No. 20-8345

IN THE SUPREME COURT OF THE UNITED STATES

RICKY PARKERSON, 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 IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in determining petitioner's sentence, the district court violated the Fifth and Sixth Amendments by considering statements in a police report and the opinion of a psychologist that were conveyed to the court in the Probation Office's presentence report.

2. Whether the court of appeals permissibly determined that petitioner's sentence was substantively reasonable.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Parkerson, No. 18-cr-517 (July 10, 2019)

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

United States v. Parkerson, No. 19-10780 (Jan. 12, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 984 F.3d 1124.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2021. The petition for a writ of certiorari was filed on June 11, 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 Northern District of Texas, petitioner was convicted of

failing to register as a sex offender, in violation of 18 U.S.C. 2250. Pet. App. B1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A12.

1. In 1988, petitioner sexually assaulted a 16-year-old girl at gunpoint in Texas. Presentence Investigation Report (PSR) ¶¶ 9, 39. Petitioner pleaded guilty to aggravated sexual assault, in violation of Texas law. PSR ¶ 39. Although petitioner was sentenced to ten years of imprisonment, he was released on parole in 1990. PSR ¶ 9.

The following year, petitioner told an 18-year-old woman that he would provide her a ride home, grabbed her and ordered to undress at knifepoint, and sexually assaulted her. PSR ¶¶ 10, 105. Petitioner then fled the State and "was not apprehended until four years later." PSR ¶ 40. In 1996, he was convicted of aggravated sexual assault and sentenced to 25 years of imprisonment. PSR ¶¶ 10, 40. Following his release on parole in 2015, petitioner registered as a sex offender in Texas. PSR ¶¶ 10-11.

On August 8, 2016, petitioner's 25-year-old niece reported to the Seagoville, Texas, police department that petitioner had assaulted her. PSR ¶ 12. Petitioner's niece told police that, after she picked petitioner up from a grocery store, petitioner made her drive down a dirt road and park in a field. Ibid.

Petitioner's niece told police that they then got out of the car and walked toward a fence; that when she refused to cross the fence, petitioner became angry and pulled a yellow box cutter out of his pocket; that she became nervous and ran back to the car, with petitioner chasing her; that when she reached the car, she placed a call to her mother while yelling at petitioner to "get back"; that after petitioner "finally moved away enough," she got into the car and locked the doors; that petitioner then hopped on the hood of the car; that she put the car in reverse, causing petitioner to slide off the hood, and then drove away; and that her mother called the police. Ibid.

Shortly thereafter, petitioner took off for Nevada, where he failed to update his sex-offender registration. PSR ¶ 15. Police officers in Texas obtained a warrant for his arrest as an unregistered sex offender. PSR ¶ 13. Two years later, police officers in Nevada arrested petitioner after receiving an anonymous tip, and he was extradited to Texas. PSR ¶ 14.

2. A federal grand jury in the Northern District of Texas indicted petitioner on one count of failing to register as a sex offender, in violation of 18 U.S.C. 2250. Indictment 1. Petitioner pleaded guilty. Pet. App. B1.

The Probation Office prepared a presentence report that included a description of petitioner's criminal history. Applying the 2018 version of the Sentencing Guidelines, the Probation Office calculated a criminal history score of 5, corresponding to a

criminal history category of III. PSR ¶¶ 20, 43. The Probation Office assigned petitioner three criminal history points for his 2016 conviction for aggravated sexual assault, PSR ¶ 40, and two criminal history points for violating Section 2250 while on parole for that aggravated sexual assault, PSR ¶ 42.

The Probation Office also observed that petitioner had six other convictions -- three of which were for felony offenses -- that did not "count[] in calculating [his] applicable criminal history score due to the age of the convictions." PSR ¶ 104. Those convictions included his older conviction for aggravated sexual assault, PSR ¶¶ 39, 105; an earlier conviction for false imprisonment after he "was originally charged with Assault to Commit Rape," PSR ¶ 34; see PSR ¶ 104; and convictions for possessing, manufacturing, or selling dangerous weapons, receiving known stolen property, theft, and unauthorized use of a motor vehicle, PSR ¶¶ 35-38. The Probation Office also recounted the statements that petitioner's niece had made to police in 2016, in which she told them that petitioner had taken "her into a secluded area and brandished a box cutter." PSR ¶ 105; see PSR ¶ 12.

