No. 22-5788

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN ELLIOTT BROOKS, 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 expressly stated that the sentencing factors set forth in 18 U.S.C. 3553(a) would result in the same sentence irrespective of that assertion.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is available at 2022 WL 2526674.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2022. The petition for a writ of certiorari was filed on October 5, 2022. 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 North Carolina, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1), and possessing stolen firearms, in violation of 18 U.S.C. 922(j)(1) and 924(a)(2) (2018). Judgment 1-2. The district court sentenced him to 288 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-3.

1. In 2018, petitioner stole several firearms and ammunition during a hotel burglary. Presentence Investigation Report (PSR) ¶ 7. Law enforcement officers obtained warrants to arrest petitioner for the burglary and went to a trailer in Pembroke, North Carolina, where they suspected petitioner was hiding. PSR ¶¶ 8-9. After they entered, petitioner fired several shots from inside the bedroom. PSR ¶ 9. Officers retreated outside and saw petitioner look through the window of the trailer with a handgun to his head. Ibid. Petitioner eventually exited the trailer and was taken into custody. Ibid. He stated that he had fired shots into the bedroom ceiling in the hope that officers would return fire and kill him. PSR ¶¶ 9-10.

When officers searched the trailer, they discovered two loaded handguns, one of which petitioner had used in the shooting, and a rifle. PSR ¶ 9. Investigation revealed that all three

firearms had been stolen, ibid., and petitioner ultimately pleaded guilty to possessing a firearm following a felony conviction and to possessing stolen firearms. Pet. App. 2.

2. Applying the 2018 version of the advisory Sentencing Guidelines, the Probation Office's presentence report calculated a total offense level of 39 and a criminal history category of VI, corresponding to a range of 360 months to life imprisonment. PSR ¶¶ 70, 86. The Probation Office observed that petitioner qualified for sentencing under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), requiring a sentence of 15 years to life imprisonment on the felon-in-possession count. PSR ¶¶ 81, 85. It further noted that the maximum term of imprisonment for the possession-of-stolen-firearms count was 10 years. PSR ¶ 85; see 18 U.S.C. 922(j) and 924(a)(2).

In calculating the total offense level, the Probation Office started with a base offense level of 24 and applied several enhancements. PSR ¶¶ 72-77. Among other things, it applied an enhancement under Sentencing Guidelines § 3A1.2(c)(1), on the ground that petitioner had assaulted law enforcement officers by repeatedly firing a weapon during the trailer search. PSR ¶¶ 9-10, 77. Section 3A1.2 specifies a six-level increase in the offense level if, "in a manner creating a substantial risk of serious bodily injury," the defendant assaults a law enforcement officer "during the course of the offense or immediate flight therefrom." Sentencing Guidelines § 3A1.2(c)(1) (2018). The Probation Office

also recommended that petitioner receive a three-level reduction for acceptance of responsibility. PSR ¶¶ 82-83.

Petitioner objected to the Section 3A1.2(c)(1) enhancement, arguing that he did not intend to assault the officers by firing into the bedroom ceiling and that his actions did not create a substantial risk of serious bodily injury. Pet. Sent. Mem. 2-4; see Addendum to PSR ¶ 2. The government did not object to the guidelines range calculated in the presentence report, although it agreed at that time that the "enhancement should not apply in this specific set of circumstances." Sent. Tr. 11.

3. At the sentencing hearing, the district court overruled petitioner's objection and accepted the Probation Office's findings in the presentence report. Sent. Tr. 4, 12-14. The district court "recognize[d] that if [it] had sustained [petitioner's] objection" to the assault enhancement, the offense level "would be a 33," and the advisory guidelines range would accordingly be "235 to 293" months of imprisonment. Id. at 14.

The district court found, however, that petitioner's conduct inside the trailer met the enhancement's requirements. Sent. Tr. 12-14. In particular, the court found that by firing into the ceiling with the stated intent of committing "suicide by cop," petitioner intended put the officers in fear of physical injury, and thereby committed an assault. Id. at 13-14; see id. at 10-11. And the court found that petitioner's actions did in fact create a substantial risk of serious bodily injury by potentially

provoking a shootout with multiple officers inside the trailer. Id. at 14; see id. at 8-9.

Petitioner requested that the court vary downward from its calculated range and impose a sentence of 235 months. Sent. Tr. 17. After hearing further argument from both sides, the district court imposed a below-guidelines sentence of 288 months of imprisonment on Count 1, and a sentence of 120 months of imprisonment on Count 2, to be served concurrently. Id. at 24.

