No. 19-6502

IN THE SUPREME COURT OF THE UNITED STATES

CORY DALE FIELDS, 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 a Texas grand jury's previous decision not to charge petitioner for a particular state offense categorically precluded the district court from subsequently finding reliable evidence of the conduct underlying the charge and relying on it in determining petitioner's sentence for a separate offense.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Fields, 17-cr-40 (July 6, 2018)

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

United States v. Fields, 18-10928 (July 29, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 932 F.3d 316.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2019. The petition for a writ of certiorari was filed on October 28, 2019 (Monday). 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

possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. B1. He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Id. at B1-B2. The court of appeals affirmed. Id. at A1-A10.

1. In November 2016, petitioner was a passenger in a car that was stopped by a county police officer for failure to signal. Presentence Investigation Report (PSR) ¶¶ 6-7. Along with a detective who had arrived on the scene, the officer conducted a consent-authorized search and found two guns in a case in the back of the car. PSR ¶ 7. The officers confirmed based on separate intelligence that the guns were 2 of 21 guns recently stolen from a firearms training academy. Ibid.

On February 1, 2017, officers learned that two of the stolen guns had been "traded" to petitioner for methamphetamine and $40. PSR ¶ 8. Later that month, following an arrest on an outstanding warrant for a motor vehicle violation, petitioner admitted that he obtained the two guns in exchange for methamphetamine and $75. PSR ¶ 9. Petitioner disclaimed any involvement in stealing the guns but acknowledged that he was a convicted felon who was not permitted to possess firearms. Ibid. A subsequent records search confirmed petitioner's multiple prior felony convictions, including one conviction for delivering methamphetamine and three convictions for evading arrest or detention with a vehicle. PSR ¶ 11.

On March 15, 2017, a federal grand jury returned an indictment charging petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). PSR ¶ 1. In September 2017, petitioner pleaded guilty without a plea agreement. PSR ¶ 3.

2. The Probation Office's presentence report "described an extensive criminal history, beginning when [petitioner] was eighteen and continuing for twenty years." Pet. App. A4. As relevant here, the report also detailed two domestic-violence arrests -- both for "Injury to a Child/Elderly/Disabled" person, one with "Intent of Bodily Injury" and the other with "Bodily Injury" -- that did not result in convictions. PSR ¶¶ 46-47. The Probation Office recounted the information in the police report from each incident. Ibid. For the first incident, in 2001, the police reported that petitioner's "then-girlfriend and her son told them that after [petitioner] found the child eating candy while in time-out, he 'pushed him by the shoulders and kicked him in the buttocks, causing him to fall against a wall and causing him pain.'" Pet. App. A4 (brackets omitted) (quoting PSR ¶ 46). For the second incident, in 2005, the police reported that petitioner's "girlfriend told them that [he] had yelled at her two children for arguing, one of the children stood up for his brother, and [petitioner] pushed him 'into a wall and onto the tile floor,' causing the child to scrape his back and hit his head on the wall." Ibid. (quoting PSR ¶ 47). In both cases, the PSR noted, a Texas

grand jury "ultimately no-billed the charge," meaning it declined to return an indictment. Ibid.

The Probation Office calculated a sentencing range of 37 to 46 months of imprisonment, based on an offense level of 17 and a criminal history category of IV. Pet. App. A4. The Probation Office also suggested that petitioner's criminal history might warrant an upward variance, and before sentencing, the district court notified petitioner that it was considering an above-Guidelines sentence. Ibid.

3. At the sentencing hearing, petitioner argued that an upward variance was unwarranted. Pet. App. A4. He contended that many of his prior convictions were already factored into his criminal history category, or otherwise deserved minimal weight. Ibid. With respect to the 2001 and 2005 domestic-violence arrests, he contended that "there was not enough reliable information to conclude that the alleged conduct occurred" in light of the grand juries' no-bills. Ibid. (brackets omitted); see Sent. Tr. 9-10.

Applying the sentencing factors set forth in 18 U.S.C. 3553(a), the district court imposed an above-Guidelines sentence of 60 months of imprisonment. Pet. App. A5; see Sent. Tr. 14-21. The court characterized petitioner's criminal history as "very disturbing" and recounted his lengthy record of convictions. Sent. Tr. 14-18. The court noted that "many of [petitioner's] past convictions were not factored into his criminal history category, and more recent offenses reflected a troubling pattern of drug

offenses and failure to cooperate with law enforcement." Pet. App. A4. The court also cited the 2001 and 2005 arrests, finding by a preponderance of the evidence that petitioner "engaged in the conduct that's described in" the presentence report. Id. at A5; see, e.g., Sent. Tr. 19 (stating, as to the 2005 arrest, that although the charge was no-billed, "I can tell from the description of the offense report in paragraph 47 [of the presentence report] that you engaged in the conduct described there"); see also, e.g., Sent. Tr. 18-19 ("I can tell from the descriptions of the conduct you had engaged in that in some of those instances that, in fact, you did engage -- commit the offense that you were charged with.").

