No. 20-6374

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE NATHANIEL BROWN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that an asserted error in the calculation of petitioner's advisory sentencing guidelines range was harmless, where the district court was aware of the alternative calculation advocated by petitioner, expressly stated that it would have imposed the same sentence regardless of the correct guidelines range, and explained that the sentence was sufficient, but not greater than necessary, in light of the circumstances of the case and the 18 U.S.C. 3553(a) sentencing factors.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Brown, No. 17-cr-150 (Nov. 26, 2019)

United States Court of Appeals (4th Cir.):

United States v. Brown, No. 18-4726 (Nov. 28, 2018)

United States v. Brown, No. 18-4650 (Apr. 26, 2019)

United States v. Brown, No. 19-4894

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OPINION BELOW

The opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 811 Fed. Appx. 818.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2020. A petition for rehearing was denied on May 29, 2020 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 13, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of conspiring to distribute and possess with intent to distribute heroin, cocaine, cocaine base, and marijuana in violation of 21 U.S.C. 841(b)(1)(C) and 846. Judgment 1; 811 Fed. Appx. 818, 822. The district court sentenced him to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 811 Fed. Appx. at 818-830.

1. The Mad Stone Bloods (MSBs) are a gang founded in the late 1990s by Rikers Island inmates. Presentence Investigation Report (PSR) ¶ 74. "The MSBs have a pyramid hierarchy structure with tiers of leadership within various sets. The head of each set is known as a Godfather." 811 Fed. Appx. at 821. Though "centrally run out of New York City," the MSBs have "sets and members in other states, including Virginia." Ibid.

Petitioner was the "acting Godfather of one Virginia set." 811 Fed. Appx. at 821. The Virginia MSBs made money by selling drugs "on the streets" and "inside the Virginia Department of Corrections." PSR ¶ 144; see PSR ¶ 75. At one point, petitioner boasted that he had 17 members of the gang working under him. C.A. App. 1687. Petitioner sold drugs with one of his subordinates, Corey Owens, and made a bet with Owens about who could sell the most drugs in a day. PSR ¶ 143; C.A. App. 2577, 2595. In addition,

petitioner and other gang members, including Owens, made plans to rob other drug dealers. Sent. Tr. 30-35. After one of those plans fell through, petitioner shot a bystander seven times in the back for not "pay[ing] [him] enough respect." Id. at 69.

A federal grand jury in the Western District of Virginia returned a superseding indictment charging petitioner with one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d); one count of conspiring to distribute and possess with intent to distribute heroin, cocaine, cocaine base, and marijuana, in violation of 21 U.S.C. 841 and 846; two counts of violent crime in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3); and two counts of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). Superseding Indictment 10-23.

The district court dismissed without prejudice, for lack of venue, the two Section 1959(a)(3) and two Section 924(c) counts. C.A. App. 2821-2829; 302 F. Supp. 3d 752, 754. Following a trial, a jury found petitioner guilty on the drug-conspiracy count, but did not reach a verdict on the racketeering-conspiracy count. C.A. App. 2830-2831; see Sent. Tr. 4.

2. Applying the 2016 version of the Sentencing Guidelines, the Probation Office's presentence report calculated a total offense level of 33 and a criminal history category of IV, which would result in an advisory guidelines range of 188 to 235 months of imprisonment. PSR ¶¶ 148, 198. The Probation Office also noted

that the statutory-maximum sentence under 21 U.S.C. 841(b)(1)(C) was 240 months of imprisonment. PSR ¶ 197.

In calculating petitioner's total offense level, the Probation Office started with a base offense level of 24. PSR ¶ 149. Sentencing Guidelines § 2D1.1 (2016) provides for a base offense level of 24 when a drug-conspiracy offense involves at least 100 kilograms but less than 400 kilograms of marijuana. See Sentencing Guidelines § 2D1.1(a)(5) and (c)(8) (2016). The Probation Office determined that, because petitioner had a leadership role over Owens, petitioner should be "held accountable for those controlled substances" that Owens had admitted to selling, PSR ¶ 61 -- namely, 500 grams to two kilograms of cocaine, which the Guidelines treat as equivalent to 100 to 400 kilograms of marijuana, and an additional 80 to 100 kilograms of marijuana. PSR ¶ 143; see Sentencing Guidelines § 2D1.1, comment. (n.8(D)) (2016). Viewing the evidence "[i]n a light most favorable to [petitioner]," the Probation Office held petitioner accountable for "the lesser of the two numbers within [each] range," for a total corresponding to 180 kilograms of marijuana. PSR ¶ 143; see PSR ¶ 149.

