No. 19-8799

IN THE SUPREME COURT OF THE UNITED STATES

JAMES JOHNMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

BRIAN C. RABBITT
Acting Assistant Attorney General

SOFIA M. VICKERY
Attorney

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

QUESTION PRESENTED

Whether the special assessment required by 18 U.S.C. 3014(a) applies to each of a defendant's counts of conviction for the type of offense that it describes.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. Johnman, No. 17-cr-245 (May 8, 2018)

United States Court of Appeals (3d Cir.):

United States v. Johnman, No. 18-2048 (Jan. 28, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 948 F.3d 612.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2020. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of, as relevant here, the judgment of the court of appeals. The petition was filed on June 16, 2020. 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 Eastern District of Pennsylvania, petitioner was convicted of using a facility of interstate commerce to entice a minor to engage in sexual conduct, in violation of 18 U.S.C. 2422(b); distributing child pornography, in violation of 18 U.S.C. 2252(a)(2); and possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Judgment 1. The district court sentenced petitioner to 368 months of imprisonment, to be followed by a life term of supervised release. Id. at 2-3. The court also imposed a $300 special assessment and a separate $15,000 assessment. Id. at 6. The court of appeals affirmed. Pet. App. 1a-7a.

1. In January 2017, the Federal Bureau of Investigation (FBI) executed a search-and-seizure warrant seeking child pornography at a residence in Philadelphia, Pennsylvania. Presentence Investigation Report (PSR) ¶ 18. Agents seized a cellphone on which they discovered instant messages transmitted over the internet between the owner and petitioner, in which the men discussed the sexual abuse of children and traded files containing child pornography. Ibid. In those messages, petitioner discussed his prior sexual assault of the nine-year-old son of one of petitioner's friends, which occurred when petitioner was entrusted to babysit the boy. Id. ¶ 19; see id. ¶ 62. Petitioner stated in the messages that he "would go as young as 5 or 6." Id. ¶ 19.

In February 2017, after obtaining consent to assume the identity of the owner of the seized cellphone, an undercover FBI agent did so and continued messaging with petitioner. PSR ¶ 20. The FBI's investigation uncovered evidence that petitioner committed the three separate federal offenses to which petitioner later pleaded guilty. See id. ¶¶ 5, 21-24.

First, petitioner distributed to the undercover agent multiple images of child pornography depicting naked children, including a toddler, being sexually assaulted. PSR ¶ 21, at 7-8.

Second, petitioner used his cellphone to attempt to engage in the criminal sexual assault of a nine-year-old boy. PSR ¶ 21, at 8-9. In his messages to the undercover agent, petitioner confirmed that he was still interested in "getting together to perv" and excitedly sought to engage in a sexual assault when the agent stated that he had a friend who was willing to "share" his nine-year-old son with others. Id. ¶ 21, at 8. Petitioner messaged that he would "take a day off work" and "[w]e could take turns f---ing the boy all day." Ibid. As the arrangements to meet to sexually assault the child on a specified date (March 4, 2017) progressed, petitioner messaged that he was "[s]uper excited" and was "totally good" with the plan. Ibid. On March 4, 2017, petitioner traveled to the hotel room agreed upon for the meeting. Id. ¶ 23. When petitioner knocked on the door, FBI agents arrested him. Ibid.

Third, on the day of his arrest, petitioner carried a cell-phone in which he kept dozens of images and three videos depicting children engaged in sexually explicit conduct. PSR ¶ 24.

2. A federal grand jury indicted petitioner on one count of distributing child pornography, in violation of 18 U.S.C. 2252(a)(2); one count of using a facility of interstate commerce to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b); and one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Am. Indictment 1-3 (D. Ct. Doc. 15, Ex. A (June 27, 2017)). Petitioner pleaded guilty to each of the three counts. Guilty Plea Agreement ¶ 1 (Oct. 26, 2017).

Under 18 U.S.C. 3013(a), "[t]he court shall assess on any person convicted of an offense against the United States" the amount specified "in the case of an infraction or a misdemeanor" or the amount specified "in the case of a felony." Ibid. "[I]n the case of a felony," the court must assess "the amount of $100 if the defendant is an individual." 18 U.S.C. 3013(a)(2)(A). In Rutledge v. United States, 517 U.S. 292 (1996), this Court recognized that "[Section] 3013 requires a federal district court to impose a [then-]$50 special assessment for every [felony] conviction," and that the district court in Rutledge was accordingly "required" under Section 3013 to impose two such assessments, one for each of Rutledge's two felony counts of conviction. Id. at 301-302; see Pet. App. 2a & n.2, 5a (explaining that the courts of appeals had similarly determined that "the

phrase 'convicted of an offense' in [Section] 3013" requires "one assessment per count of conviction").[1]

In 2015, Congress supplemented Section 3013 by enacting 18 U.S.C. 3014, which took effect on its date of enactment (May 15, 2015) and will sunset on "September 30, 2021." 18 U.S.C. 3014(a); see Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 101(a), 129 Stat. 228-230 (enacting Section 3014). Section 3014 provides that, "in addition to the assessment imposed under section 3013, the court shall assess an amount of $5,000 on any non-indigent person or entity convicted of an offense under" specified provisions prohibiting sexual abuse and exploitation and human trafficking. 18 U.S.C. 3014(a). Amounts collected under Section 3014 are transferred to the Domestic Trafficking Victims' Fund for use in funding various child-abuse and trafficking-victims programs. 18 U.S.C. 3014(c)-(e).