4. Petitioner appealed, arguing "solely" that the presentence report's "description of the conduct underlying the 2001 and 2005 no-billed arrests was insufficiently reliable for the district court to account for those arrests at sentencing." Pet. App. A5. The court of appeals rejected that argument and affirmed. Id. at A1-A10.

The court of appeals explained that a sentencing court "may consider any information which bears sufficient indicia of reliability to support its probable accuracy," including information pertaining to "prior criminal conduct not resulting in a conviction." Pet. App. A5 (citations omitted). The court then observed that a presentence report may contain information of such sufficient reliability where it is "based on the results of a police investigation, especially where the offense report is

detailed and includes information gathered from interviews with the victim and any other witnesses." Id. at A6 (citation and internal quotation marks omitted). And the court found that, consistent with those principles, the district court in this case had permissibly "looked to the [presentence report's] description of two detailed offense reports explaining when, where, and how [petitioner] allegedly engaged in abusive conduct toward his girlfriend's children, and found by a preponderance that he engaged in the conduct described." Ibid.

The court of appeals rejected petitioner's argument that Texas grand juries' no-billing of the charges from the 2001 and 2005 arrests precluded the district court from finding the evidence of the underlying conduct sufficiently reliable for purposes of sentencing in this case. Pet. App. A6. In particular, the court of appeals determined that Texas law undermined petitioner's contention that a non-indictment precluded the district court from finding that the conduct occurred by a preponderance of the evidence, which was premised on the theory that the grand juries had necessarily found no probable cause for that conduct. Id. at A7. The court of appeals explained that, in Texas, a no-bill instead "signif[ies] only that the specific evidence before the grand jury did not convince it to formally charge the defendant with a specific offense." Ibid.; see id. at A7-A8 (citing Rachal v. State, 917 S.W.2d 799, 806-807 (Tex. Crim. App.) (en banc), cert. denied, 519 U.S. 1043 (1996)). Thus, "[w]hile the grand

jury might return a no-bill because it found no probable cause to conclude that the events occurred as described, it also might return a no-bill as a function of the evidence and argument presented by the prosecution, or based on its conclusion that the facts were a poor fit for the particular offense charged." Id. at A9.

The court of appeals accordingly determined that, "[b]y itself, the no-bill cannot transform a factual recitation with sufficient indicia of reliability into one that lacks such indicia." Pet. App. A9. And the court of appeals observed that, in this case, the district court had found by a preponderance of the evidence only that petitioner "engaged in the conduct described in the" presentence report relating to the 2001 and 2005 arrests, not that he committed the offenses for which he was arrested, such that the district court's determination was consistent with the grand juries' no-bills. Ibid. (internal quotation marks omitted).

ARGUMENT

Petitioner renews his contention (Pet. 4-7) that the Texas grand juries' no-bills categorically precluded the district court from subsequently finding and relying on the underlying misconduct in determining his sentence. The court of appeals correctly rejected that contention, and petitioner does not allege that its decision implicates any conflict in the circuits. In any event, any error did not affect petitioner's sentence. Further review is not warranted.

1. The court of appeals correctly affirmed the district court's reliance on conduct underlying petitioner's 2001 and 2005 domestic-violence arrests in imposing an upward variance. Congress has provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. That provision codifies the "longstanding principle that sentencing courts have broad discretion to consider various kinds of information" to tailor each sentence to the particular defendant involved. Pepper v. United States, 562 U.S. 476, 488 (2011) (quoting United States v. Watts, 519 U.S. 148, 151 (1997) (per curiam)). In consequence, a sentencing judge is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446 (1972).

Under the Due Process Clause, however, a criminal sentence may not be based on "materially false" information that the offender did not have an effective "opportunity to correct." Townsend v. Burke, 334 U.S. 736, 741 (1948). To implement that principle, the Sentencing Guidelines require that whenever a "factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor," and provide that the court will rely on information only if it

determines that the "information has sufficient indicia of reliability to support its probable accuracy." Sentencing Guidelines § 6A1.3(a) (2016).

The district court in this case correctly determined that factual information in the presentence report about conduct underlying petitioner's 2001 and 2005 domestic-violence arrests had sufficient indicia of reliability to be taken into account at sentencing. While it explicitly declined to consider the conduct underlying other no-billed arrests -- namely, a 2011 drug arrest and a 2001 aggravated-robbery arrest, see PSR ¶¶ 49, 51 -- due primarily to a lack of indicia of reliability, see Sent. Tr. 19, it determined that conduct underlying the domestic-violence arrests was sufficiently reliable. The district court "did not rely on a bare arrest record," but instead "looked to the [presentence report's] description of two detailed offense reports explaining when, where, and how [petitioner] allegedly engaged in abusive conduct towards his girlfriend's children." Pet. App. A6. Notably, both offense reports were based on firsthand interviews with the abused children and their mother. PSR ¶¶ 46-47. And petitioner does not claim -- and offered no evidence at sentencing to suggest -- that either offense report is inaccurate in any respect. Sent. Tr. 6.

