

No. 23-5713

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IN THE SUPREME COURT OF THE UNITED STATES

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DELVAREZ LONG, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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ELIZABETH B. PRELOGAR  
Solicitor General  
Counsel of Record

NICOLE M. ARGENTIERI  
Acting Assistant Attorney General

DAVID M. LIEBERMAN  
Attorney

Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals correctly determined on plain-error review, after examining the particular reasons given by the district court for the sentence it imposed, that the record in this case did not show clear or obvious error under Tapia v. United States, 564 U.S. 319 (2011).

(I)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 79 F.4th 882.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2023. The petition for a writ of certiorari was filed on September 28, 2023. 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 Southern District of Indiana, petitioner was convicted on

one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 13a. He was sentenced to 51 months of imprisonment, to be followed by three years of supervised release. Id. at 14a-15a. The court of appeals affirmed. Id. at 1a-12a.

1. On April 2, 2021, law enforcement saw petitioner leave an Indianapolis motel and enter a car registered to his girlfriend. Presentence Investigation Report (PSR) ¶ 7. At the time, petitioner had an outstanding arrest warrant for domestic battery and was wanted for questioning in a homicide investigation. PSR ¶ 6. Officers directed petitioner to leave the car. PSR ¶ 8. Petitioner initially did not comply but eventually opened the driver's side door. Ibid. Officers then arrested him, and saw a black handgun in his waistband and a small bag of suspected cocaine in the driver's door panel. Ibid.

A grand jury in the Southern District of Indiana charged petitioner with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). PSR ¶ 4. Petitioner pleaded guilty without a plea agreement. PSR ¶ 5.

2. At sentencing, the district court calculated a total offense level of 19 and a criminal history category of II, yielding an advisory Sentencing Guidelines range of 33 to 41 months of imprisonment. Pet. App. 44a. Petitioner's counsel advocated for a 33-month term, citing petitioner's family support and the link

between his drug addiction and his criminal conduct. Id. at 45a-46a. The government, in contrast, recommended an above-Guidelines sentence of 60 months. Id. at 46a. The government cited, among other things, petitioner's history of domestic abuse. Id. at 47a-48a. It observed that petitioner had "threatened his girlfriend with \* \* \* what appeared to be a firearm." Id. at 47a. And the government explained that the conduct was "especially concerning in relation to [his] prior conviction in 2016 for battery with bodily injury to a pregnant woman." Ibid.

The district court imposed an above-Guidelines 51-month term of imprisonment, Pet. App. 49a, based on the sentencing factors in 18 U.S.C. 3553(a), Pet. App. 51a. The court cited petitioner's criminal history, which included "convictions for operating without a license, possession of cocaine, forgery, resisting law enforcement, driving while suspended, and the battery with bodily injury to a pregnant woman." Id. at 52a. It noted that petitioner had previously "been afforded the opportunity for rehabilitation" and that "his criminal history is understated in the guideline calculation." Ibid. And, citing petitioner's recent domestic-abuse incident where he "threatened his girlfriend with what she believed to be a handgun," ibid., the court found his "history of domestic violence" to be "very concerning." Ibid.

The district court then reviewed petitioner's childhood, parental circumstances, drug-abuse-history, and educational

status. Pet. App. 52a-54a. It additionally credited petitioner's decision to accept responsibility, express remorse, and acknowledge his drug addiction. Id. at 54a. And it observed the need for petitioner to "gain control of his life by maintaining sobriety, establishing legitimate employment, \* \* \* taking care of his children," and obtaining "some domestic violence assistance, because \* \* \* he's violent." Ibid.

The district court stated that it was "ordering [petitioner's] sentence to promote respect for the law and provide just punishment, and it is a long enough time that the defendant can participate in prison industries, as well as learn some job skills so that -- that he can use upon his release." Pet. App. 54a. "Those are the reasons the Court intends to impose the stated sentence." Ibid.

Petitioner did not object to the district court's sentencing explanation. Pet. App. 55a.

3. The court of appeals affirmed. Pet. App. 1a-12a.

Petitioner contended on appeal that the district court had contravened this Court's decision in Tapia v. United States, 564 U.S. 319 (2011), which interpreted the Sentencing Reform Act of 1984 to "preclude[] federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation," id. at 321. See Pet. App. 2a. The court of

appeals reviewed that newly raised claim for plain error and found no "clear or obvious" error. Id. At 2a, 4a.

The court of appeals noted that under circuit precedent, "the [sentencing] judge must consider rehabilitation as a goal but may not use prison for rehabilitative purposes," and "may not consider the possibility that prison will contribute to rehabilitation in deciding how long the prison term should be," but "in explaining the sentence, the judge may encourage the defendant to take advantage of any rehabilitation opportunities available in prison, such as treatment and counseling for substance abuse and addiction, educational programs, and job training and work experience." Pet. App. 5a.