In his plea agreement, petitioner stated that he understood that each of his three counts of conviction would result not only in a sentence of imprisonment but also a "$100 special assessment" under Section 3013 and "a $5,000 special victims assessment under [Section] 3014." Guilty Plea Agreement ¶ 3. Petitioner thus expressly acknowledged that his aggregate sentence for the three counts would include "a $300 special assessment, and an additional

[1] Rutledge ultimately held that the second $50 assessment reflected an improper "cumulative punishment" for the same offense because Rutledge's second count of conviction was a lesser included offense of his first. 517 U.S. at 300, 302-303.

$15,000 special victims assessment." Id. ¶ 3.d. Petitioner further "agree[d] to pay the special victims and court assessments in the amount of $15,300 before the time of sentencing or at a time directed by th[e] Court." Id. ¶ 7. The district court sentenced petitioner accordingly, imposing, as relevant here, a $300 assessment and an additional $15,000 assessment under Section 3014. Judgment 6.

3. The court of appeals affirmed. Pet. App. 1a-7a. On appeal, petitioner argued for the first time that Section 3014 authorizes only one $5000 assessment, even if the defendant is convicted of multiple distinct qualifying offenses. Pet. Corrected C.A. Br. 6-19. The court observed that its review was limited to "review only for plain error" because petitioner had failed to challenge his Section 3014 assessment in district court. Pet. App. 2a. And the court found no reversible plain error, determining that the district court did not err in imposing a $15,000 assessment under Section 3014. Id. at 2a-5a.

The court of appeals explained that Section 3014's text requires a $5000 assessment for each qualifying count of conviction. Pet. App. 3a-4a. The court observed that Section 3014(a)'s instruction to impose an assessment on any non-indigent person "'convicted of an offense'" under specified provisions is most naturally read to require an assessment for each qualifying conviction because "'convicted'" is normally understood to be "an offense-specific term" and because the singular use of "'an

offense'" is "best read to mean that 'each offense' requires a separate assessment." Id. at 3a (citation omitted). The court further explained other provisions of Section 3014 that referred to the required assessment "confirm[ed] th[at] ordinary reading." Id. at 3a-4a.

The court of appeals also recognized that Section 3014's relevant statutory context additionally reinforced the application of Section 3014's assessment to each qualifying conviction. Pet. App. 4a-5a. When Congress enacted Section 3014, the court explained, "the meaning of the phrase 'convicted of an offense' in [neighboring Section] 3013 was settled in the federal courts." Id. at 4a; see id. at 2a & n.2, 5a (explaining that Section 3013's meaning was "settled" by Rutledge and decisions of the courts of appeals). The court reasoned that the "settled" understanding of the statutory text in a neighboring provision, whose language Congress mirrored in Section 3014, indicates that Congress intended Section 3014 to be interpreted similarly and that "Section 3014's [express] cross-reference to [Section] 3013 further counsels" that the two statutes should be interpreted "in lockstep." Ibid.

Finally, the court of appeals observed that "the logic used by courts to interpret [Section] 3013" applies directly to Section 3014. Pet. App. 5a. The court explained that, as in the Section 3013 context, it would be "illogical" to read the total assessment required by Section 3014 to depend "on the happenstance of 'whether

[the defendant] was tried for [the qualifying] offenses in one or more proceedings.'" Id. at 5a (citation omitted).

ARGUMENT

Petitioner contends (Pet. 6-7) that the $5000 special assessment required by Section 3014(a) should apply on a per-offender basis, rather than to each qualifying count of conviction. The court of appeals correctly rejected that contention on plain-error review. Although the Second Circuit recently concluded that Section 3014 authorizes only one $5000 special assessment per offender, the resulting disagreement between two courts of appeals is limited and would not warrant this Court's review in this plain-error context. Moreover, the disagreement is of limited prospective importance because Section 3014(a) is scheduled to sunset in September 2021. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly affirmed the district court's imposition of a $15,000 assessment under Section 3014 on plain-error review. Because petitioner expressly agreed in district court that Section 3014 authorized the imposition of a $15,000 assessment ($5000 for each of his three counts of conviction), see Guilty Plea Agreement ¶ 3, petitioner's contention that the district court erred in imposing that $15,000 assessment is subject only to (at best) plain-error review. See Fed. R. Crim. P. 52(b). "[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it," United

States v. Dominguez Benitez, 542 U.S. 74, 82 (2004), and requires, among other things, a showing that the asserted error is "clear" or "obvious," United States v. Olano, 507 U.S. 725, 734 (1993), and not "subject to reasonable dispute," Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioner fails to show such a reversible plain error.

