No. 20-6794

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR GUEVARA SALAMANCA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
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 relying on petitioner's prior state convictions to calculate his sentencing range under the advisory Sentencing Guidelines.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Salamanca, No. 18-cr-107 (June 24, 2019)

United States Court of Appeals (6th Cir.):

United States v. Salamanca, No. 19-5746 (Aug. 3, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-9) is not published in the Federal Reporter but is reprinted at 821 Fed. Appx. 584.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2020. The petition for a writ of certiorari was filed on December 31, 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 Tennessee, petitioner was convicted of illegally reentering the United States after removal following conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). Judgment 1. Petitioner was sentenced to 130 months of imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 2-9.

1. In 1999, petitioner -- a citizen of El Salvador -- was convicted in South Carolina state court of five felony offenses. Presentence Investigation Report (PSR) ¶¶ 5, 38. Specifically, petitioner, who was represented by counsel, pleaded guilty to grand larceny, possession of a stolen vehicle, resisting arrest, and threatening a public officer. PSR ¶ 38. He was sentenced to five years of imprisonment on several of those offenses, with the sentences suspended to five years of probation. Ibid.

In 2001, while on probation for the South Carolina convictions, petitioner was convicted in Tennessee state court of theft, possession of burglary tools, and public intoxication. PSR ¶ 39. That same year, he was convicted in Virginia state court of receiving stolen goods. PSR ¶ 40. In 2002, while still on probation for the South Carolina convictions, he was convicted of several additional offenses in Virginia state court, including burglary. PSR ¶¶ 41-42. He was sentenced to five years of

imprisonment for the burglary conviction, with two years of the sentence suspended. PSR ¶ 42.

While petitioner was incarcerated in Virginia for the burglary offense, South Carolina notified petitioner that it would conduct a hearing to determine whether to revoke his probation. See Gov't C.A. Br. 2-3, 12 n.2. On May 15, 2003, South Carolina revoked petitioner's probation in absentia and ordered him to serve the five-year term of imprisonment imposed in 1999 for his South Carolina convictions. See ibid.; PSR ¶ 38. The South Carolina court ordered petitioner's sentence to run concurrently with his Virginia sentence; after he completed the three-year custodial portion of his Virginia sentence, petitioner was remanded to South Carolina to serve the remainder of his sentence there. See Gov't C.A. Br. 2-3. Petitioner was released from custody in November 2006 and removed from the United States in December 2006. Ibid.

2. On August 18, 2007, petitioner was arrested in Texas for illegally reentering the United States after removal. See Gov't C.A. Br. 3; PSR ¶ 43. He was sentenced to 41 months of imprisonment for that offense. See ibid. On September 17, 2010, after completing his custodial sentence, petitioner was removed from the United States for the second time. See ibid.

Petitioner again reentered the United States and, on February 24, 2014, was convicted of five burglary-related offenses in Virginia. See ibid. He was sentenced to 20 years of imprisonment, suspended to 39 months of imprisonment. See Gov't C.A. Br. 3; PSR

¶ 44. On September 22, 2017, after completing his custodial sentence, petitioner was removed from the United States for a third time. See Gov't C.A. Br. 3.

3. Petitioner yet again reentered the United States two months later and, on June 13, 2018, was arrested in Tennessee for driving under the influence. See Gov't C.A. Br. 4; PSR ¶ 45. A grand jury then charged petitioner with one count of illegally reentering the United States after removal following conviction for an aggravated felony (namely, his 2014 Virginia burglary conviction), in violation of 8 U.S.C. 1326(a) and (b)(2). Indictment 1. Petitioner pleaded guilty. Judgment 1.