The Probation Office found that petitioner's "criminal history reflects a pattern of recidivism." PSR ¶ 104. It observed that a psychologist from the Texas Department of Criminal Justice (TDCJ) had determined that petitioner "represented a high risk for sexual re-offense and suffered from a behavior abnormality that made him likely to engage in future acts of predatory sexual

violence." PSR ¶ 76; see PSR ¶ 105. The Probation Office also found that petitioner "continued to minimize his convictions of sexual assaults." PSR ¶ 105. It noted, for example, that petitioner had told TDCJ officials that "the victims were his girlfriends" and that "there were no weapons" involved. Ibid.

Based on a criminal history category of III and a total offense level of 13, the Probation Office calculated an advisory guidelines range of 18 to 24 months of imprisonment. PSR ¶ 92. It noted, however, that under Sentencing Guidelines § 4A1.3, p.s., an upward departure might be warranted on the ground that petitioner's "criminal history category substantially under-represents the seriousness of [his] criminal history or the likelihood [that he] will commit other crimes." PSR ¶ 104. It also noted that those same factors could "be used to impose a sentence outside the advisory guideline range." PSR ¶ 106.

3. Petitioner objected to "[i]nclusion or [c]onsideration" of the "[e]vents" reported by petitioner's niece to police. C.A. ROA 116 (emphasis omitted). Petitioner noted that "no charges were ever filed against [him]." Id. at 117. And he argued that the presentence report "does not include any information to indicate that there is any corroborating evidence that the allegations actually took place," and that "[w]ithout more, a single statement made by an alleged victim to the police does not bear sufficient indicia of reliability to overcome [his] Due Process rights and support consideration at sentencing." Ibid.

Petitioner also objected to the "[i]nclusion and [c]haracterization" of the TDCJ psychologist's evaluation of him. C.A. ROA 118 (emphasis omitted). Petitioner argued that the results of an assessment known as a "Static-99R" "should be included" in the presentence report to "provide a more complete understanding" of the psychologist's evaluation. Id. at 118-119. Petitioner noted that the "Static-99R" placed him at only a "Low-Moderate risk" of re-offending, id. at 120, and he argued that in light of those results, the psychologist's contrary opinion -- namely, that his risk of re-offending was high -- should be disregarded, id. at 119.

4. At sentencing, the district court overruled petitioner's objections to the presentence report. Sent. Tr. 9, 13. The court found the statements that his niece gave to police to be "very detailed" and "credible," and stated that it would "assign [them] some weight." Id. at 9. The court also explained that although "part" of the TDCJ psychologist's evaluation had found petitioner to be a "low risk" and "another part" had found him to be a "high risk," id. at 12, it would "take both conclusions and give them as much weight as * * * they deserve, which is not much," id. at 13. The court adopted the presentence report's calculation of the advisory guidelines range. Ibid.

The district court then heard argument from petitioner's counsel on the appropriate sentence and permitted petitioner to speak on his own behalf. Sent. Tr. 13-15. Petitioner claimed

that he "went to Nevada" in 2016 because his "dad died," not because he was "running" from the law. Id. at 15. Petitioner also addressed "that thing with * * * [his] niece," claiming that after he saw her "in the backyard smoking that K-2 stuff" and "blowing it in her kid's face," he "got onto her" about it. Ibid. According to him, he "had the box cutter in [his] hand" because he had been working "in the craft shop." Ibid.

The district court varied upward from the advisory guidelines range and sentenced petitioner to 120 months of imprisonment, the statutory maximum. Sent. Tr. 18; see PSR ¶ 91. The court explained that the case was "unusual" because the advisory guidelines range was only 18 to 24 months, "yet [petitioner] is a repeat offender of the worst kind." Sent. Tr. 17. The court recounted petitioner's criminal history, emphasizing that he "raped someone in '88," "spent two" years in prison, "got right out and raped someone again," spent "a long time in prison," "[g]ot out again," and then "attack[ed]" his niece within a short time after "getting out." Ibid. In light of that history, the court found a "very big" risk that petitioner would re-offend, and it determined that a 120-month sentence was necessary to "keep the community safe," "promot[e] respect for the law," "provid[e] just punishment," and "deter[] others." Ibid.