Petitioner cannot show that it is obvious and not subject to reasonable dispute that Section 3014 authorized only one $5000 assessment in a case in which the defendant is convicted of multiple distinct qualifying offenses. Petitioner notes (Pet. 6-7) that after the Third Circuit decided his appeal, the Second Circuit disagreed with the Third Circuit's interpretation of Section 3014 and held that Section 3014 authorizes only one $5000 assessment. But that disagreement does not show that the question was not reasonably disputable. Petitioner's failure to even attempt to show reversible plain error in this Court is thus fatal to his claim.

In any event, the court of appeals adopted not only a reasonable interpretation of Section 3014, but the best one. Section 3014(a) directs the court to "assess an amount of $5,000 on any non-indigent person or entity convicted of an offense under" certain federal provisions. 18 U.S.C. 3014(a). As the court of appeals explained, "how many assessments a court must impose turns on the meaning of the phrase 'convicted of an offense,'" which is best understood to require a separate assessment for each count of

conviction. Pet. App. 3a-4a. The word "offense" "refer[s] to a discrete criminal act"; the statute's use of the singular "an" before "offense" logically indicates that "each offense requires a separate assessment"; and the references to the assessment in other subsections of Section 3014 confirm that the total assessment described in Section 3014(a) may have more than one possible value. Ibid. (internal quotation marks omitted).

That understating is strongly reinforced by the "long-standing" and "settled" interpretation of the phase "convicted of an offense" in Section 3013, which requires its assessment for each count of conviction. Pet. App. 4a-5a. Congress specifically enacted Section 3014 to require that its special assessment be imposed "in addition to the assessment imposed under section 3013." 18 U.S.C. 3014(a). Congress therefore would have expected Section 3014's application to any person "convicted of an offense" of the type described in Section 3014(a) to similarly apply for each qualifying count of conviction.

Petitioner's contrary reading, moreover, would lead to anomalous results. If the government had filed charges against petitioner in three separate prosecutions rather than one, nothing in Section 3014's text would preclude each district court in those separate cases from applying a $5000 assessment for the particular offense before it. Given that each of petitioner's offenses was a wholly distinct crime involving distinct offense conduct,

Section 3014's proper application should not turn on the happenstance of charging decisions.

2. Petitioner correctly notes (Pet. 6-7) that the Second Circuit recently disagreed with the Third Circuit's interpretation of Section 3014 in this case, concluding instead that Section 3014 allows only one $5000 assessment in a case involving multiple qualifying counts of conviction, and granting relief on a forfeited claim under a "'relaxed' form of plain error review." See United States v. Haverkamp, 958 F.3d 145, 149-150 & n.3 (2d Cir. 2020) (citation omitted). That decision does not suggest plain error under the proper standard -- which petitioner does not challenge -- in this case. In any event, although the Second Circuit disagrees with the Third Circuit about how Section 3014 is best interpreted, no other court of appeals has addressed the question and that disagreement is of very recent vintage. Such a newly developed interpretive conflict would not normally warrant this Court's review, particularly in a case such as this involving plain-error review where the defendant must show that his reading of the statute was so plainly correct at the time of his appeal that it was not even subject to reasonable dispute.[2]

[2] Petitioner notes (Pet. 7) that United States v. Kelley, 861 F.3d 790 (8th Cir. 2017), affirmed the imposition of one $5000 assessment under Section 3014 in a case involving multiple counts of conviction. But Kelley did not consider whether such an assessment could be imposed for each count of conviction; the court addressed only whether an assessment could be properly imposed on a defendant who was deemed indigent for purposes of appointing counsel. Id. at 799-802. Moreover, the one $5000 assessment that

Review is particularly unwarranted for the additional reason that Section 3014(a) by its terms will cease to have effect after "September 30, 2021." 18 U.S.C. 3014(a). That upcoming sunset date counsels strongly against further review because, unless Congress enacts new legislation to apply Section 3014(a) after September 2021, any decision that this Court would render in this case would have limited prospective importance and effect. If Congress were in the future to extend Section 3014(a)'s sunset, this Court would have an opportunity to resolve the question presented here in a later case if that question ultimately produces an enduring and entrenched division of authority warranting this Court's review.

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the Kelley district court imposed corresponds to the only count of conviction in that case that was based on offense conduct occurring after Section 2014's May 29, 2015 effective date. See Indictment at 1-3, United States v. Kelley, No. 15-cr-50085 (W.D. Ark. Oct. 28, 2015). Kelley therefore does not reflect any conflict with the decision in this case. Petitioner's reliance (Pet. 7-8) on unelaborated district court judgments likewise provides no basis for review. Sup. Ct. R. 10(a); cf. Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBITT
Acting Assistant Attorney General

SOFIA M. VICKERY
Attorney

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