The court of appeals highlighted the parties' disagreement regarding appellate review of Tapia claims: petitioner argued that resentencing is warranted whenever the sentencing transcript contains "a hint that rehabilitative aims have affected a prison term," whereas the government argued that "Tapia prevents a court only from imposing a prison term based primarily on rehabilitation." Pet. App. 6a. Consistent with "[m]ost circuits," the court took the view that a district court errs under Tapia when it "impos[es] a prison term based primarily on rehabilitation." Id. At 6a & n.1. And, after reviewing the sentencing transcript, the court of appeals agreed that "the

[district] court did not impose [petitioner's] sentence based primarily on rehabilitation." Id. at 8a.

The court of appeals also acknowledged that the district court's comment about petitioner's sentence being "'long enough' to allow him to "'participate in prison industries' \* \* \* supports an inference that prison programming was at least a reason for the length of the prison term." Pet. App. 10a. And it accordingly stated that it "could find error here" "[u]nder the strict reading of Tapia that [petitioner] urge[d]." Ibid. Because "the transcript overall does not show that rehabilitation drove the [district] court's choice of the prison term," the court of appeals "doubt[ed] that the district court erred." Ibid. But it opted "not \* \* \* to decide that question," because "[a]t a minimum, any mistake would not have been 'clear or obvious,' as required to reverse on plain-error review." Id. at 10a-11a (quoting Molina-Martinez v. United States, 578 U.S. 189, 194 (2016)).

The court of appeals explained that "[w]hether and to what extent the [district] court weighed rehabilitation in determining [petitioner's] sentence is not clear from the transcript, and \* \* \* the legal standard remains the subject of debate among circuits." Pet. App. 11a. It suggested that in future cases, "it might be helpful for a sentencing court to include a candid and explicit disclaimer to the effect that rehabilitation goals did

not affect whether a prison term was imposed or how long it would be." Id. at 12a.

#### ARGUMENT

Petitioner contends (Pet. 9-21) that the court of appeals erred when, on plain-error review, it rejected petitioner's claim that the district court's sentencing explanation was inconsistent with Tapia v. United States, 564 U.S. 319 (2011). But the court's factbound determination that petitioner had not established plain error does not conflict with the decision of any other court of appeals and does not otherwise warrant this Court's review. The petition for a writ of certiorari should be denied.

1. In Tapia, this Court held that "sentencing courts [are precluded] from imposing or lengthening a prison term to promote an offender's rehabilitation." 564 U.S. at 332. Noting that federal law instructs courts to "recogniz[e]" that "imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. 3582(a), the Court concluded that "when sentencing an offender to prison, the court shall consider all the purposes of punishment except rehabilitation." 564 U.S. at 328.

As petitioner acknowledges (Pet. 18-19), because he did not raise his Tapia-based claim in district court, it is reviewable only for plain error. To prevail under that standard, a defendant must show that (1) the district court committed an error; (2) the error was plain, meaning "clear or obvious"; (3) the error

"affected [his] substantial rights"; and (4) the error "'seriously affect[ed] the fairness, integrity or public reputation of [the] proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting United States v. Olano, 507 U.S. 725, 736 (1993)). Petitioner failed to make that showing here.

The court of appeals correctly determined (Pet. App. 10a-12a) that petitioner failed to demonstrate that any error committed by the sentencing court was "clear or obvious." Puckett, 556 U.S. at 135. As it observed, "[w]hether \* \* \* the [district] court weighed rehabilitation in determining [petitioner's] sentence is not clear from the transcript." Pet. App. 11a. The district court focused on "[petitioner's] criminal history and the seriousness of his offense throughout its explanation." Id. at 9a. And when the district court initially referenced "[petitioner] needing rehabilitation" with respect to employment, drug addiction, and domestic violence, it "did not connect these rehabilitative needs to the length of [his] proposed prison term." Id. at 9a-10a.

The allegedly impermissible link between rehabilitation and the length of petitioner's sentence came only at the conclusion of the district court's sentencing explanation, when the court stated that it was "ordering [petitioner's] sentence to promote respect for the law and provide just punishment," and then explained that the sentence "is a long enough time that the defendant can participate in prison industries, as well as learn some job skills

so that -- that he can use upon his release," before concluding that "[t]hose are the reasons the Court intends to impose the stated sentence." Pet. App. 3a-4a. But as the court of appeals recognized, particularly when considered in context, that statement is insufficiently unambiguous to show "clear or obvious" error. See id. at 10a-11a (citation omitted).

