No. 19-7116

IN THE SUPREME COURT OF THE UNITED STATES

EDDIE ESTUARDO GALINDO-MENDEZ, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL N. LERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court plainly erred in determining that petitioner "otherwise used" a pipe bomb while robbing a bank, within the meaning of Section 2B3.1(b)(2)(D) of the advisory Sentencing Guidelines.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Galindo-Mendez, No. 18-cr-25 (Nov. 9, 2018)

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

United States v. Galindo-Mendez, No. 18-11516 (Sept. 26, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-7116

EDDIE ESTUARDO GALINDO-MENDEZ, 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

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is not published in the Federal Reporter but is reprinted at 777 Fed. Appx. 769.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2019. The petition for a writ of certiorari was filed on December 26, 2019 (Thursday following a holiday). 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 bank robbery, in violation of 18 U.S.C. 2113(a). 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. On November 20, 2017, petitioner entered Happy State Bank in Lubbock, Texas, wearing a large coat, hat, and sunglasses, and carrying a large paper grocery bag. Presentence Investigation Report (PSR) ¶ 15. He approached one of the bank tellers, removed a pipe bomb from the bag, and placed the bomb, along with a note, on the counter in front of the teller. Ibid. The note stated: "There is a bomb, it is activated, don't push the button, no bait money, no ink." Ibid. The teller handed petitioner approximately $2550 in cash. Ibid. Petitioner then left the bank, taking the note with him but leaving the bomb behind. Ibid.

About two months later, petitioner was aboard a Greyhound bus that stopped at an immigration checkpoint. PSR ¶ 21. Petitioner admitted to U.S. Border Patrol agents that he was in the country illegally and was taken into custody. Ibid. While in immigration custody, petitioner was served with a federal arrest warrant for his role in the Lubbock bank robbery. Ibid.

2. A grand jury in the United States District Court for the District of Northern Texas charged petitioner with one count of

bank robbery, in violation of 18 U.S.C. 2113(a). Indictment 1. Petitioner pleaded guilty to the charge. Pet. App. A1.

In preparation for sentencing, the Probation Office determined that petitioner's base offense level under the advisory Sentencing Guidelines was 20. PSR ¶ 30. The Probation Office further determined that petitioner should receive a four-level increase in offense level under Sentencing Guidelines § 2B3.1(b)(2)(D), which provides for such an enhancement when "a dangerous weapon was otherwise used" in a robbery. PSR ¶ 32; cf. Sentencing Guidelines § 2B3.1(b)(2)(E) (providing for a three-level enhancement "if a dangerous weapon was brandished or possessed"). After other adjustments, the Probation Office determined that petitioner's advisory sentencing range was 46 to 57 months of imprisonment. PSR ¶¶ 36, 73.

Petitioner filed a statement with the district court adopting the contents of the Probation Office's report. Sent. Tr. 3. At the sentencing hearing, petitioner did not object to the Probation Office's Guidelines calculation generally or its application of the dangerous-weapon enhancement in particular. Id. at 1-8. The district court "adopt[ed] as [its] findings those matters set forth in th[e Presentence Report], not only as it relates to the background data and information, but also the analysis made under the Sentencing Guidelines." Id. at 3. The court then sentenced petitioner to 57 months of imprisonment, to be followed by three

years of supervised release. Id. at 6; see Pet. App. A2-A3. Petitioner did not object to that sentence after it was imposed.

3. The court of appeals affirmed. Pet. App. B1-B2.

a. On appeal, petitioner argued for the first time that the district court had erred in applying Section 2B3.1(b)(2)(D)'s enhancement for "otherwise us[ing]" a dangerous weapon in the course of a robbery. Pet. App. B1 (citation omitted). He contended that he had only "brandished" the pipe bomb when he placed it next to the bank teller, and therefore should have received only a three-level increase in offense level under Sentencing Guidelines § 2B3.1(b)(2)(E), rather than a four-level increase for "otherwise us[ing]" the weapon under Sentencing Guidelines § 2B3.1(b)(2)(D), see Pet. C.A. Br. 7. Petitioner relied in particular on the Fifth Circuit's statement in United States v. Dunigan, 555 F.3d 501, cert. denied, 556 U.S. 1264 (2009), that "[d]isplaying a weapon without pointing or targeting should be classified as 'brandished,' but pointing the weapon at any individual or group of individuals in a specific manner should be 'otherwise used.'" Id. at 505-506; see Pet. C.A. Br. 6-7.

