No. 20-6802

IN THE SUPREME COURT OF THE UNITED STATES

NOEL JONES, 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

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QUESTIONS PRESENTED

1. Whether a defendant who pleaded guilty to a drug-distribution conspiracy without being advised that he could be held responsible only for the quantity of drugs reasonably foreseeable to him is automatically entitled to relief on plain-error review.

2. Whether a sufficient factual basis supported petitioner's plea of guilty to the drug-trafficking conspiracy charged in the indictment in his case.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Jones, No. 14-cr-59 (Sept. 27, 2017)

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

United States v. Jones, No. 17-30829 (Aug. 7, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 969 F.3d 192.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on January 4, 2021. 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 Louisiana, petitioner was convicted of conspiring to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A) (2012). He was sentenced to 327 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A10.

1. Between approximately 2011 and 2013, petitioner was a heroin dealer in New Orleans, Louisiana. Pet. App. 5; C.A. ROA 215-216. Petitioner purchased "wholesale quantities of heroin" from co-defendants Arthur McKinnis and Terence Taylor, and worked with co-defendant Terrell Dyer "to resell the heroin in gram quantities to street-level customers on a daily basis." Pet. App. 5 (citation omitted). Between March and November of 2013, Drug Enforcement Administration (DEA) agents conducted at least six controlled purchases from petitioner, each of which involved between one and four grams of heroin. C.A. ROA 118.

In March of 2013, New Orleans Police Department detectives attempted to stop petitioner for disregarding a stop sign while driving. C.A. ROA 119. Petitioner sped away and, after striking a stopped car, fled on foot. Ibid. As he did so, he threw away a small bag of marijuana and a .40-caliber pistol. Ibid. He was later arrested. Id. at 229.

2. A federal grand jury in the Eastern District of Louisiana charged petitioner and 11 others with conspiring to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 841(a)(1), 846, and 21 U.S.C. 841(b)(1)(A) (2012). Pet. App. 1-2; C.A. ROA 10. The indictment also charged petitioner with six substantive counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 2; C.A. ROA 12-14. Petitioner pleaded guilty to the conspiracy count pursuant to a plea agreement in which the government agreed to dismiss the remaining charges against him and not to seek enhancement of petitioner's sentence under 21 U.S.C. 851 based on his prior felony drug conviction. Pet. App. 2; C.A. ROA 200-203.

Before entering his guilty plea, petitioner signed a factual statement in which he admitted that beginning "prior to January 2011" he "combined, conspired, confederated, and agreed with other persons to distribute heroin in the New Orleans area." C.A. ROA 117. He admitted that he "bought wholesale quantities of heroin" from McKinnis and Taylor and that he "worked with Terrell Dyer to resell the heroin in gram quantities to street-level customers on a daily basis." Ibid. (capitalization altered). Petitioner also "stipulate[d] and agree[d]" that he "should be held accountable for at least one kilogram but less than three kilograms of heroin" because "this amount of heroin was distributed during the course

of the conspiracy as a result of the defendant's conduct and the reasonably foreseeable conduct of his co-conspirators within the timeframe of the Indictment." Id. at 119.

At a joint hearing in which petitioner and six of his co-defendants pleaded guilty, the district court explained that the indictment charged the defendants with conspiring "with each other" and with others "to distribute 1 kilogram or more of heroin." C.A. ROA 396. The court described the elements of that offense, including, as relevant here, that "the overall scope of the conspiracy involved [at] least 1 kilogram [of] heroin." Id. at 397. Petitioner stated that he understood the crime to which he was pleading guilty, id. at 399, and confirmed that the written factual basis accurately described his conduct, id. at 424.

The district court sentenced petitioner to 327 months of imprisonment, with 87 months of that time running concurrently to a previously imposed state sentence, to be followed by five years of supervised release. C.A. ROA 131; Pet. App. 2. Petitioner did not file a direct appeal, but later filed a timely motion to vacate his sentence under 28 U.S.C. 2255, in which he contended that his counsel provided ineffective assistance by, among other things, failing to file a notice of appeal at petitioner's request. Pet. App. 2. The district court reinstated petitioner's judgment to allow him to file a timely notice of appeal, which he did. Ibid.

3. The court of appeals affirmed. Pet. App. 1-10. The court explained that because none of petitioner's claims were

presented to the district court, petitioner would be entitled to relief only if he could satisfy the requirements of plain-error review. Id. at 2; see Fed. R. Crim. P. 52(b).