Petitioner objected to the calculation of his base offense level, asserting that he should not be held responsible for drugs that Owens had distributed. C.A. App. 3237. At the sentencing hearing, Owens testified for the defense that he was not petitioner's subordinate and had never seen petitioner sell drugs.

Sent. Tr. 7. But on cross-examination, Owens acknowledged that he had admitted at his own plea hearing that he had conspired with other gang members to distribute 500 grams to two kilograms of cocaine and 80 kilograms to 100 kilograms of marijuana. Id. at 12. Petitioner's sentencing hearing also included testimony from an agent of the Federal Bureau of Investigation (FBI), who testified that other gang members had stated that petitioner and Owens had sold marijuana together, and that following the seizure of marijuana from Owens's home after Owens's arrest, petitioner had demanded payment from Owens because some of the seized marijuana belonged to him. Id. at 25-27. The FBI agent further testified that he had concluded that petitioner and Owens had been "dealing narcotics together" based on "the amount of time they spent together; their interactions at the meetings that they had together; [and] the free manner in which they discussed their activity." Id. at 45.

3. The district court overruled petitioner's objection to the calculation of his base offense level. Sent. Tr. 67. The court stated that because "this is a conspiracy case," "the law requires [petitioner] to be held accountable for drugs not only that he sold himself, but drugs that were * * * related to the jointly undertaken activity and that were reasonably foreseeable to him." Id. at 65. The court found Owens's testimony at the sentencing hearing "to be incredible" and inconsistent "with the statements that he made when he pled guilty." Id. at 67; see id.

at 68 ("I do not find the testimony of Corey Owens today to be credible."). The court instead credited the testimony of the FBI agent at the sentencing hearing and the testimony of petitioner's fellow gang members at trial, who stated that petitioner and Owens had sold marijuana together. Id. at 67; see id. at 68-69. The court found petitioner accountable for 180 kilograms of marijuana and adopted the Probation Office's calculation of a base offense level of 24. Id. at 68.

After hearing argument from both petitioner and the government on the 18 U.S.C. 3553(a) sentencing factors, see Sent. Tr. 72-83, the district court imposed a statutory maximum sentence of 240 months of imprisonment, id. at 88. The court explained that, based on the evidence presented at trial, petitioner had engaged in "a drug conspiracy like I've never seen before in the 14 years that I've been on the bench." Id. at 84. The court emphasized that "the facts of this case and the evidence that I heard is among the worst I've ever heard as a United States District Judge," and that it "was actually taken aback and shocked by the level of violence and the callous disregard for human life demonstrated in this trial." Id. at 86. The court stressed "the level of violence, the level of danger, [and] the level of callous disregard for human life" that had been "associated with [petitioner's] drug dealing." Id. at 84-85. The court highlighted, for example, that after petitioner's plans to rob one "drug dealer who was in a wheelchair" fell through, petitioner

proceeded to "shoot someone else, who just happened to be there and who didn't give [petitioner] the proper respect." Id. at 85.

The district court also found that, "despite the best efforts of his parents," petitioner had led a "life of crime." Sent. Tr. 86. The court explained that it had heard about petitioner's "past conduct" for "four weeks" during trial, and that petitioner's "serious crime" "demand[ed] a serious penalty." Ibid. The court also determined that petitioner had "demonstrated absolutely no respect for the law," and that a 240-month sentence was warranted to "protect[] the public from future crimes of [petitioner]." Id. at 87. The court observed that although it had sentenced other gang members to "less time," "they did not have the violence associated with them and the callous disregard for human life associated with the drug dealing activities in this case." Id. at 88. The court therefore explained that it was "varying upwards" to the "statutory maximum penalty" of 240 months, ibid., and that it viewed a 240-month sentence as "sufficient, but not greater than necessary," in light of the Section 3553(a) factors, id. at 87.

