No. 19-

IN THE

SUPREME COURT OF THE UNITED STATES

JAY EUGENE REED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

HEIDI R. FREESE, ESQ.
Federal Public Defender

FREDERICK W. ULRICH, ESQ.
Assistant Federal Public defender

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
fritz_ulrich@fd.org

Counsel for Petitioner

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QUESTION PRESENTED

1. Under Evidence Rule 103 and Criminal Rule 52(b), once a party informs the court of the substance of the evidence at issue, and the court rules, counsel need not renew an objection or offer of proof to preserve a claim of error. Petitioner offered expert testimony at sentencing, which the district court rejected. Did the Court of Appeals err in treating this evidentiary issue as forfeited and subject to only plain error review?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Jay Eugene Reed.

The Respondent, the appellee below, is the United States.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jay Eugene Reed, petitions this Court for a writ of certiorari to review the final order of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals order is at No. 18-3511, and is reproduced in the appendix to this petition. (Petitioner's Appendix ("Pet. App.") 1a). The judgment of the district court may be found at 1:15-CR-00193 and is reproduced in the appendix, (Pet. App. 10a).

JURISDICTION

The Court of Appeals for the Third Circuit issued its opinion on December 4, 2019. (Pet. App. 4a). And on February 28, 2020, Justice Alito granted Petitioner a 30-day extension. This Court thus has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

INTRODUCTION

For 54 years, Appellant, Jay Eugene Reed, had almost no contact with the criminal justice system, save for a driving under the influence offense. Then, in what can be described only as inconsistent with his history and character, he committed child pornography and witness tampering offenses. A defense psychiatric expert explained how this conduct could occur that late in life, concluding that Mr. Reed's behavior resulted from a brain injury and the onset of dementia. The district court dismissed this opinion, however, as not based on science.

On appeal, the Third Circuit extended its case law governing the preservation of an issue of procedural reasonableness of a sentence to the evidentiary ruling here. This extension conflicts with the governing evidentiary rule, Rule 103, and the corresponding rule of criminal procedure, Rule 52(b). And this Court recently addressed this issue in a related context in *Holguin-Hernandez v. United States*, No. 18-7739, 2020 WL 908880 (U.S. Feb. 26, 2020). There, this Court held that counsel's action in requesting a specific sentence was adequate to preserve the issue for review. Based on the holding and reasoning in *Holguin-Hernandez*, this Court should grant this petition, vacate the judgment, and remand to the Third Circuit.

STATEMENT OF THE CASE

a. Mr. Reed's background and the facts surrounding the offenses

While it is hard to identify what precipitated the change in Mr. Reed that led to the current offenses, his life has been marked by many serious medical issues. For example, at one point Mr. Reed had been working in home construction for Excel Homes, but that employment ended when he suffered third-degree burns on a quarter of his body after the gas tank of his car exploded. *See* (Joint Appendix "JA" at 129-30, 159).[1] After a year of recovery, Mr. Reed began working as a commercial truck driver. This employment lasted until a stroke, diabetes, high blood pressure, and sleep apnea prevented him from passing a Department of Transportation physical. *See* (Presentence Investigation Report at ¶¶ 88, 100) ("PSR"); (JA 76, 107, 132). Given these medical issues, it is unsurprising that Mr. Reed also suffers from anxiety and depression. *See* (PSR at 89). And in recent years, he has had memory problems. *See* (PSR at ¶ 88).

In the wake of the loss of his employment as an over-the-road-driver and the dissolution of his relationship with a woman he had met while driving, he moved in with Deborah Baughman, her daughter, and her two granddaughters. *See* (JA at 132); (PSR at ¶ 4). Ms. Baughman had been experiencing financial difficulty since her husband had passed away, and the arrangement also benefitted Mr. Reed, who was living alone. *See* (JA at 132).

[1] JA refers to the appendix filed in the Court of Appeals.

