. The court also observed, however, that petitioner's offense conduct -- producing child pornography using his five-year-old granddaughter -- was "horrendous." Id. at 39. The court explained that its sentence of 180 months "reflect[ed] the seriousness of the offense" and "satisf[ied] the concerns of section 3353(a)." Id. at 39-40. The court stated that 180 months "happens to be the mandatory minimum. So the sentence is based upon the mandatory minimum and the court's independent concern[.]" Id. at 40. And the court emphasized that

it "agree[d] with the mandatory minimum" on the facts of this case, describing 180 months as "the appropriate sentence." Ibid.

3. The court of appeals affirmed in an unpublished memorandum disposition, although it modified several terms of petitioner's supervised release. Pet. App. 1a-5a. As relevant here, the court declined to decide whether the district court had erred in determining that it was obligated to impose the statutory minimum sentence of 180 months on the two child-pornography production counts, without subtracting the 51 months petitioner had served in state prison. Id. at 3a. The court of appeals explained that "any error here was harmless" because the district court "made clear that the sentence imposed was the term that it considered appropriate and that it would not have imposed a shorter sentence based on the time served on the discharged state sentence" even if it had the authority to do so. Id. at 3a-4a.

ARGUMENT

Petitioner contends (Pet. 12-13) the court of appeals erred in finding that any error in the district court's determination that it could not impose a term of imprisonment shorter than the statutory minimum of 180 months was harmless. That factbound contention does not warrant this Court's review, and any differences in the courts of appeals' precise articulation of the harmless-error standard in this context do not suggest that another court of appeals would have found the alleged error in this case to be prejudicial. This Court has repeatedly denied petitions for

writs of certiorari that have raised similar issues about purported conflicts in applying the harmless-error standard in the context of sentencing. See Elijah v. United States, 139 S. Ct. 785 (2019) (No. 18-16); 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). The same result is warranted here.

1. The court of appeals correctly applied the principles of harmless-error review to this case. Pet. App. 3a-4a.

a. Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." When a defendant preserves a claim of error in the district court, the government has the burden of establishing under Rule 52(a) that the error was harmless because it did not affect substantial rights. United States v. Davila, 569 U.S. 597, 607 (2013). An error generally "affect[s] substantial rights," Fed. R. Crim. P. 52(a), only if it "affect[s] the outcome of the district court proceedings," United States v. Marcus, 560 U.S. 258, 262 (2010) (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)). Here, as the court of appeals recognized, even if petitioner's claim of legal error in his sentence had merit, the asserted error did not affect the sentence he received.

In imposing a statutory-minimum sentence of 180 months, the district court expressly explained that it "agree[d]" with the 180-month term of imprisonment, that it found 180 months to be "the appropriate sentence" in light of the sentencing factors specified in 18 U.S.C. 3553(a), and that the 180-month sentence was "based upon the mandatory minimum and the court's independent concern" about the seriousness of petitioner's offenses. Pet. C.A. E.R. 40 (emphasis added). On appeal, petitioner did not challenge the reasonableness of the court's determination that 180 months was the appropriate sentence in light of the sentencing factors in Section 3553(a). Petitioner contended, however, that the court misapprehended its authority to impose the mandatory minimum sentence of 180 months but then to grant petitioner "credit" of 51 months "for the time he spent in state custody," which would have resulted in a federal prison term of only 129 months. Pet. C.A. Br. 50; see id. at 50-60.

The court of appeals correctly determined that any error in the district court's conclusion regarding its authority to impose a sentence less than the statutory minimum of 180 months did not affect petitioner's substantial rights and was therefore harmless. As the court of appeals recognized, the district court "made clear" that the 180-month sentence was the "term [of imprisonment] that it considered appropriate" for petitioner's conduct, and that it "would not have imposed a shorter sentence based on the time served" in state prison in any event. Pet. App. 3a-4a. Thus, the

question whether the district court could have disregarded the statutory minimum was academic, because the district court indicated that it would not have done so even if it could have.

b. Petitioner errs in suggesting (Pet. 10-11, 14-15) that the decision below is in tension with this Court's decisions in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), and Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018).

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). If the reviewing court determines that the district court would have imposed the same sentence without regard to any asserted error, as the court of appeals did here, the putative error cannot be said to have affected the defendant's substantial rights.

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); see Fed. R. Crim. P. 52(b). The Court in that case did not address the circumstances under which an error may affect the defendant's substantial rights for purposes of the harmless-error rule.