The district court made clear that, "regardless of whether [it had] found [petitioner] responsible for all the drug weight attributed to him in the" presentence report or instead had found him responsible for only "3 kilograms of marijuana," which is "what he thinks he should be responsible for," it would have imposed "the very same sentence," Sent. Tr. 66-67, "because this is the

most dangerous conduct involved with drug dealing that" it had ever seen, id. at 88. The court stated that the guidelines are only "advisory," id. at 67; that it would "consider them or not," ibid.; and that it "kn[ew] what the sentence need[ed] to be in this case under the 3553(a) factors" "[r]egardless of where [it] c[a]me down on the guidelines," id. at 66. The court further stated that, "if any case demands the maximum 240-month sentence, this one cries out for it." Id. at 88. And it explained that, if it could have sentenced petitioner to "more time," it would have done so, but that 240 months was the "statutory maximum." Ibid.

4. The court of appeals affirmed in an unpublished, nonprecedential decision. 811 Fed. Appx. at 818-830. On appeal, petitioner contended that the district court erred in "holding him responsible for the equivalent of 180 kilograms of marijuana sold by [Owens]." Id. at 826. The court of appeals observed that "the evidence presented during the sentencing hearing and cited by the district court related to [petitioner's] knowledge of and participation in marijuana sales, which comprised 80 of the 180 kilograms of marijuana equivalency attributed to him." Id. at 828. The court of appeals further stated that, "although the district court did not make a specific finding as to Owens' cocaine sales" -- an omission that "might give [the court of appeals] pause" -- "it may not have been clearly erroneous to include them as relevant conduct given the closeness of Owens' and [petitioner's] interactions, as described by [the FBI] Agent."

Id. at 828-829. But the court of appeals found it unnecessary to resolve petitioner's challenge to the calculation of his base offense level because "any error was ultimately harmless." Id. at 829.

The court of appeals explained that an error in calculating the applicable guidelines range can be harmless if the record shows that "(1) the district court would have reached the same result even if it had decided the Guidelines issue the other way, and (2) the sentence would be reasonable even if the Guidelines issue had been decided in the defendant's favor." 818 Fed. Appx. at 826 (brackets and citation omitted). The court determined that the "first part of the inquiry is readily satisfied in this case given the district court's repeated statements that it would impose the same sentence under § 3553(a) regardless of which drug weight it selected." Id. at 829. The court of appeals further determined that petitioner's sentence was "substantively reasonable, meaning that the second part of the inquiry is also satisfied." Ibid. The court explained that, although a 240-month sentence "represents a significant upward variance of 194 months from the range [petitioner] advocated," "it is not per se unreasonable," and "the district court gave a detailed explanation of why it was imposing the sentence." Ibid.

The court of appeals emphasized that, "[w]hen it sentenced [petitioner], the district court discussed the relevant § 3553(a) factors, focusing on the seriousness of the offense, [and] the

need to promote respect for the law, provide just punishment, protect the public, and promote specific and general deterrence." 811 Fed. Appx. at 829. In doing so, the court of appeals took account that petitioner was later "acquitted on charges" in the Eastern District of Virginia related to "some" of the "violent conduct" on which the district court relied. Id. at 830 n.5. "Viewing the totality of [the district court's] explanation and affording requisite deference to the court's § 3553(a) assessment," the court of appeals determined that "the district court acted within its considerable discretion to impose a 240-month sentence." Id. at 830.

Judge Thacker dissented with respect to petitioner's sentence. 811 Fed. Appx. at 830-835. Judge Thacker would not have found any potential guidelines-calculation error harmless, and would have remanded "for resentencing so that adequate factual findings can be made on the record with regard to [petitioner's] purported responsibility for [Owens's] drug weight." Id. at 831.