b. The government contended that the court of appeals should reject petitioner's position "for three reasons." Gov't C.A. Br. 9; see id. at 9-17.

"First, as a threshold matter," the government contended, "[petitioner's] failure to object to [the district court's] finding at sentencing compels affirmance without further inquiry."

Gov't C.A. Br. 9. The government based that argument on Fifth Circuit precedent providing 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 (per curiam), cert. denied, 500 U.S. 924 (1991)).

Second, the government contended that "the district court properly found that [petitioner] did more than brandish or display the pipe bomb and that his conduct rose to the level of 'otherwise using' the bomb under [Sentencing Guidelines] § 2B3.1(b)(2)(D)." Gov't C.A. Br. 10; see id. at 10-15. Specifically, the government explained that the Fifth Circuit's decision in Dunigan distinguished "'otherwise using'" a weapon from "'brandishing'" the weapon on the ground that "'otherwise using'" the weapon requires a "specific rather than general" threat. Id. at 11 (citations omitted). And the government contended that, by placing the purported pipe bomb next to the teller, petitioner had made a "specific threat" that qualified as "'otherwise using'" the weapon under Dunigan. Id. at 13-14.

Finally, the government contended that, even if the district court had erred, any error was "not clear or obvious" and therefore did not satisfy the plain error standard as articulated by this Court. Gov't Br. 16 (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)); see id. at 17.

c. The court of appeals reviewed petitioner's "unpreserved argument under the plain error standard." Pet. App. B2. The court explained that, under the Guidelines, "'[o]therwise used' . . . means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." Ibid. (citation omitted). The court then found that, "[i]n light of the location of the apparent bomb and the nature of the specific threat indicated by the note that [petitioner] handed to the bank teller, he has not shown clear or obvious error in the district court's application of the enhancement under [Sentencing Guidelines] § 2B3.1(b)(2)(D)." Ibid. (citing Puckett, 556 U.S. at 135, and Dunigan, 555 F.3d at 505-506).

ARGUMENT

Petitioner asks (Pet. 4-6) this Court to hold his petition for a writ of certiorari pending -- and then to grant the petition, vacate the decision, and remand his case following -- the Court's resolution of several cases involving the Fifth Circuit's rule that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." United States v. Lopez, 923 F.2d 47, 50 (per curiam), cert. denied, 500 U.S. 924 (1991). This Court recently resolved those cases by disapproving the Fifth Circuit's rule. See Davis v. United States, No. 19-5421 (Mar. 23, 2020), slip op. 3; see also Bazan v. United States, No. 19-6113 (Mar. 23, 2020)

(vacating and remanding Fifth Circuit decision in light of Davis); Bazan v. United States, No. 19-6431 (Mar. 23, 2020) (same). But the decision in this case does not involve the application of the Fifth Circuit rule at issue in those cases. Rather than resolving petitioner's appeal on the ground that factual errors can never constitute plain error, the decision below reviewed the substance of petitioner's claim and found that he had "not shown clear or obvious error in the district court's" decision. Pet. App. B2. This Court's vacatur of the Fifth Circuit's decisions in Davis and Bazan, supra, therefore does not support vacatur here. And petitioner does not suggest that certiorari is warranted on any other ground. The petition should accordingly be denied.

1. As petitioner observes (Pet. 4), some Fifth Circuit decisions have "held that factual errors may never be plain." On March 23, 2020, this Court granted certiorari, vacated several Fifth Circuit decisions resting on that rule, and remanded those cases to the court of appeals. See Davis, supra (No. 19-5421); Bazan, supra (No. 19-6113); Bazan, supra (No. 19-6431). This Court found "no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error." Davis, slip op. 3.