The district court made clear that it had "considered all arguments" raised by the parties, Sent. Tr. 20, including "the issue associated with the six-level enhancement," and that it had decided to "vary down to account for the debate about" that enhancement, id. at 23. The court also "recognize[d] its obligation to impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in" 18 U.S.C. 3553(a). Sent. Tr. 19-20.

In discussing the Section 3553(a) factors, the district court stressed "the nature and circumstances of the offense," including petitioner's "incredibly serious conduct" inside the trailer. Sent. Tr. 20-21. The court also observed that petitioner "ha[s] a very serious criminal history," including several convictions for robbery, impersonating law enforcement officers, and kidnapping. Id. at 21-22. And the court explained that because of petitioner's "very, very serious conduct and very, very serious

criminal history," it did not view the 235-month sentence that petitioner requested as "sufficient." Id. at 23.

Finally, the district court stated that while it believed it had "properly calculated the advisory guideline range," including by applying the "six-level enhancement," it nevertheless would have "impose[d] the same sentence as an alternative variant sentence" if it had "miscalculated the advisory guideline range." Sent. Tr. 25. The court emphasized that the "guidelines are advisory," noted that it had "varied down" to account for the dispute about the assault enhancement, and stated again that it "would impose this same sentence if I've miscalculated, in any way, the advisory guidelines in this case." Ibid. The court concluded by explaining that the sentence it chose "is the sentence sufficient but not greater than necessary for [petitioner] in light of all the 3553(a) factors that I have discussed and in light of all the arguments that I have considered in this case." Ibid.

4. The court of appeals affirmed in an unpublished, nonprecedential decision. Pet. App. 1-3. On appeal, petitioner had challenged only the assault enhancement. Id. at 2. The government had defended the district court's application of the enhancement. Gov't C.A. Br. 12-22. The court of appeals declined to address the guidelines issue, however, because it found that any error on that issue was harmless. Pet. App. 2-3.

The court of appeals explained that an error in calculating the 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." Pet. App. 2 (quoting United States v. Mills, 917 F.3d 324, 330 (4th Cir. 2019)). The court determined that the first part of the inquiry was satisfied because the district court "announced that it would impose the same sentence as an alternative variant sentence even if it had miscalculated the Guidelines range." Id. at 2-3. And the court of appeals found the sentence to be substantively reasonable even under petitioner's preferred guidelines range without the enhancement. Id. at 3.

The court of appeals observed that the sentence of 288 months would fall within the alternative range that would apply without the challenged six-level enhancement; that the court accords a "presumption of reasonableness" to within-Guidelines sentences that "can only be rebutted by showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors"; and that petitioner had failed to overcome that presumption. Pet. App. 3 (citation omitted). In particular, the court determined that "[t]he district court considered [petitioner's] arguments and credited all of the points he made, but reasonably found that the § 3553(a) factors called for a sentence of 288-months' imprisonment regardless of how it resolved the disputed Guidelines issue." Ibid.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erred in affirming on harmless-error grounds based on its determination that the asserted error in the calculation of petitioner's advisory guidelines range did not affect the sentence imposed. 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.[1] The same result is warranted here.[2]

1. The court of appeals correctly applied the principles of harmless-error review in determining that the asserted error in the district court's calculation of petitioner's advisory guidelines range was harmless. Pet. App. 2-3.

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[1] See Brown v. United States, 141 S. Ct. 2571 (2021) (No. 20-6374); Rangel v. United States, 141 S. Ct. 1743 (2021) (No. 20-6409); Snell v. United States, 141 S. Ct. 1694 (2021) (No. 20-6336); Thomas v. United States, 141 S. Ct. 1080 (2021) (No. 20-5090); 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).

[2] The pending petition for a writ of certiorari in Irons v. United States, No. 22-242 (filed Sept. 12, 2022), also raises a similar issue.

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 ensure 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 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 (7th Cir. 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 inside or outside the resulting advisory guidelines range, 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 Section 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, 578 U.S. 189 (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 200; see id. at 204 (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 the district court's calculation of petitioner's advisory guidelines range was harmless because it did not affect the district court's determination of the appropriate sentence. Pet. App. 2-3.