As relevant here, the court of appeals first rejected petitioner's claim that the factual basis for his plea "did not support his involvement in a larger conspiracy involving all twelve defendants and a kilogram of heroin." Pet. App. 3. The court of appeals observed that petitioner had stipulated that he should "be held accountable for at least one kilogram but less than three kilograms of heroin." Id. at 5 (quoting C.A. ROA 119). And even setting aside that stipulation, the court found that "it was not clear error" for the district court to rely on petitioner's factual admissions to support his plea to conspiring to distribute a kilogram of heroin. Ibid. The court of appeals emphasized petitioner's admission that he had sold heroin "'in gram quantities'" "'on a daily basis'" for nearly three years, which would itself "total more than a kilogram of heroin over the course of the conspiracy." Ibid. (quoting C.A. ROA 117).

The court of appeals also determined that the district court "did not clearly err in finding that individuals other than [petitioner] and Dyer were part of the same conspiracy." Pet. App. 5. The court of appeals emphasized the fact-specific nature of its assessment, id. at 4, and it observed that "a defendant need not know every member of a conspiracy personally," id. at 5. And the court found that petitioner's purchase of "wholesale

quantities" from Taylor and McKinnis "impl[ied] ongoing involvement with these codefendants, the men operating a narcotics supply chain." Id. at 6. The court rejected petitioner's attempt to "characterize his relationship with McKinnis as a mere buyer-seller relationship," explaining that although a "'single buy-sell agreement'" might not establish a conspiracy, "'a strong level of trust and an ongoing, mutually dependent relationship'" provides evidence of a conspiracy. Id. at 6-7 (citations omitted). Finding that "the statements in the factual basis form an adequate evidentiary foundation for [petitioner's] guilty plea," the court determined that petitioner had "shown no error." Id. at 7.

The court of appeals also rejected petitioner's separate argument that "his guilty plea was unknowing and involuntary because the district court misinformed him about the government's burden for proving a conspiracy and attributing a quantity of drugs to him." Pet. App. 7. The court of appeals noted that Federal Rule of Criminal Procedure 11 requires a district court to ensure that a defendant understands "the nature of the charge" to which he is pleading, and stated that in cases involving a drug-trafficking conspiracy, "some explanation of drug quantities is required" when those quantities could serve as the basis for enhanced penalties. Id. at 7-8. The court of appeals then observed that here, the district court had informed petitioner "that, if he chose to plead not guilty, the government would have to prove that 'the overall scope of the conspiracy involved at

least 1 kilogram of heroin,'" but did not specifically inform him of the circuit's limitation of a drug-conspiracy defendant's responsibility to "only 'the quantity of drugs with which [the defendant] was directly involved or that was reasonably foreseeable to him.'" Id. at 8 (quoting United States v. Haines, 803 F.3d 713, 740 (5th Cir. 2015), cert. denied, 137 S. Ct. 2107 (2017)) (brackets omitted).

The court of appeals concluded that "despite this distinction," reversal would not be required on plain-error review because petitioner could not "show that he would have chosen not to plead guilty had he been instructed differently." Pet. App. 8; see ibid. ("[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea.") (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004)) (brackets in original). The court of appeals observed that petitioner's "indictment charged him with conspiring to distribute one kilogram of heroin"; that he was "otherwise properly charged and instructed" by the district court; and that "he admitted in the factual basis that he had direct involvement in distributing more than a kilogram of heroin over the duration of the conspiracy." Id. at 9. The court accordingly found that, "even if [petitioner] had been explicitly informed that his responsibility was limited to drug quantities with which he was

directly involved or that were reasonably foreseeable to him, there is no reason to think that he would have chosen to plead not guilty." Id. at 8. And the court rejected petitioner's contention that "the district court's instructions rise to the level of a structural error requiring automatic reversal," explaining that "'[t]he omission of a single Rule 11 warning without more is not colorably structural,' and is thus not reversible without a showing that it affected the proceedings." Id. at 9 (quoting United States v. Scott, 587 Fed. Appx. 201, 202 (5th Cir. 2014) (per curiam), and in turn quoting Dominguez Benitez, 542 U.S. at 81 n.6).

ARGUMENT

1. Petitioner contends (Pet. 12-16) that the district court's description of the drug-quantity element during his plea colloquy was a structural error requiring automatic reversal. On January 8, 2021, this Court granted the petition for a writ of certiorari in United States v. Gary, No. 20-444 (argued Apr. 20, 2021), to consider whether plain-error relief is automatically available when a defendant pleads guilty without being fully informed of the knowledge-of-status element required for a conviction of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). The petition here references (at 15) the Fourth Circuit's decision in Gary, but does not expressly contend that the question presented there is related to the question presented here. Nonetheless, the issues are close enough that this Court's decision in Gary could affect the proper

disposition of this petition. The best course is therefore to hold the petition pending the decision in Gary and then dispose of it as appropriate in light of that decision.