Instead, petitioner contends (Pet. 4-5, 7) that the presentence report's description of the conduct underlying the domestic-violence arrests is categorically unreliable because

Texas grand juries no-billed the charges arising from those arrests. That contention lacks merit. As the Texas courts have explained, "[a] Grand Jury's no-bill is merely a finding that the specific evidence brought before the particular Grand Jury did not convince them to formally charge the accused with the offense alleged." Rachal v. State, 917 S.W.2d 799, 807 (Tex. Crim. App.) (en banc), cert. denied, 519 U.S. 1043 (1996). In other words, a "grand jury's no-bill is a decision not to charge the accused with a particular offense, not a judgment that no unlawful conduct whatsoever occurred." Pet. App. A8 (quoting United States v. Gipson, 746 Fed. Appx. 364, 366 (5th Cir. 2018) (per curiam)). A grand jury might, for example, determine "that the facts were a poor fit for the particular offense charged," or that the conduct occurred but the defendant had a valid defense to the charge. Id. at A9 & n.31. The latter possibility is particularly likely here, given petitioner's contention that he had a valid defense to both of the no-billed charges. Ibid. In either scenario (or others), the grand jury could "reject[] the charge * * * without rejecting the prosecution's factual claims." Id. at A8 (emphasis omitted).

Accordingly, because the district court in this case based its upward variance on the "underlying activities" described in the offense reports -- regardless of whether those activities would support legal charges -- its sentencing determination was fully consistent with the grand jury's no-bills. Pet. App. A9. Its determination was also fully consistent with this Court's decision

in Watts, supra, on which petitioner mistakenly relies (Pet. 5-7). Watts upheld a sentencing court's consideration of acquitted conduct, reasoning that an "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." Watts, 519 U.S. at 155 (citation omitted); see Pet. 6. Accordingly, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." Watts, 519 U.S. at 156 (citation omitted). Petitioner's argument (Pet. 6) that preclusion is warranted here because the federal sentencing court is applying a higher standard of proof (preponderance of the evidence) than the state grand juries (probable cause) misapprehends the grand jury's role under Texas law. As explained above, a Texas no-bill does not necessarily reflect any factual findings by the grand jury with respect to the charged conduct at all. Furthermore, Watts itself makes clear that even in the context of a petit jury's acquittal, "the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty." 519 U.S. at 155. Watts also rejected the idea that courts should "invent a blanket prohibition against considering certain types of evidence at sentencing." Id. at 152. And state proceedings should not have any preclusive effect on the prosecution of a federal criminal case. See Gamble v. United States, 139 S. Ct. 1960 (2019).

2. Petitioner does not suggest that the court of appeals' decision in this case conflicts with the decision of any other court of appeals. And it is unclear that it applies beyond the context of a no-bill by a Texas grand jury. But in any event, this case would be a poor vehicle for further review because any error was harmless. See Fed. R. Crim. P. 52(a).

Petitioner's advisory Guidelines range was 37 to 46 months. Pet. App. A4. In assessing whether that range was appropriate on the facts of the case, the district court recounted petitioner's extensive criminal history. It began with convictions not included in the Guidelines' criminal history calculations, which included convictions for possession of cocaine; possession of marijuana (three convictions); driving with a suspended license; illegally obtaining a license certificate; tampering with a government record; failing to identify one's self and providing false information; and evading arrest or detention with a vehicle. Sent. Tr. 14-16. It then described the crimes included in the criminal history calculations, including evading arrest or detention with a vehicle (two convictions); delivering methamphetamine; and possession of methamphetamine. Id. at 16-18. The court observed that petitioner also violated parole on many of these offenses. Id. at 14-18. Finally, the court found not only that petitioner had engaged in the conduct underlying the 2001 and 2005 domestic-violence arrests, but also that he had committed property theft underlying a separate arrest. Id. at 19.

In light of this history, the district court determined that an above-Guidelines sentence of 60 months was warranted. It explained that this sentence was justified based on "a need to promote the respect for the law," to afford "adequate deterrence to criminal conduct," and to "protect the public from further crimes of the defendant." Sent. Tr. 20. Given the overwhelming evidence of prior criminal conduct -- and the absence of any suggestion in the sentencing transcript that a marginal change to petitioner's record would have persuaded the court that a lower sentence was warranted -- no sound basis exists to conclude that petitioner's sentence would have been different had the court ignored the conduct underlying petitioner's domestic-violence arrests. Petitioner does not challenge the upward variance on any other basis. Pet. App. A9 n.34. Any error was accordingly harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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