As the court of appeals explained, the district court expressly stated that it would have imposed the same sentence even without the six-level assault enhancement. Pet. App. 2-3; see Sent. Tr. 25. And the district court supported that statement with ample explanation. It took account of the alternative guidelines range that would have applied had it sustained petitioner's objection, Sent. Tr. 14, and it explained that it had varied downward from the calculated guidelines range to account for that enhancement dispute. Id. at 23. And in imposing a sentence within petitioner's preferred range, the court thoroughly discussed the Section 3553(a) factors, including the "very, very serious" nature of petitioner's offense, his conduct in the trailer, and his extensive criminal history. Ibid.; see id. at 20-26. In doing so, the court considered petitioner's proposed sentence of 235 months but found it too low, id. at 23, explaining that a 288-month sentence was "sufficient but not greater than necessary" in light of the Section 3553(a) factors, id. at 25.

Petitioner errs in asserting that, by crediting the district court's statement that it would have chosen the same sentence notwithstanding a guidelines error, the court of appeals failed to "consider the trial record as a whole." Pet. 12 (emphasis and

citation omitted). In finding that the sentence was substantively reasonable in "the totality of the circumstances," the court of appeals observed that the district court "considered [petitioner's] arguments * * * but reasonably found that the 3553(a) factors called for a sentence of 288-months' imprisonment regardless of how it resolved the disputed Guidelines issue." Pet. App. 3; see ibid. (finding that petitioner's sentence was substantively reasonable "[b]ased on the factors identified by the district court"). The court of appeals also noted that the 288-month sentence was within the guidelines range that petitioner himself had advocated, and thus would have been viewed as presumptively reasonable had the district court accepted his guidelines calculations. See ibid.

c. Petitioner contends (Pet. 11-12) that permitting harmless-error review of guidelines-calculation errors diminishes "the anchoring effect of the guidelines" and jeopardizes appellate review of guidelines questions. But harmless-error review does not alter the principle that "the Guidelines should be the starting point" for a district court's determination of the appropriate sentence. Gall, 552 U.S. at 49. It simply identifies cases, like this one, where the court found that factor to be outweighed by others.

Harmless-error review in cases like this one therefore "merely removes the pointless step of returning to the district court when [the court of appeals is] convinced that the sentence

the judge imposes will be identical" regardless of the correct range. Abbas, 560 F.3d at 667. And far from undermining appellate review, "[a]n explicit statement that the district court would have imposed the same sentence under two different ranges can help to improve the clarity of the record, promote efficient sentencing, and obviate questionable appeals." United States v. Zabielski, 711 F.3d 381, 389 (3d Cir. 2013).

2. The court of appeals' decision does not conflict with any decision of another court of appeals. To the extent that some formal differences exist in the articulated requirements for harmless-error review when a district court has offered an alternative sentencing determination, those differences do not reflect any meaningful substantive disagreement about when an alternative sentence can render a guidelines-calculation error harmless. Petitioner has failed to identify any court that would have reached a different result in the circumstances of this case.

Petitioner errs in suggesting (Pet. 6-7) that the court of appeals' resolution of his case conflicts with the Seventh Circuit's decisions in United States v. Asbury, 27 F.4th 576 (2022), and United States v. Loving, 22 F.4th 630 (2022). In Loving, the district court had not even made a statement that the sentence would have been the same notwithstanding a guidelines error; to the contrary, "the district court said three times that Loving deserved a sentence within the guideline range." 22 F.4th at 636. And in Asbury, the Seventh Circuit merely rejected the

proposition that a district court could "nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence"; the district court's disclaimers in that case had not specified which potential guidelines errors it had in mind, and the court failed to connect its alternative sentence to specific Section 3553(a) factors. 27 F.4th at 579-583. Here, by contrast, the district court tied its statement to the disputed six-level enhancement, see Sent. Tr. 25; set forth the alternative guidelines range that would have applied had it credited petitioner's objection, id. at 14; explained that it was varying downward to account for that objection, id. at 23; and explained why its choice of a 288-month sentence was appropriate under specific Section 3553(a) factors, id. at 20-26.