5. The court of appeals affirmed. Pet. App. A1-A12.

The court of appeals rejected petitioner's argument that "the district court erred by considering the alleged encounter with his

niece." Pet. App. A5. The court of appeals acknowledged that "[i]f information in the [presentence report] lacks sufficient indicia of reliability, then it is error for the district court to consider it even if the defendant offers no rebuttal evidence." Id. at A6. The court of appeals determined, however, that "the niece's account, as reflected in the relevant passage of the [presentence report], bears sufficient indicia of reliability." Id. at A8. The court emphasized that the niece's account was not "an unsubstantiated assertion by the government that [petitioner] assaulted his niece," but rather "statements [his] niece made to the police." Ibid. The court also observed that "the account given to the police by [his] niece is quite detailed and specific, including the location of the alleged assault, specific directions as to how they supposedly got there, the nature of the weapon that was allegedly used, and specific details about the alleged assault itself." Id. at A7. And the court stressed that at the sentencing hearing, petitioner "did not so much deny or respond to his niece's allegations but, instead, told a story that was entirely detached from the narrative proffered by his niece, whose only points of contact with his niece's account were that, in both, the two of them were together and [petitioner] was holding a box cutter, thus corroborating at least those aspects of his niece's story." Id. at A7-A8.

The court of appeals also found no reversible error in the district court's consideration of "the opinion of [the] TDCJ

psychologist * * * that [petitioner's] likelihood of re-offending was high." Pet. App. A8. The court of appeals explained that even if "the district court's consideration of [the psychologist's] opinion was error," the "record indicates that his opinion did not affect the district court's composition of the sentence it imposed." Id. at A9. The court of appeals observed that "[t]he district court, by its own account, gave 'not much' weight to the opinion" and that "[i]n setting forth its reasons for the sentence, the district court did not mention [the psychologist's] evaluation." Ibid. And the court of appeals found the record "quite clear that the district court would have imposed the same 120-month sentence even if it had given no weight to [the psychologist's] opinion." Ibid.

Finally, the court of appeals determined that "[g]iven the public safety concerns at issue, when viewed in the light of [petitioner's] criminal history," his sentence was not "substantively unreasonable." Pet. App. A11. The court observed that "[p]revious sentences involving substantial jail time had not deterred [petitioner] from committing additional crimes, including serious offenses involving sexual violence." Ibid. The court also explained that "the district court considered the [18 U.S.C.] 3553(a) factors and found that only a statutory maximum sentence would be sufficient to protect the public from further crimes of the defendant." Ibid. "Under these circumstances," the

court continued, "it is not our role to second-guess the district court's exercise of its sound discretion." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-12) that the district court violated the Fifth and Sixth Amendments in considering statements in the police report and a psychologist's opinion that were conveyed in the presentence report. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Although a narrow disagreement exists in the circuits on whether a bare objection to the factual accuracy of findings in a presentence report requires the government to introduce additional evidence to support those findings, this Court has repeatedly and recently denied petitions for writs of certiorari raising that issue, and in any event, it is not implicated here. Furthermore, the court of appeals did not address any constitutional claims, and in fact found that any error in the district court's consideration of the psychologist's opinion did not affect petitioner's sentence. Finally, petitioner's fact-bound contention that his sentence is substantively unreasonable likewise lacks merit and does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner's contention that the district court violated the Fifth and Sixth Amendments by considering the police-report

statements and psychologist's opinion conveyed in the presentence report does not warrant this Court's review.

a. The court of appeals correctly found no reversible procedural error in the district court's sentencing determination. Pet. App. A5-A9.

Congress has provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. That provision codifies the "longstanding principle that sentencing courts have broad discretion to consider various kinds of information" to tailor each sentence to the particular defendant involved. Pepper v. United States, 562 U.S. 476, 488 (2011) (quoting United States v. Watts, 519 U.S. 148, 151 (1997) (per curiam)).