2. Petitioner contends (Pet. 12-13) that the courts of appeals are divided about the standard for applying the harmless-error rule in the context of sentencing. The decisions petitioner identifies, however, do not demonstrate any division of authority warranting this Court's review. To the extent that some differences exist in how the various circuits articulate the harmless-error standard in this context, those differences do not reflect any meaningful, substantive disagreement.

All courts of appeals agree that an error is harmless if "the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed." Williams v. United States, 503 U.S. 193, 203 (1992). Different courts of appeals sometimes characterize that standard in different ways. For example, as petitioner notes (Pet. 12), the Second and Third Circuits have sometimes described the standard as requiring that it be "highly probable" that the asserted error did not affect the

sentence. United States v. Zabielski, 711 F.3d 381, 387 (3d Cir. 2013) (quoting United States v. Langford, 516 F.3d 205, 215 (3d Cir. 2008)); see United States v. Stevens, 211 F.3d 1, 5 (2d Cir. 2000) (similar). And the First and Ninth Circuits have sometimes described the standard as requiring that the reviewing court have a "fair assurance that the sentencing court 'would have imposed the same sentence even without the error.'" United States v. Fernández-Garay, 788 F.3d 1, 5 (1st Cir. 2015) (quoting United States v. Tavares, 705 F.3d 4, 25 (1st Cir.), cert. denied, 569 U.S. 986, and 571 U.S. 964 (2013)); see United States v. Beng-Salazar, 452 F.3d 1088, 1092 (9th Cir. 2006) (stating that the court reviews for "fair assurance of harmlessness") (quoting United States v. Seschillie, 310 F.3d 1208, 1214 (9th Cir. 2002), cert. denied, 538 U.S. 953 (2003)).

Petitioner suggests (Pet. 12) that, in Beng-Salazar, the Ninth Circuit adopted a different standard from other circuits by stating that an error is harmless if "it is more probable than not that the error did not materially affect" the sentence. Beng-Salazar, 452 F.3d at 1096 (citation omitted). But the court of appeals emphasized that its approach in applying the harmless-error standard in that case was the same as the approaches in other circuits -- including the First Circuit and the Second Circuit, whose approach the decision described as "particularly persuasive" and quoted at length. Ibid.; see id. at 1095-1096. Beng-Salazar accordingly does not suggest that the Ninth Circuit has departed

from other circuits in its application of harmless-error review. Petitioner's contention (Pet. 12) that the Eleventh Circuit has done so is similarly mistaken. In the decision petitioner cites, the Eleventh Circuit made clear that its language was intended to follow this Court's precedent. See United States v. Scott, 441 F.3d 1322, 1329 (2006) (per curiam) (stating that the court of appeals is "not required to vacate the sentence and remand the case if the [district] court would have likely sentenced [the defendant] in the same way without the error") (citing Williams, 503 U.S. at 1120-1121).

At bottom, petitioner has failed to identify any substantial division of authority warranting this Court's review. The linguistic differences petitioner identifies in particular decisions do not reflect any substantive disagreement about when an asserted error at sentencing is harmless. And all the courts of appeals agree on the fundamental principles of harmless-error review -- including that the government bears the burden of proving harmlessness (cf. Pet. 12-13). To the extent that the lower courts have reached different outcomes in different cases based on different facts, that is the inevitable result of the highly case-specific inquiry that harmless-error review requires. See Molina-Martinez, 136 S. Ct. at 1346 (explaining that "[t]he sentencing process is particular to each defendant * * * and a reviewing court must consider the facts and circumstances of the case before it").

3. Even if the question petitioner seeks to present otherwise warranted review, this case would be an unsuitable vehicle. The harmless-error question is ultimately of no practical consequence to the proper disposition of this case because the district court did not commit any error at all in concluding that it was obligated to impose a sentence consistent with the range of penalties prescribed by 18 U.S.C. 2251(e). See Gov't C.A. Br. 40-59. Petitioner has yet to identify any statute that would have permitted the court to impose a sentence of less than 180 months under these circumstances. Although 18 U.S.C. 3584(a) permits a federal court to order that a sentence run concurrently with "an undischarged term of imprisonment" (emphasis added) --i.e., a term that the defendant has not yet served or is still serving -- it contains no analogous provision authorizing a court to reduce the statutory minimum sentence in order to "credit" (Pet. 6) a defendant for time the defendant already served for a prior conviction in state court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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