Petitioner contends (Pet. 5) that the decision below "might" have been influenced by the "categorical rule" that this Court disapproved in Davis, and urges that his case should therefore be granted, vacated, and remanded to the Fifth Circuit. The premise

of petitioner's contention is unsound. Unlike in the Davis and Bazan decisions recently vacated and remanded by this Court, the Fifth Circuit here did not rely on a rule that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." United States v. Davis, 769 Fed. Appx. 129, 130 (5th Cir. 2019) (per curiam) (quoting Lopez, 923 F.2d at 50), vacated by Davis, supra (No. 19-5421); see United States v. Bazan, 773 Fed. Appx. 811, 811 (5th Cir. 2019) (similar), vacated by Bazan, supra (No. 19-6431); United States v. Bazan, 772 Fed. Appx. 214, 215 (5th Cir. 2019) (per curiam) (similar), vacated by Bazan, supra (No. 19-6113). Instead, the court of appeals in the decision below considered petitioner's argument that the district court had plainly erred by applying a four-level enhancement under Sentencing Guidelines § 2B3.1(b)(2)(D), and rejected that argument by reasoning that "[i]n light of the location of the apparent bomb and the nature of the specific threat indicated by the note that [petitioner] handed to the bank teller, he has not shown clear or obvious error in the district court's application of the enhancement under § 2B3.1(b)(2)(D)." Pet. App. B2.

Petitioner recognizes (Pet. 4-5) that if the court of appeals "meant that the location and text of the note arguably satisfied the Guidelines standard for 'otherwise using' a deadly weapon" -- an interpretation that he acknowledges to be reasonable – then "overturning the rule that factual error may never be plain would

not be of much assistance" to him. Petitioner nevertheless suggests (Pet. 5) that "the court might have meant that plain error could not be shown because these issues were of a factual nature." Under that reading, petitioner contends (ibid.), "overruling the categorical prohibition on plain factual error would destroy the sole basis for the decision below." But the court did not mention that petitioner challenged a finding of fact, much less state that petitioner's claim was foreclosed because he challenged a factual determination. To the contrary, the court expressly considered and rejected the substance of petitioner's argument. Pet. App. B2. The court referred to "the location of the apparent bomb and the nature of the specific threat indicated by the note that [petitioner] handed to the bank teller," ibid., and then cited its decision in United States v. Dunigan, 555 F.3d 501 (5th Cir.), cert. denied, 556 U.S. 1264 (2009), which had construed the meaning of "a dangerous weapon was otherwise used" in Sentencing Guidelines § 2B3.1(b)(2)(D) to include a "specific" threat, 555 F.3d at 505-506; see Pet. App. B2. That reasoning unambiguously rests on the merits of petitioner's claim, not any categorical rule foreclosing the possibility of plain error.

Petitioner observes (Pet. 5) that the government's brief below cited the Fifth Circuit's statement in prior cases that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." Gov. C.A. Br. 9 (quoting Lopez, 923 F.2d at 50). But as

explained above, the government also argued -- as an analytically distinct ground for affirmance -- that the district court's application of Section 2B3.1(b)(2)(D) did not constitute plain error under the Fifth Circuit's interpretation of that provision in Dunigan. See p. 5, supra. The court of appeals' reasoning tracks the government's alternative argument. See Pet. App. B2. The government's citation of Lopez therefore lends no support to petitioner's contention (Pet. 5) that the court of appeals "might" itself have silently applied that rule here, notwithstanding its different explanation for its decision.

2. No other basis exists for review. Petitioner suggests (Pet. 4) that the Fifth Circuit's rule that "factual errors may never be plain" implicates a "division of authority." But this Court has removed any such division by disapproving that rule. See Davis, slip op. 3. And petitioner does not suggest that review would be warranted on any other ground. The petition should accordingly be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL N. LERMAN
Attorney

APRIL 2020