Under the Due Process Clause, a criminal sentence may not be based on "materially false" information that the offender did not have an effective "opportunity to correct." Townsend v. Burke, 334 U.S. 736, 741 (1948). Otherwise, however, a sentencing judge is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446 (1972); see Williams v. New York, 337 U.S. 241, 246 (1949) (citing reliance on reports prepared by federal probation officers as "[a] recent manifestation of the historical latitude allowed sentencing judges"). To ensure that

a defendant receives due process, the Sentencing Guidelines require that whenever a "factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor," and that the court will rely on information only if it determines that the "information has sufficient indicia of reliability to support its probable accuracy." Sentencing Guidelines § 6A1.3(a), p.s.

When factual information in a presentence report is not "reasonably in dispute," however, a district court may accept it as true. Federal Rule of Criminal Procedure 32(i)(3)(A) authorizes a district court, without further inquiry, to adopt "any undisputed portion of the presentence report as a finding of fact." For "any disputed portion of the presentence report or other controverted matter," the court "must * * * rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B).

The district court adhered to those procedural requirements in determining petitioner's sentence. Although petitioner objected to the presentence report's "[i]nclusion or [c]onsideration of [e]vents [a]lleged" by his niece to have occurred on August 8, 2016, he did not dispute that the presentence report accurately recounted his niece's statements to police. C.A. ROA 116 (emphasis omitted). He instead challenged only the

statements' reliability as a matter of law, asserting that a victim's statements to police do "not bear sufficient indicia of reliability" in the absence of "charges" filed against the defendant or "corroborating evidence." Id. at 117; see Garland v. Ming Dai, 141 S. Ct. 1669, 1681 (2021) (distinguishing "factual accuracy" from "credibility"). The lower courts correctly rejected that challenge. Pet. App. A8.

As the court of appeals explained, "the account given to the police by [his] niece is quite detailed and specific, including the location of the alleged assault, specific directions as to how they supposedly got there, the nature of the weapon that was allegedly used, and specific details about the alleged assault itself." Pet. App. A7. And when petitioner addressed the district court at sentencing, he "did not so much deny or respond to his niece's allegations," but rather "told a story" that "corroborat[ed]" key aspects of his niece's account -- namely, that "the two of them were together and [petitioner] was holding a box cutter." Id. at A7-A8; see Sent. Tr. 15.

The district court likewise committed no procedural error in considering the TDCJ psychologist's evaluation of petitioner. Sent. Tr. 12-13. In objecting to the presentence report's "[i]nclusion and [c]haracterization" of that evaluation, petitioner did not dispute that the presentence report accurately recounted the psychologist's opinion. C.A. ROA 118 (emphasis omitted). Nor did petitioner contest any facts underlying that

opinion. See id. at 118-120. Rather, petitioner contested only the psychologist's judgment that he presents a high risk of committing additional crimes. Id. at 119. But the district court appropriately took reliability concerns into account by considering the Static-99R assessment, which placed petitioner at only a low or moderate risk of re-offending, resulting in a determination that neither the assessment nor the judgment of the psychologist was entitled to "much" weight. Sent. Tr. 13.

The district court accordingly followed the prescribed procedures, and petitioner's due process claim lacks merit. His claim (Pet. 11-12) that the court violated his Sixth Amendment right of confrontation is likewise unsound. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. This Court has stated that the right of confrontation "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." Crawford v. Washington, 541 U.S. 36, 54 (2004). And the Sixth Amendment's confrontation right, like its common-law antecedent, applies only at trial, not at sentencing. See Williams, 337 U.S. at 243-246 & n.4.

b. Although a narrow disagreement exists in the courts of appeals on whether a bare objection to the factual accuracy of findings in a presentence report requires the government to