Beginning in May 2014 and continuing through July 2015, Mr. Reed photographed Ms. Baughman's granddaughters and one of their friends. *See* (JA at 19, 28). The photographs depicted the girls' genital areas. *See id*. A friend of Ms. Baughman's granddaughters reported Mr. Reed's conduct to the Pennsylvania State Police, who along with the Centre County Children's Advocacy Center, interviewed the girls and investigated their allegations. *See* (PSR at ¶¶ 5-7). Ultimately, the State Police executed a search warrant at Mr. Reed's residence. *See* (PSR at ¶ 9); (JA at 28). During the search, police seized, among other things, Mr. Reed's cellular telephone and a desktop computer. *See id*. A forensic examination of the phone revealed pornographic images of the victims. *See* (PSR at ¶ 10); (JA at 28). On the computer, police uncovered 300 images of commercially downloaded child pornography. *See* (PSR at ¶ 11); (JA at 28).

The State Police arrested Mr. Reed, charging him with several contact offenses involving the victims. *See* (PSR at ¶¶ 79-80). Following his arrest, Mr. Reed sent two letters—one to Ms. Baughman and one to a victim. *See* (JA at 28). In the letters, Mr. Reed, essentially, asked that the girls not volunteer anything or talk to anyone. *See id*.

Then a federal grand jury indicted Mr. Reed, charging him with production of child pornography, possessing such material, and tampering with witnesses. *See* (JA at 19-2). There was no evidence, however, that Mr. Reed distributed the images of the victims. *See* (JA at 28).

b. The guilty plea and calculation of the Sentencing Guidelines

As the Government declined to make any concessions on the charges, Mr. Reed pleaded guilty to the indictment without a plea agreement. *See* (JA 23, 74). The Probation office then prepared a presentence report. After adjustments for several specific offense characteristics as well as for multiple counts, and including a three-level reduction for accepting responsibility, Mr. Reed's total offense level was the highest possible—43. *See* (PSR at ¶ 65). Even with no criminal history points, Mr. Reed faced life imprisonment under the Guidelines. But because the total statutory maximums for the offenses was 90 years, his guideline range was 1,080 months. *See* (PSR at 110).

To contextualize his conduct and provide a map for treatment, Mr. Reed underwent both psychological and psychiatric evaluations. Frank M. Dattilio, Ph.D., conducted the psychological evaluation, finding that Mr. Reed was amenable to treatment, as he had never been charged before with a sexual offense, always maintained gainful employment, was at an age when recidivism was less likely, and there had been no additional reports of inappropriate behaviors. *See* (JA 143-44). Doctor Dattilio noted that Mr. Reed may have been laboring under an undiagnosed hypomanic disorder that contributed to his behavior and inhibited his ability to control his impulses. *See* (JA at 144). And he emphasized that Mr. Reed suffered from significant depression. *See* (JA at 145).

Joseph S. Silverman, M.D., conducted the psychiatric evaluation. In the evaluation, Dr. Silverman noted that Mr. Reed's onset of interest in pre-adolescent

girls later in life may be connected with dementia. *See* (JA at 147). In this regard, Dr. Silverman found that Mr. Reed suffered from memory impairment. *See* (JA at 149). Based on testing and Mr. Reed's history, Dr. Silverman opined that he had a neurocognitive disorder that impaired his brain functions. *See id*. Although a later magnetic resonance imaging of Mr. Reed's brain showed evidence of a "hyperintense focus in the left frontoparietal region," Dr. Silverman viewed the clinical indication of this finding as unknown. *See* (JA at 157). In sum, Dr. Silverman found evidence of dementia in the broad sense, but the cause of it was unknown. *See* (JA at 157-58).

c. Sentencing and the ruling presented for review

At sentencing, Mr. Reed provided a video to the court and presented testimony from his sister and Dr. Silverman. Mr. Reed's sister described her brother as kind, compassionate, and caring. She recounted instances of Mr. Reed helping others less fortunate and how difficult it was for her to reconcile the person she has known with the offenses. *See* (JA at 75-78). In retrospect, however, Mr. Reed's sister noted that there were changes to his personality that coincided with health issues that were, perhaps, red flags. *See* (JA 76).