2. Petitioner separately contends (Pet. 17-19) that the factual basis for his plea to the charged conspiracy was insufficient. The lower courts' case-specific finding of a sufficient factual basis for petitioner's plea is correct and does not conflict with any decision of this Court or another court of appeals. And this case would be a poor vehicle for further review because, even if he could establish error, petitioner could not satisfy the other requirements for plain-error relief on this claim.

a. Before accepting a guilty plea, "the court must determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). Rule 11(b)(3)'s requirements are "fairly modest." United States v. Ramos-Mejía, 721 F.3d 12, 16 (1st Cir. 2013). The government "need not 'support every element of the charged crime by direct evidence,' or demonstrate that the defendant is guilty beyond a reasonable doubt." United States v. Gonzalez-Negron, 892 F.3d 485, 487 (1st Cir. 2018) (quoting Ramos-Mejía, 721 F.3d at 16), cert. denied, 139 S. Ct. 1169 (2019). Instead, "the government need only show a rational basis in fact for the defendant's guilt." Ramos-Mejía, 721 F.3d at 16; see, e.g., United States v. Owen, 858 F.2d 1514, 1517 (11th Cir. 1988)

(per curiam) ("evidence from which a court could reasonably find that the defendant was guilty").

As the court of appeals determined, the record provided an ample factual basis from which a "reasonable factfinder could determine" that petitioner was part of the conspiracy to which he pleaded guilty. Pet. App. 6. Petitioner admitted to personally trafficking in "'gram quantities'" of heroin on a "'daily basis'" for almost three years, directly implicating himself in the sale of "more than a kilogram of heroin over the course of the conspiracy." Id. at 5 (citation omitted); see also C.A. ROA 118 (admitting to having sold between one and four grams of heroin in DEA-controlled buys on at least six occasions). And although the factual stipulations did not directly link petitioner to every other co-defendant, the court of appeals observed that petitioner "admitted that he purchased wholesale quantities from Taylor and McKinnis," Pet. App. 6; that those admissions "imply ongoing involvement with these codefendants, the men operating the narcotics supply chain" -- not one-time buyer-seller transactions, ibid.; and that a "defendant need not know every member of a conspiracy personally," id. at 5. See, e.g., United States v. Monroe, 73 F.3d 129, 131 (7th Cir. 1995) (explaining that "it is well settled that a conspiracy can exist" even if "each participant does not know the identity of [all] the others or does not participate in all the events") (citation and internal quotation marks omitted). Based on his admissions, the court correctly found

that, in the circumstances here, a "reasonable factfinder could determine * * * that [petitioner] was part of a common venture including McKinnis and Taylor with a shared goal of distributing illegal drugs for profit." Pet. App. 6.

Contrary to petitioner's contention (Pet. 19), the decision below does not "conflict[] with" Kotteakos v. United States, 328 U.S. 750 (1946). Kotteakos concerned a variance between the indictment, which alleged a single conspiracy, and the evidence at trial, which "the Government admit[ted] proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure." Id. at 752; id. at 768. Here, by contrast, the indictment and factual basis for the plea both supported a single conspiracy. The court of appeals' case-specific determination that a factual basis existed for petitioner's plea is consistent with Kotteakos.

b. This case is also a poor vehicle for further review because, at minimum, no plain, obvious error occurred, as would be necessary for petitioner to obtain relief notwithstanding his forfeiture of this claim. See Johnson v. United States, 520 U.S. 461, 466-467 (1997) (describing the four requirements for obtaining relief under the plain-error standard, including the requirement that the error be "plain," which is "synonymous with 'clear' or, equivalently, 'obvious'") (quoting United States v. Olano, 507 U.S. 725, 734 (1993)). Had petitioner argued in the district court that additional facts were necessary in order to

establish his participation in the drug-trafficking conspiracy, the government would have had the opportunity to supply them. Instead, petitioner affirmatively acknowledged that he "combined, conspired, confederated, and agreed with other persons to distribute heroin" and that he therefore "should be held accountable for at least one kilogram but less than three kilograms of heroin." C.A. ROA 117, 119.

Nor could petitioner satisfy the other requirements for plain-error relief. See United States v. Marcus, 560 U.S. 258, 262 (2010) (stating that a defendant is entitled to plain-error relief only if he shows that the error "affected [his] substantial rights" and also "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings") (citation omitted). Regardless of whether he joined the charged conspiracy or some smaller conspiracy, petitioner agreed that he was responsible for one kilogram or more of heroin. Thus at most, under petitioner's current view, he should have been convicted of a somewhat smaller conspiracy that involved the same drug quantity and many of the same co-conspirators. And petitioner received substantial benefits as part of his plea agreement, including the dismissal of six substantive heroin-distribution counts and a firearm-possession count, as well as the government's agreement not to seek an enhanced sentence under 21 U.S.C. 851. See Pet. App. 2; C.A. ROA 200-204. Petitioner therefore could not obtain relief

under the standards of plain-error review even if he were correct that an error, or even an obvious one, occurred.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in Gary and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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