In preparation for sentencing, the Probation Office provided a presentence report applying the advisory Sentencing Guidelines. The report started with a base offense level of 8, see PSR ¶ 8, which was then increased for several reasons. As most relevant here, the Probation Office determined that petitioner should receive a 10-level increase under Sentencing Guidelines § 2L1.2(b)(2)(A) because he had engaged in criminal conduct that resulted in "a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more" -- namely, the 1999 South Carolina offenses -- before he was ordered removed from the United States for the first time. PSR ¶ 20. Based on the offense-level increases and petitioner's criminal-history category of VI, the Probation Office determined that petitioner's advisory Sentencing Guidelines range

was 130-162 months of imprisonment. PSR ¶ 68; see PSR ¶ 48. Petitioner did not object to the Probation Office's calculations, which the district court adopted. 6/24/2019 Tr. (Sent. Tr.) 4-6. The court sentenced petitioner to 130 months of imprisonment. Id. at 18.

4. The court of appeals affirmed in a nonprecedential opinion. Pet. App. 2-9; see 6th Cir. R. 32.1.

Petitioner's principal contention, raised for the first time on appeal, was that the district court should not have relied on the 1999 South Carolina convictions to increase his offense level or his criminal-history score. Pet. App. 3. That argument proceeded in several steps: (1) Under the application note to Sentencing Guidelines § 4A1.1(a), a "sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted" for purposes of criminal history "unless the defendant's incarceration extended into this fifteen-year period." § 4A1.1(a) comment. (n.1). (2) Because petitioner's sentence for his 1999 South Carolina convictions was initially suspended to probation -- and because the only "incarceration" within the "fifteen-year period" referenced by the application note occurred as a result of the 2003 probation revocation -- only the 2003 probation revocation could provide a basis for counting the South Carolina convictions in his criminal history. Ibid.; see Pet. C.A. Br. 4-5, 15-16. (3) Because the 2003 revocation occurred in abstentia (while petitioner was incarcerated in

Virginia), see PSR ¶ 38, petitioner was denied his constitutional rights to counsel and due process, and he should be able to collaterally attack the validity of the probation revocation under Custis v. United States, 511 U.S. 485 (1994). (4) Because the invalidity of the 2003 probation revocation precluded the use of the South Carolina convictions for purposes of calculating petitioner's criminal history, those convictions also could not be used to increase his offense level under Section 2L1.2(b)(2)(A), because an application note to that guideline provides that "only those convictions that receive criminal history points" can provide a basis for the increase. Sentencing Guidelines § 2L1.2(b)(2)(A), comment. (n.3); see Pet. C.A. Br. 4-5, 15-16.

Applying plain-error review, the court of appeals determined that the district court did not commit any "obvious or clear error" in considering petitioner's South Carolina convictions at his federal sentencing. Pet. App. 3. The court first observed that the parties agreed that, by revoking petitioner's probation in his absence, the South Carolina court violated petitioner's due-process right to be heard. Ibid. But the court of appeals explained that "a violation of a probationer's due-process rights, while unacceptable, is not something federal courts can remedy at sentencing for another offense." Ibid. The court observed that a prior state conviction "may be collaterally attacked at federal sentencing only if the state procured that judgment in violation of the defendant's right to counsel under Gideon v. Wainwright,

372 U.S. 335 (1963)," id. at 3-4 (citing Custis, 511 U.S. at 496-497), and that, under this Court's precedents, "[n]o other constitutional challenge to a prior conviction may be raised in the sentencing forum," ibid. (quoting Daniels v. United States, 532 U.S. 374, 382 (2001)).

The court of appeals therefore focused on petitioner's contention that he was deprived of his constitutional right to counsel when the South Carolina court revoked his probation in absentia. Pet. App. 4. The court observed that probationers generally do not have a constitutional right to counsel, and that "[t]he right to counsel that probationers may claim in special circumstances stems from Gagnon v. Scarpelli, 411 U.S. 778 (1973), rather than Gideon." Ibid. (citations omitted). The court stated that it was unclear whether this Court's decisions in Custis and its progeny allow "collateral review of denial-of-counsel claims not premised on Gideon at sentencing." Ibid. But it determined that in the particular circumstances of this case, even if "Custis permits a defendant to raise a collateral attack based on Scarpelli at sentencing," petitioner had "not shown he was unconstitutionally deprived of counsel -- much less plainly so." Ibid.