Dr. Silverman testified that he looked for changes in brain function when examining Mr. Reed, concluding that he had dementia and, at the time of the offenses, he was laboring under the burden of a brain dysfunction that had complex effects on his thinking, feelings, desires, and capacity for self-control. *See* (JA at 78-79). On cross-examination, Dr. Silverman explained that, while Mr. Reed engaged

in pedophilic behavior, he was not a pedophile, but a victim of a brain disorder. *See* (JA at 83). In Dr. Silverman's opinion, a pedophile was someone with an inherent disorder, while Mr. Reed's later in life display of that behavior was caused by brain disease. *See id*. Dr. Silverman acknowledged that the cause of the brain damage was unknown, and that it could be explained by a lack of oxygen to the brain from sleep apnea, a lesion, or a tumor. *See* (JA at 84, 87).

Counsel for Mr. Reed asked the court to impose a sentence consisting of the 15-year mandatory minimum. In support, counsel cited Dr. Silverman's opinion, Mr. Reed's health issues, his age, the lack of criminal history, and that between supervised release and Megan's Law registration; he would not be a recidivist risk. *See* (JA at 87-88). For its part, the Government sought a sentence of 90 years, asserting that Dr. Silverman's opinion was a fringe one, and that the court needed to have the "backs of the victims." (JA at 89-90).

The court noted the guideline range and Mr. Reed's age and health issues. *See* (JA at 90). And the court recognized Mr. Reed's law abiding history. But in addressing Dr. Silverman's opinion, the court found it to be "fanciful and really not based in science." (JA at 90). In the court's view, it would have likely rejected the opinion on a *Daubert* motion. *See id*. The court then imposed consecutive statutory maximum terms on the pornography counts with consecutive ten-year terms on the witness tampering counts. *See* (JA at 91). The total sentence was 840 months with a lifetime of supervised release. *See id*.

d. The Third Circuit's ruling

On appeal, the Third Circuit viewed Mr. Reed's issue over the rejection of his expert's testimony as a procedural sentencing error. *See* (Pet. App. 4a). In other words, as affecting the procedural reasonableness of the sentence. As a procedural reasonableness issue, the Court reasoned that Mr. Reed needed to object after the district court pronounced sentence. *See id*. Having failed to do so, the Court applied a plain error review standard. *See id*. Because the ultimate sentence, 840 months, was "twenty years below the maximum Guidelines sentence, [the Court] found no plain error." (Pet. App. 6a).

REASONS FOR GRANTING THE PETITION

A. The Third Circuit's ruling that a party offering expert testimony must re-object at the end of a sentencing to preserve an adverse evidentiary ruling, is contrary to this Court's recent opinion in *Holguin-Hernandez* and the governing rules.

Mr. Reed offered expert testimony to the effect that he had dementia and, at the time of the offenses, he was laboring under the burden of a brain dysfunction that had complex effects on his thinking, feelings, desires, and capacity for self-control. *See* (JA at 78-79). The expert opined that Mr. Reed had a neurocognitive disorder that impaired his brain functions. After receiving this testimony, the district court rejected it, concluding that it was "fanciful and really not based in science." The court added, "were [the expert] here on a *Daubert* motion, I would likely reject the conclusions that he offered to the court." (JA at 90). By referencing *Daubert* the court, seemingly, confused the applicable standards.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that Federal Evidentiary Rule 702 places a special obligation upon the trial judge to "ensure that any and all scientific testimony is not only relevant, but reliable." *Id*. at 589.[2] "*Daubert* holds that an inquiry into the reliability of scientific evidence under Rule 702 requires a determination as to its scientific validity." *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 742 (3d Cir. 1994).

[2] *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (applying standard established in *Daubert* to all expert testimony).

But that's not the standard that applies at a sentencing hearing. The standard for admissibility of evidence at sentencing is much lower than that governing admissibility at trial. *See United States v. Malone*, 828 F.3d 331, 336-37 (5th Cir. 2016). At sentencing, Congress has directed that there is no limitation on information about a defendant's background, character or conduct. *See* 18 U.S.C. § 3661. And the Sentencing Guidelines incorporate this directive, providing that this information need only have "sufficient indicia of reliability to support its probable accuracy." U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (U.S. SENTENCING COMM'N 2018) ("USSG"). The indicia of reliability standard is not intended to be onerous. *See Malone*, 828 F.3d at 337. For this reason, courts have admitted, for example, uncorroborated hearsay, and out-of-court declarations by an unidentified informant. *See id.*; *accord* USSG § 6A1.3 cmt. And this was the issue Mr. Reed presented on appeal.