introduce evidence to support those findings, that conflict is not implicated in this case and does not warrant the Court's review. This Court has repeatedly and recently denied petitions for writs of certiorari raising substantially the same issue. See, e.g., Tshiansi v. United States, 139 S. Ct. 2748 (2019) (No. 18-8524); Gipson v. United States, 139 S. Ct. 2636 (2019) (No. 18-7139); Pena-Trujillo v. United States, 138 S. Ct. 639 (2018) (No. 17-5532); Williams v. United States, 138 S. Ct. 504 (2017) (No. 17-5739); Peru v. United States, 138 S. Ct. 61 (2017) (No. 16-8398); Gutierrez v. United States, 577 U.S. 1031 (2015) (No. 15-5043); Marroquin-Salazar v. United States, 577 U.S. 843 (2015) (No. 14-9992); Rodriguez v. United States, 568 U.S. 1196 (2013) (No. 12-6838); Navejar v. United States, 565 U.S. 1236 (2012) (No. 11-7052); Bolt v. United States, 562 U.S. 1222 (2011) (No. 10-5738); Moreno-Padilla v. United States, 562 U.S. 1140 (2011) (No. 10-5128); Del Carmen v. United States, 562 U.S. 1091 (2010) (No. 09-11245); Alexander v. United States, 562 U.S. 1066 (2010) (No. 10-5229); Godwin v. United States, 556 U.S. 1132 (2009) (No. 08-7920); O'Garro v. United States, 555 U.S. 1140 (2009) (No. 08-6259). The same result is warranted here.

Consistent with the Fifth Circuit's approach, a majority of the courts of appeals have recognized that, notwithstanding a defendant's objection to the factual accuracy of a finding in a presentence report, a district court may rely on the report "'without more specific inquiry or explanation'" unless the

defendant makes "an affirmative showing [that] the information is inaccurate." United States v. Love, 134 F.3d 595, 606 (4th Cir.) (citation omitted), cert. denied, 524 U.S. 932 (1998); see United States v. Cyr, 337 F.3d 96, 100 (1st Cir. 2003); United States v. Campbell, 295 F.3d 398, 406-407 (3d Cir. 2002), cert. denied, 537 U.S. 1239 (2003); United States v. Caldwell, 448 F.3d 287, 290 (5th Cir. 2006); United States v. Lang, 333 F.3d 678, 681 (6th Cir. 2003); United States v. Mustread, 42 F.3d 1097, 1101-1102 (7th Cir. 1994); see also United States v. Brown, 52 F.3d 415, 424-425 (2d Cir. 1995), cert. denied, 516 U.S. 1068 (1996).* Those decisions reflect the understanding that the presentence report, developed by an officer of the court after a thorough investigation, bears sufficient indicia of reliability that its findings ordinarily cannot be overcome by a bare objection, unsubstantiated by any proffer of evidence. See Caldwell, 448 F.3d at 291 n.1; Cyr, 337 F.3d at 100; United States v. Coonce, 961 F.2d 1268, 1278-1280 (7th Cir. 1992); Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.6(a), at 1119 (2d ed. 1992) ("[T]he general rule throughout this country [is] that when matters contained in a [presentence] report are contested by the defendant, the defendant has, in effect, an affirmative duty to present

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* Contrary to petitioner's contention (Pet. 10-11), the Second Circuit's decision in United States v. Helmsley, 941 F.2d 71 (1991), cert. denied, 502 U.S. 1091 (1992), does not show that the Second Circuit is aligned with the minority view on this issue. In Helmsley, the Second Circuit upheld the district court's reliance on the presentence report. Id. at 97-98.

evidence showing the inaccuracies contained in the report.") (citation and internal quotation marks omitted).

The Eighth Circuit has stated that when a defendant objects to the factual accuracy of a finding in the presentence report, the government must present evidence to prove the disputed fact, even if the defendant's objection is unsupported by any rebuttal evidence. See, e.g., United States v. Poor Bear, 359 F.3d 1038, 1041 (2004). At the same time, however, the Eighth Circuit "recognize[s] that the Sentencing Guidelines do not mandate a full evidentiary hearing when a defendant disputes a [presentence report's] factual representation." United States v. Stapleton, 268 F.3d 597, 598 (2001). The Ninth, Eleventh, and D.C. Circuits appear to have rejected reliance on findings in a presentence report whose factual accuracy the defendant disputed, at least in certain instances. See United States v. Showalter, 569 F.3d 1150, 1160 (9th Cir. 2009); United States v. Martinez, 584 F.3d 1022, 1027 (11th Cir. 2009); United States v. Price, 409 F.3d 436, 444 (D.C. Cir. 2005). And the Tenth Circuit has taken varying approaches. Compare United States v. Ary, 518 F.3d 775, 787 (2008) ("When a defendant objects [to a fact stated in the presentence report], the government must prove that fact at the sentencing hearing by a preponderance of the evidence."), with United States v. Warren, 737 F.3d 1278, 1285-1286 (2013) (recognizing that "a district court is free to rely on" a presentence report's "recitation of facts underlying" a defendant's prior arrests