ARGUMENT

Petitioner contends (Pet. 6-11) that the court of appeals erred in determining that an asserted error in the calculation of his advisory guidelines range was harmless. That contention lacks merit, the court's unpublished per curiam decision does not conflict with any decision of this Court or another court of appeals, and this case would be a poor vehicle for addressing the question presented. This Court has repeatedly denied petitions

for writs of certiorari that have raised similar issues. See Snell v. United States, No. 20-6336 (Mar. 22, 2021); Thomas v. United States, No. 20-5090 (Jan. 11, 2021); Torres v. United States, 140 S. Ct. 1133 (2020) (No. 19-6086); 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); Mendez-Garcia v. United States, 556 U.S. 1131 (2009) (No. 08-7726); Bonilla v. United States, 555 U.S. 1105 (2009) (No. 08-6668).* The same result is warranted here.

1. The court of appeals correctly applied the principles of harmless-error review in determining that any error in the district court's calculation of petitioner's advisory guidelines range was harmless. 811 Fed. Appx. at 827-830.

a. In Gall v. United States, 552 U.S. 38 (2007), this Court stated that under the advisory Sentencing Guidelines, an appellate court reviewing a sentence, within or outside the guidelines range, must make sure that the sentencing court made no significant procedural error, such as by failing to calculate or incorrectly calculating the guidelines range, treating the Guidelines as

* A pending petition for a writ of certiorari raises a similar issue. See Perez Rangel v. United States, No. 20-6409 (filed Nov. 18, 2020).

mandatory, failing to consider the sentencing factors set forth in 18 U.S.C. 3553(a), making clearly erroneous factual findings, or failing to explain the sentence. 552 U.S. at 51. The courts of appeals have consistently recognized that errors of the sort described in Gall do not automatically require a remand for resentencing, and that ordinary appellate principles of harmless-error review apply. As the Seventh Circuit has explained:

> [a] finding of harmless error is only appropriate when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights (here -- liberty). To prove harmless error, the government must be able to show that the Guidelines error "did not affect the district court's selection of the sentence imposed." [United States v. Anderson, 517 F.3d 953, 965 (7th Cir. 2008)] (quoting Williams v. United States, 503 U.S. 193, 203 (1992) (applying harmless error pre-Gall)).

United States v. Abbas, 560 F.3d 660, 667 (2009); see Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

A sentencing court may confront a dispute over the application of the Sentencing Guidelines. When the court resolves that issue and imposes a sentence, it may also explain that, had it resolved the disputed issue differently and arrived at a different advisory guidelines range, it would nonetheless have imposed the same sentence in light of the factors enumerated in 18 U.S.C. 3553(a). Under proper circumstances, that permits the reviewing court to affirm the sentence under harmless-error principles even if it disagrees with the sentencing court's resolution of the disputed

guidelines issue. This Court in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), analogously 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." Id. 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 Federal Rule of Criminal Procedure 52(b), the principle it recognized applies with equal force in the context of harmless-error review under Rule 52(a).

b. Applying ordinary principles of harmless-error review to the circumstances of this case, the court of appeals correctly determined that any error in calculating petitioner's advisory guidelines range was harmless, because it did not affect the district court's determination of the appropriate sentence. 811 Fed. Appx. at 827-830. The district court expressly and repeatedly stated that it "would have reached the same result even if it had decided the Guidelines issue the other way." Id. at 829 (brackets and citation omitted); see Sent. Tr. 66 ("[R]egardless of whether I found [petitioner] responsible for all the drug weight

attributed to him in the [presentence report] or whether he thinks he should be responsible for, and that is * * * 3 kilograms of marijuana, I would give the very same sentence in this case, the very same sentence."); Sent. Tr. 88 ("Regardless of the guidelines finding I made in this case, I would give the same sentence, because this is the most dangerous conduct involved with drug dealing that I have seen in my years as a United States District Judge."). And to the extent that harmless-error review entails asking whether the court was aware of the alternative calculation advocated by petitioner, the record here satisfied that inquiry. At sentencing, the court noted that petitioner believed he should be held responsible for only "3 kilograms of marijuana." Sent. Tr. 67.