The Third Circuit, however, treated the issue as forfeited. *See* (Pet. App at 4a). In the Court's view, Mr. Reed needed to object to the evidentiary ruling after the court pronounced its sentence. *See id*. But this holding conflicts with this Court's rulings and the applicable evidentiary and criminal rules.

Here, sentencing counsel presented expert testimony and the district court ruled on it. Having informed the court of the substance of the expert testimony, once it ruled, counsel was under no further obligation to lodge an exception or objection. For example, as an evidentiary issue, preserving a claim of error is governed by Evidentiary Rule 103. Under Rule 103, once a party informs the court

of the substance of the evidence at issue, and the court rules, he "need not renew an objection or offer of proof to preserve a claim of error for appeal." FED. R. EVID. 103(a)(2), (b). This is also true under the governing Criminal Procedural Rule. *See, e.g.*, FED. R. CRIM. P. 51(a), (b) (providing that exceptions are unnecessary and all a party need to is inform the court of the action it wishes the court to take).

But here, the Third Circuit relied on its opinion in *United States v. Flores-Mejia*, 759 F.3d 253 (3d Cir. 2014). *See* (Pet. App. 4a). In *Flores-Mejia*, however, the court addressed error preservation in the context of challenges to the procedural reasonableness of a sentence. *See id*. at 257. For instance, where there are several arguments for a departure or a variance from the guideline and the court fails to address one. The concern in *Flores-Mejia* was with a sentencing court's failure to rule and counsel's "sandbagging." *Id*. at 257.

In Mr. Reed's case, by contrast, the district court ruled on the expert testimony. Nor does the issue involve the procedural reasonableness of the sentence. And as an evidentiary ruling, it's outside the scope of *Flores-Mejia*. The Third Circuit's extension of *Flores-Mejia* beyond the text of the opinion and in contravention of the governing evidentiary and procedural rules is unwarranted.[3] Indeed, such an extension would lead to the need to take exception to every ruling, which Congress eliminated through Rule 51(a).

Finally, in a related context, this Court recently addressed issue preservation under criminal Rule 51(b). *See Holguin-Hernandez*, No. 18-7739, 2020 WL 908880,

[3] As Judge Greenaway observed in *Flores-Mejia*, textually, Rule 51(b) contemplates liberal issue preservation. *See id*. at 261 (Greenaway, J., dissenting).

at *2. There, counsel for Holguin-Hernandez argued that the sentencing factors in Section 3553(a) of the Sentencing Reform Act of 1984 did not warrant a prison term or, at a minimum, a departure from the advisory range. *See id.* The district court imposed a 12-month sentence and Mr. Holguin-Hernandez challenged the reasonableness of it on appeal. The Fifth Circuit, however, treated the issue as forfeited because counsel failed to object after the sentence was imposed. *See id.* at *3. But this Court reversed, explaining that Criminal Rule 51 dispensed with the need for exceptions. And by informing the district court of the action he wished it to take, the claim or error was preserved. *See id.*

Similarly, counsel for Mr. Reed presented expert testimony, informing the district court of the basis for a variance or departure from the advisory guideline range. The district court ruled by rejecting that testimony. This was all that is required under Evidentiary Rule 103 and Criminal Rule 51.

This Court should thus grant certiorari, vacate the Third Circuit's judgment, and remand for further consideration in light of *Holguin-Hernandez*.

CONCLUSION

For all of these reasons, this Honorable Court should grant the petition for a writ of certiorari, vacate, and remand.

Respectfully submitted,

HEIDI R. FREESE, ESQ.
Federal Public Defender

/s/ Frederick W. Ulrich
FREDERICK W. ULRICH, ESQ.
Assistant Federal Public Defender
Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
fritz_ulrich@fd.org

Counsel for Petitioner

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