The court of appeals explained that "Scarpelli requires a probationer asserting a right to counsel" at a revocation hearing "to colorably claim either that (1) he did not violate his probation or (2) revocation is unwarranted due to 'substantial reasons' justifying or mitigating the violation and that those

reasons 'are complex or otherwise difficult to develop or present.'" Pet. App. 4 (quoting Scarpelli, 411 U.S. at 790). The court stated that petitioner did not explain in either the district court or on appeal how he might have met that standard, because he admitted to violating his South Carolina probation by pleading guilty to burglary in Virginia and "merely assert[ed] that 'he could have advocated for substantially less time' at a revocation hearing" -- which is "not enough to suggest he had a colorable, complicated argument for which counsel was needed." Ibid. Given petitioner's "lack of evidence and argument," the court of appeals "fail[ed] to see how any district court error was obvious or clear." Ibid. (citation and internal quotation marks omitted). "Indeed," the court of appeals added, "an 'admission to having committed another serious crime creates the very sort of situation in which counsel need not ordinarily be provided.'" Ibid. (quoting Scarpelli, 411 U.S. at 791). Because petitioner did not "sufficiently allege an unconstitutional denial of counsel under Scarpelli," the court rejected "his collateral attack" on his revocation sentence. Ibid.

Judge Stranch dissented. Pet. App. 5-9. In her view, Custis's limitation on collateral attacks on prior convictions at federal sentencing is inapplicable here. See id. at 5. She asserted that "Custis's holding is limited to collateral attacks on convictions as predicates to apply an Armed Criminal Career Act [ACCA] enhancement," and noted that petitioner's "Guideline range

was enhanced based on language in the Sentencing Guidelines," not the ACCA. Ibid. Judge Stranch also viewed petitioner's challenge not to be a "typical collateral attack" in any event, because "no doubt" exists that his revocation sentence was unconstitutionally imposed. Id. at 7. She would have concluded that petitioner's sentence was at least procedurally unreasonable for the absence of consideration of that issue. Id. at 5, 8-9.

ARGUMENT

Petitioner contends (Pet. 16-17) that the court of appeals erred in rejecting his unpreserved challenge to the district court's reliance on his South Carolina convictions to increase his offense level and criminal history score in calculating the advisory Sentencing Guidelines range for his later federal conviction. That contention lacks merit, and the court of appeals correctly rejected it. Petitioner does not identify any conflict of authority on the question presented, and this case would be a poor vehicle to address that question in any event because petitioner's claim is reviewable only for plain error.

1. As a general matter, a federal criminal defendant may not "collaterally attack prior convictions" that are used in computing his federal sentence. Custis v. United States, 511 U.S. 485, 493-497 (1994); see Daniels v. United States, 532 U.S. 374, 382 (2001). In Custis v. United States, this Court recognized a "sole exception" to that rule for convictions obtained in violation of the "right to have appointed counsel established in Gideon [v.

Wainwright, 372 U.S. 335 (1963)]." 511 U.S. at 487, 496. Invoking that exception, petitioner seeks (Pet. 13-19) to collaterally attack the validity of his probation revocation for his 1999 South Carolina convictions, which he contends would in turn preclude the federal sentencing court's reliance on those convictions in determining his advisory guidelines range. That claim, which petitioner asserted for the first time on appeal and is accordingly reviewable only for plain error, is unsound for multiple reasons.

a. As a threshold matter, it is far from clear that any exception to the general preclusion of collateral attacks on prior convictions at federal sentencing allows a collateral attack on a proceeding that does not pertain to the prior conviction itself, but instead pertains to the revocation of a probationary sentence for that conviction. Even if one did, petitioner does not contend that the absence of counsel at his revocation hearing actually fits into the "sole exception" recognized in Custis -- namely a denial of the "right to have appointed counsel established in Gideon." Custis, 511 U.S. at 487, 496; see Daniels, 532 U.S. at 382 ("No other constitutional challenge to a prior conviction may be raised in the sentencing forum."). He instead relies on Gagnon v. Scarpelli, 411 U.S. 778 (1973), which recognized a "limited" right to counsel at probation revocation hearings on a "case-by-case" basis under the Due Process Clause. Id. at 789. The due process right recognized in Scarpelli, however, is not the "right to have appointed counsel established in Gideon." Custis, 511