Petitioner similarly errs in suggesting (Pet. 7-8) that the decision below conflicts with the Second Circuit's analysis in United States v. Seabrook, 968 F.3d 224 (2020), and the Fifth Circuit's in United States v. Tanksley, 848 F.3d 347, supp. op., 854 F.3d 284 (2017). In both cases, the court of appeals was unconvinced -- based on the record before it -- that the district court's choice of sentence was independent of the asserted errors in calculating the guidelines range. See Seabrook, 968 F.3d at 234 (observing that, "[t]ellingly," the district court "'returned multiple times'" to the Guidelines in "framing its choice of the appropriate sentence," and had also declined the government's

suggestion to take a guidelines factor into account under Section 3553(a)) (citation omitted); see also Tanksley, 848 F.3d at 353 (finding that a "review of the record" did not satisfy the court that the error was harmless, given the district court's repeated reliance on the guidelines range). And the Second and Fifth Circuits have been clear that they will credit the kind of "unequivocal[]" statements at issue in this case under appropriate circumstances. United States v. Jass, 569 F.3d 47, 68 (2d Cir. 2009), cert. denied, 558 U.S. 1159, and 559 U.S. 1087 (2010); see Tanksley, 848 F.3d at 353; United States v. Thomas, 793 Fed. Appx. 346, 346-347 (5th Cir. 2020) (per curiam), cert. denied, 141 S. Ct. 1080 (2021).

Petitioner's reliance on Third Circuit decisions (Pet. 8) is likewise misplaced. In United States v. Smalley, 517 F.3d 208 (3d Cir. 2008), the court of appeals declined to find a guidelines-calculation error harmless where the district court "did not explicitly set forth an alternative Guidelines range," id. at 214, and where its "alternative sentence" was accompanied by only a "bare statement" that was "at best an afterthought, rather than an amplification of the Court's sentencing rationale," id. at 215; see United States v. Wright, 642 F.3d 148, 154 n.6 (3d Cir. 2011) (concluding that Smalley required a remand for resentencing). Here, the district court specified the alternative guidelines range on the record, Sent. Tr. 14, and it coupled its statement that it would have imposed the same 288-month sentence with an

explanation that it had accounted for the disputed guidelines issue by varying downward, id. at 25; see id. at 23.

Petitioner also fails to adequately support his suggestion (Pet. 8) that his appeal necessarily would have proceeded differently in the Ninth Circuit. He cites United States v. Williams, 5 F.4th 973 (9th Cir. 2021), but in that case, the district court had selected a within-guidelines sentence and provided "no explanation of why an above-Guidelines sentence would be appropriate." Id. at 978. Here, the district court selected a below-guidelines sentence that was within petitioner's alternative range and thoroughly explained its choice under Section 3553(a). Sent. Tr. 20-26.[3]

3. In addition, this case would be an unsuitable vehicle for resolving the question presented because the district court did not err in calculating petitioner's advisory guidelines range.

On appeal, petitioner argued only that the district court erred in applying the enhancement for assaulting law enforcement officers during the trailer search. Pet. App. 2. Sentencing Guidelines § 3A1.2 provides for a six-level increase in the offense level if, "in a manner creating a substantial risk of serious bodily injury," the defendant assaults a law enforcement officer "during the course of the offense or immediate flight therefrom."

[3] Petitioner also asserts (Pet. 6) that the Tenth Circuit follows his preferred approach to harmlessness in this context, but he cites no decision from the Tenth Circuit to support that assertion.

Sentencing Guidelines § 3A1.2(c)(1). Although in the district court the government did not view the enhancement as applicable, see Sent. Tr. 11, it argued on appeal that the district court did not clearly err in applying it, see Gov't C.A. Br. 12-22.

Petitioner did not dispute that he knew the people in the trailer were law enforcement officers. Pet. Sent. Mem. 2-5; see Sent. Tr. 9. Instead, he argued that he lacked the requisite intent to assault them. Pet. Sent. Mem. 3-4; see Pet. 4. But the Fourth Circuit has recognized that "assault" within the meaning of Section 3A1.2(c) includes the "deliberate infliction upon another of a reasonable fear of physical injury." United States v. Hampton, 628 F.3d 654, 660 (2010) (citation omitted). And as the district court found, petitioner stated that he shot into the ceiling in the hope that the officers would return fire, and that he intended to commit "suicide by cop." PSR ¶¶ 9, 10; see Sent. Tr. 10-11, 13. That establishes petitioner's intent to put the officers in sufficient fear that they would open fire in defense. The district court also properly found that petitioner created a substantial risk of serious bodily injury, because petitioner could indeed have provoked a shootout inside the trailer. Sent. Tr. 8-9, 14. The question presented is therefore unlikely to be outcome-determinative here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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