unless the defendant "presents 'information to cast doubt on' th[ose] facts") (citation omitted), cert. denied, 572 U.S. 1078 (2014), and United States v. Barnett, 828 F.3d 1189, 1192-1193 (2016) (recognizing that the district court permissibly relied on the presentence report because, although the defendant had objected to the report's findings, he had failed to make specific allegations of factual inaccuracy).

But the narrow disagreement in the courts of appeals would not warrant this Court's review even if this case implicated it. As explained above, see pp. 12-13, supra, petitioner objected not to the reliability of the Probation Office's report -- i.e., the reliability of its recounting of the niece's and psychologist's statements -- but instead to the reliability of the statements themselves. His objection therefore does not implicate any conflict concerning a court's consideration of a presentence report's findings as such, and it is far from clear that any circuit would preclude the sentencing court from relying on the accurately reported statements of the niece and psychologist, after hearing petitioner out on the issues raised by their evidence. See, e.g., United States v. Bledsoe, 445 F.3d 1069, 1073 (8th Cir. 2006) (recognizing that court could rely on "factual allegations" in presentence report where the defendant "objected not to the facts themselves, but only to the report's recommendation based on those facts") (citation and internal quotation marks omitted); Warren, 737 F.3d at 1286 (10th Cir.)

(recognizing that court permissibly relied on presentence report where defendant's objection did not raise "factual inaccuracies" in the report); see also, e.g., Price, 409 F.3d at 444 (D.C. Cir.) (stating that the government's "burden is triggered whenever a defendant disputes the factual assertions in the [presentence] report").

c. In any event, this case would be a poor vehicle for further review, for two reasons. First, as petitioner acknowledges (Pet. 7), the court of appeals did not address his contention that the district court's consideration of his niece's statements or the psychologist's opinion violated his Fifth and Sixth Amendment rights. Nor did petitioner seek rehearing in the court of appeals when the court issued a decision that did not address that contention. Because this Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), its review is not warranted in these circumstances.

Second, as the court of appeals found, any error in the district court's consideration of the psychologist's opinion was harmless. See Fed. R. Crim. P. 52(a). "The district court, by its own account, gave 'not much' weight to the opinion," and "[i]n setting forth its reasons for the sentence, the district court did not mention [the psychologist's] evaluation" at all. Pet. App. A9. Thus, as the court of appeals correctly recognized, "the record is quite clear that the district court would have imposed

the same 120-month sentence even if it had given no weight to [the psychologist's] opinion." Ibid.

2. Petitioner additionally contends (Pet. 14-17) that the court of appeals erred in upholding his sentence as substantively reasonable. That fact-bound contention likewise does not warrant this Court's review.

a. After ensuring that a district court has not committed any procedural error in imposing a sentence, an appellate court should "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." Gall v. United States, 552 U.S. 38, 51 (2007). The reviewing court cannot presume that a sentence outside the advisory guidelines range is unreasonable and must give "due deference to the district court's decision that the [sentencing factors listed in 18 U.S.C. 3553(a)], on a whole, justify the extent of the variance" from the guidelines range. Ibid. And a court of appeals may not set aside a sentence simply because it "might reasonably have concluded that a different sentence was appropriate" had it been in the district court's position. Ibid.