U.S. at 496. Indeed, Scarpelli expressly disclaimed reliance on Gideon's Sixth Amendment right-to-counsel holding, concluding that "[p]robation revocation * * * is not a stage of a criminal prosecution" and that a more flexible analysis under the Due Process Clause instead applies. Scarpelli, 411 U.S. at 782; see id. at 788-790; see also Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (applying a similar analysis to parole revocation). In any event, even if Custis could be read to permit petitioner to collaterally attack his probation revocation based on Scarpelli, the court of appeals correctly concluded that he failed to show "an unconstitutional denial of counsel under Scarpelli." Pet. App. 4.

In Scarpelli, this Court rejected the contention that a "State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation hearings." 411 U.S. at 787. Rather, the Court explained, "the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." Id. at 790. The Court stated that counsel "[p]resumptively" should be provided when: (1) "after being informed of his right to request counsel," (2) "the probationer or parolee makes such a request" (3) "based on a timely and colorable claim (i) that he has not committed the alleged violation of the [probation] conditions" or "(ii) that, even if the violation is a matter of public record or

is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." Ibid.

Petitioner did not show below, and he does not show here, that he would have been entitled to counsel under that standard. Petitioner notes (Pet. 14) that "[t]he citation with which South Carolina served him explicitly notified him that he was entitled to counsel." And he does not contend that he ever "ma[de] * * * a request" that counsel be appointed to represent him. Scarpelli, 411 U.S. at 790. Petitioner therefore presents no evidence or argument that he was "refused" counsel by the State, as required to make out a denial-of-counsel claim under Scarpelli. Id. at 791.

In addition, petitioner fails to meet Scarpelli's additional requirement that a probationer show that he did not commit the alleged violation or "substantial reasons which justified or mitigated the violation and make revocation inappropriate" that "are complex or otherwise difficult to develop or present." 411 U.S. at 790. Petitioner suggests (Pet. 14-15) that a lawyer could have explained how a revocation sentence might affect him adversely and may have helped him advocate for a shorter sentence. But that is not an argument that his probation violation was "justified" or that revocation was "inappropriate" in light of that undisputed violation. Ibid. Thus, as the court of appeals correctly

explained, petitioner "alleges nothing outside the ordinary regarding his probation violation" that might provide the basis for a claim under Scarpelli. Pet. App. 4 (emphasis added).

b. Petitioner contends (Pet. 16-17) that, "[e]ven in the absence of a right to counsel, Custis does not permit the district court to rely" on his South Carolina revocation sentence because that sentence was imposed in violation of a separate due-process right to be heard. In his view (Pet. 16), Custis "assumed that the prior conviction was otherwise imposed in accordance with the fundamental due process rights to notice, to appear, and to be heard" and that those rights likewise may be invoked in a collateral attack in the context of a federal sentencing. But while acknowledging the "sole exception" for Gideon, Custis expressly declined to "extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in Gideon," including to the due-process violations alleged in that case. Custis, 511 U.S. at 496. Likewise, Daniels v. United States rejected a federal criminal defendant's challenge to prior convictions that he alleged "violated due process." 532 U.S. at 379. And the Court's comment that the Gideon exception had arisen "perhaps because of [the] oft-stated view that '[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel,'" Custis, 511 U.S. at 494-495 (citation omitted; brackets in original), did not "assume[]" (Pet. 16) that

a right to be heard at a probation-revocation hearing would itself have Gideon-like status.