Petitioner asserts that "the district court did not consider the extent of a 194-month variance in issuing its sentence." Pet. 8 (citation omitted). But as the court of appeals found, "the district court gave a detailed explanation of why it was imposing the sentence." 811 Fed. Appx. at 829. "When it sentenced [petitioner], the district court discussed the relevant § 3553(a) factors, focusing on the seriousness of the offense, [and] the need to promote respect for the law, provide just punishment, protect the public, and promote specific and general deterrence." Ibid. The court emphasized that "the facts of this case and the evidence that I heard is among the worst I've ever heard as a United States District Judge." Sent. Tr. 86. And the court

explained that it would have imposed a sentence even higher than the statutory maximum of 240 months if it could have. Id. at 88. Thus, to the extent that the adequacy of the district court's explanation of its chosen sentence is part of the harmless-error inquiry, the "totality of [its] explanation" of its 240-month sentence here supports the court of appeals' harmless-error determination. 811 Fed. Appx. at 830.

2. Petitioner does not identify any conflict in the courts of appeals on the question presented in this case. Rather, petitioner contends (Pet. 7) that the court of appeals misapplied its own precedent (which even the dissent did not question) governing harmless-error review of guidelines-calculation errors. As explained above, see pp. 13-15, supra, that contention is incorrect. And in any event, any misapplication of circuit precedent would not be grounds for this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

A recently denied petition for a writ of certiorari that raised a similar issue alleged a conflict between the Fourth Circuit and other courts of appeals. See Pet. at 14-17, Snell v. United States, No. 20-6336 (Nov. 10, 2020). For the reasons stated in the government's brief in opposition to that petition for a writ of certiorari, any formal differences that may exist in the circuits' approaches do not reflect any meaningful substantive

disagreement about when an alternative sentence can render a guidelines-calculation error harmless. See Br. in Opp. at 14-18, Snell, supra (No. 20-6336). We have served petitioner with a copy of the government's brief in opposition in Snell.

3. In any event, this case would be a poor vehicle for addressing the question presented, because its resolution would be unlikely to change the outcome. In particular, the district court did not clearly err in determining the applicable drug quantity in the first place. See 811 Fed. Appx. at 831 (treating "a district court's drug weight determination" as a "factual finding[]" that is reviewed for "clear error"). And further proceedings are unlikely to alter that determination.

Sentencing Guidelines § 2D1.1 (2016) provides for a base offense level of 24 when a drug-conspiracy offense involves at least 100 kilograms but less than 400 kilograms of marijuana. See Sentencing Guidelines § 2D1.1(a)(5) and (c)(8) (2016). Here, the evidence showed that petitioner was the "acting Godfather of [a] Virginia set" of MSBs, 811 Fed. Appx. at 821; that petitioner had a leadership role over Owens, whom petitioner regarded as his "right-hand man," id. at 827 & n.4 (citing C.A. App. 1693); and that petitioner and Owens had a particularly close relationship, which included selling drugs together, see C.A. App. 2575-2577, 2595; Sent. Tr. 25-27, 30-35, 45. Furthermore, "Owens had stipulated that during the course of the drug conspiracy he had sold 80 to 100 kilograms of marijuana and cocaine in an amount

equivalent to 100 to 400 kilograms of marijuana." 811 Fed. Appx. at 827; see Sent. Tr. 12.

Given the nature of petitioner's relationship with Owens, and the amount of drugs that Owens admitted to selling as a member of the gang, the district court did not clearly err in finding petitioner accountable for the equivalent of at least 100 kilograms of marijuana under Section 2D1.1. See Sent. Tr. 68; PSR ¶ 143; C.A. App. 3284-3285; Sentencing Guidelines § 1B1.3(a)(1)(B) (2016). And to the extent that the panel majority expressed concern about whether the district court had made all of the relevant findings, see 811 Fed. Appx. at 828, those concerns would not preclude the district court from making those findings and reaching the same result -- as it is highly likely to do on this record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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