The court of appeals correctly applied those principles in declining to disturb petitioner's sentence in this case. Although petitioner's advisory guidelines range was 18 to 24 months of imprisonment, the criminal history score on which that advisory guidelines range was based "substantially under-represent[ed] the seriousness of [petitioner's] criminal history" and "the

likelihood [that he] will commit other crimes." C.A. ROA 114. Only one of petitioner's seven convictions was counted in calculating his criminal history score; the remaining convictions were not counted due to their age. Ibid. When viewed as a whole, however, petitioner's criminal history "reflects a pattern of recidivism." Ibid.; see Sent. Tr. 17. And "[p]revious sentences involving substantial jail time had not deterred [petitioner] from committing additional crimes, including serious offenses involving sexual violence." Pet. App. A11; see Sent. Tr. 17 (describing petitioner as "a repeat offender of the worst kind"). Accordingly, given petitioner's "criminal history and the need to ensure public safety" -- as well as the need to "promot[e] respect for the law, provid[e] just punishment, and deter[] others" -- the district court did not abuse its discretion in sentencing petitioner to 120 months of imprisonment. Pet. App. A11; see Sent. Tr. 17-18.

b. Petitioner errs in contending (Pet. 17) that the court of appeals affirmed his sentence "without conducting any kind of reasonableness analysis." The court of appeals recognized the relevant legal principles, "review[ing] [his] sentence for substantive reasonableness" and "examin[ing] whether the district court abused its discretion in applying the statutory factors set forth in § 3553(a)." Pet. App. A10. When the court of appeals stated that "[u]nder these circumstances, it is not [its] role to second-guess the district court's exercise of its sound discretion," it was describing its determination that "[g]iven the

public safety concerns at issue, when viewed in light of [petitioner's] criminal history," it could not "say that the sentence imposed is substantively unreasonable." Id. at A11. The court's decision thus reflects nothing more than the application of "the deferential abuse-of-discretion standard," Gall, 552 U.S. at 52, to the particular circumstances of this case.

Petitioner likewise errs in asserting (Pet. 16) that the Fifth Circuit has "refused to conduct any reasonableness review" in other cases. In the decisions that he cites (Pet. 16-17), the Fifth Circuit conducted such review and simply determined that a particular sentence was substantively reasonable. See United States v. Hernandez, 876 F.3d 161, 167 (2017) (per curiam); United States v. Malone, 828 F.3d 331, 342, cert. denied, 137 S. Ct. 526 (2016); United States v. Douglas, 667 Fed. Appx. 508, 509 (per curiam), cert. denied, 137 S. Ct. 411 (2016); United States v. Cotten, 650 Fed. Appx. 175, 178 (2016) (per curiam); United States v. Turcios-Rivera, 583 Fed. Appx. 375, 376 (2014) (per curiam); United States v. Mosqueda, 437 Fed. Appx. 312, 312 (2011) (per curiam); United States v. Cisneros-Gutierrez, 517 F.3d 751, 766-767 (2008). And contrary to petitioner's suggestion (Pet. 15), the Fifth Circuit has also found particular sentences not to be substantively reasonable in conducting such review. See, e.g., United States v. Khan, 997 F.3d 242, 247 (2021); United States v. Hoffman, 901 F.3d 523, 555 (2018), cert. denied, 139 S. Ct. 2615 (2019); United States v. Nguyen, 854 F.3d 276, 283 (2017).

Petitioner contends that unlike other circuits, the Fifth Circuit has "prohibit[ed] 'substantive second-guessing of the sentencing court.'" Pet. 14 (quoting Cisneros-Gutierrez, 517 F.3d at 767). But what the Fifth Circuit has prohibited is "the substantive second-guessing of the sentencing court that [this] Court [has] told us we are not to do." Cisneros-Gutierrez, 517 F.3d at 767 (emphasis added). The Fifth Circuit's approach thus accords with this Court's decisions and the decisions of other circuits. See, e.g., United States v. Miranda-Diaz, 942 F.3d 33, 42 (1st Cir. 2019) (explaining that "it is not [the court of appeals'] task simply to second-guess a sentencing court's considered decisions about matters squarely within its discretion"); United States v. Perez-Frias, 636 F.3d 39, 42 (2d Cir. 2011) (per curiam) (explaining that "if the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence," the court of appeals will generally "not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor") (brackets and citation omitted); United States v. Snipes, 611 F.3d 855, 872 (11th Cir. 2010) (explaining that the court of appeals "will not second guess the weight (or lack thereof) that the [district court] accorded to a given factor * * * as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented") (citation omitted), cert. denied, 563 U.S. 1032 (2011). And petitioner has

not identified any court of appeals in which the outcome of his case would have been different.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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