Petitioner states that "the Court's concern in Custis that anything other than the right to counsel would be too arduous to investigate during a later sentencing is not present here," because "the five-year [revocation] sentence 'was no doubt a violation of [petitioner's] right to due process.'" Pet. 17 (quoting Pet. App. 3). But the Court's statement in Custis that "[e]ase of administration also supports" the rule it established does not mean that defendants can collaterally attack the validity of prior convictions based on any other constitutional defect that is not "too arduous to investigate." 511 U.S. at 496. Nor did Custis suggest that the administrability consideration was case-specific, rather than category-dependent. Many assertions of a violation of a "right to be heard" at a probation-revocation hearing will not be obvious, and will instead require precisely the sort of detailed record analysis that Custis avoids. 511 U.S. at 494-495.

c. As another alternative, petitioner seeks (Pet. 18) to distinguish the rule established in Custis because that decision "was interpreting and applying the ACCA, which is a statute written by Congress, whereas here the Court is addressing a guideline written by the Sentencing Commission." But, if anything, a defendant would have fewer due-process rights in the context of the advisory Sentencing Guidelines than in the context of the

ACCA's statutory minimum. Cf. Beckles v. United States, 137 S. Ct. 886, 892-895 (2017). In any event, petitioner misreads Custis.

In Custis, the Court first rejected the defendant's contention that the ACCA permits defendants to collaterally attack the validity of prior convictions for sentencing purposes. 511 U.S. 490-493. The Court then went on to reject the defendant's separate contention that, "regardless of whether [the ACCA] permits collateral challenges to prior convictions, the Constitution requires that they be allowed." Id. at 493 (emphasis added). The Court held that "Congress did not prescribe" in the ACCA "and the Constitution does not require" allowing defendants to challenge the validity of prior convictions on grounds other than the denial of the right to appointed counsel under Gideon. Id. at 497 (emphasis added). Custis's holding was thus not limited to the ACCA.

Indeed, as the court of appeals observed (Pet. App. 5), this Court applied Custis outside the context of the ACCA in Lackawanna County District Attorney v. Coss, 532 U.S. 394 (2001), which involved a state court's use of a defendant's prior convictions to determine his applicable sentencing under state law. Id. at 403-405. And "[a]t least eight other courts of appeals," United States v. Bacon, 94 F.3d 158, 163 n.5 (4th Cir. 1996), have recognized that the limitations in Custis apply "not just to enhancements under the [ACCA], but also to enhancements under the sentencing

guidelines," United States v. Aguilar-Diaz, 626 F.3d 265, 269 (6th Cir. 2010). No court of appeals has held otherwise.

d. At a minimum, none of petitioner's arguments establish that the district court plainly erred in relying on his South Carolina convictions in calculating his advisory sentencing range. Petitioner does not dispute that he failed to object to reliance on those convictions before the district court, and that his claim is therefore reviewable only for plain error. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner must demonstrate (1) error; (2) that is plain or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732-736; see Pet. App. 3.

The court of appeals correctly determined that petitioner had failed to meet his burden of showing "how any district court error was 'obvious or clear.'" Pet. App. 4 (citation omitted). As explained above, petitioner's claims rest on a complicated and novel theory that ultimately requires (at least) extending Custis beyond the category of errors to which it has previously applied. At a minimum, the "lack of binding precedent" supporting petitioner's theory "indicates that there is no plain error." United States v. Lantz, 443 Fed. Appx. 135, 139 (6th Cir. 2011) (citing United States v. Amos, 501 F.3d 524, 529 n.2 (6th Cir. 2007)). Moreover, petitioner fails to establish the case-specific

plain-error elements. See Olano, 507 U.S. at 734. Given petitioner's defiance of the law by repeatedly reentering the United States after being removed for committing serious crimes in this country -- and then committing more such crimes -- a prison sentence of the length he received was fully justified by 18 U.S.C. 3553(a) regardless of the advisory guidelines.

2. Petitioner identifies no sound reason for further review of the idiosyncratic and nonprecedential decision below. Petitioner does not contend that the decision conflicts with the decision of any other court of appeals, nor does he identify any court that would have afforded him relief on the claim that he presses here. And as noted, petitioner's claim is reviewable only for plain error, which makes this case a poor vehicle for considering the question presented in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. MCQUAID
Assistant Attorney General

DANIEL N. LERMAN
Attorney

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