It is unclear that the district court's reference to rehabilitation was a purpose of the prison term, as opposed to a description of an ancillary benefit that petitioner would receive from a term of imprisonment imposed "to promote respect for the law and provide just punishment," Pet. App. 54a. While the court followed its reference to rehabilitative services with the statement that "[t]hose are the reasons" for its sentence, that statement may have referred to the district court's explanation of the sentence as a whole, as the statement came at the conclusion of the entire explanation, immediately before the court asked the parties whether they objected to his sentence. Ibid.; see id. at 55a. And as the court of appeals observed, "the transcript overall does not show that rehabilitation drove the [district] court's choice of the prison term." Id. at 10a.

In addition, as the court of appeals noted, the district court entered a separate written statement of reasons, explaining that it had imposed an above-Guidelines sentence based on "[petitioner's] understated criminal history and history of

domestic violence, without mentioning rehabilitation." Pet. App. 10a. n.3. "The form include[d] boxes for 'drug or alcohol dependence' and 'to provide the defendant with needed educational or vocational training,' but the [district] court did not check either as an explanation for the prison sentence." Ibid. And even if petitioner could establish that rehabilitation considerations had some effect on the district court's sentencing calculus in this case, the absence of a circuit consensus on the precise application of Tapia would preclude a showing that any error was "clear or obvious, rather than subject to reasonable dispute," Puckett, 556 U.S. at 135; see Olano, 507 U.S. at 734 ("At a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law."). "[W]here neither the Supreme Court nor th[e court of appeals] has ever resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue." United States v. Williams, 469 F.3d 963, 966 (11th Cir. 2006) (per curiam) (citation omitted; brackets in original); see, e.g., United States v. Williams, 53 F.3d 769, 771-772 (6th Cir. 1995) (relying on existence of a circuit conflict and the absence of controlling precedent to find an error not plain), cert. denied, 516 U.S. 1120 (1996).

2. The court of appeals' plain-error determination does not conflict with the decisions of any other circuit.

Some disagreement exists in the courts of appeals regarding the appellate standard of review for Tapia claims. A majority of circuits find a Tapia error only where "rehabilitative concerns were the driving force behind, or a dominant factor in, the length of a sentence." United States v. Del Valle-Rodríguez, 761 F.3d 171, 175 (1st Cir.), cert. denied, 574 U.S. 913 (2014). Under this approach, "the [district court's] mere mention of rehabilitative needs, without any indication that those needs influenced the length of the sentence imposed, is not Tapia error." Ibid.; see United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013) (per curiam); United States v. Schonewolf, 905 F.3d 683, 691-692 (3d Cir. 2018), cert. denied, 139 S. Ct. 1587 (2019); United States v. Bennett, 698 F.3d 194, 201-202 (4th Cir. 2012), cert. denied, 568 U.S. 1218 (2013); United States v. Garza, 706 F.3d 655, 660 (5th Cir. 2013); United States v. Replogle, 678 F.3d 940, 943 (8th Cir.), cert. denied, 568 U.S. 1053 (2012). Four other circuits, in contrast, ask only whether "there is an identifiable basis for concluding that the district court based the length of the sentence of incarceration in part on rehabilitation." United States v. Krul, 774 F.3d 371, 372 (6th Cir. 2014); see United States v. Joseph, 716 F.3d 1273, 1281 n.10 (9th Cir. 2013); United States v. Thornton, 846 F.3d 1110, 1116 (10th Cir. 2017); United States v. Vandergrift, 754 F.3d 1303, 1311 (11th Cir. 2014).

The court of appeals noted the circuit disagreement, Pet. App. 6a n.1, commended the majority view “[a]s truer to Tapia,” id. at 6a, and “reaffirm[ed]” that “to show a Tapia error, a defendant must show that the district court focused exclusively or disproportionately on rehabilitation in deciding whether to impose a prison term or how long a term should be,” id. at 11a-12a. But it found no need to determine whether the court had erred here, because the sentencing transcript left open the question “[w]hether and to what extent the [district] court weighed rehabilitation in determining [petitioner’s] sentence” and because “the legal standard remains the subject of debate among circuits.” Id. at 11a. Its decision -- which resolved petitioner’s Tapia claim at the second step of plain-error review -- therefore does not implicate the circuit disagreement.

Petitioner also identifies no precedential decision by another circuit that conflicts with the court of appeals’ case-specific analysis of petitioner’s Tapia claim under the plain-error standard. In fact, the circuits identified by petitioner have applied the plain-error standard in similar factual circumstances to deny relief. See, e.g., United States v. Kratz, No. 22-5089, 2023 WL 3035195, at \*4 (10th Cir. Apr. 21, 2023) (“[A] court doesn’t commit plain error by making ‘stray remarks’ about the value of rehabilitative programs in prison.”) (citation omitted); United States v. Weightman, 781 Fed. Appx. 660, 660 (9th

Cir. 2019) (no plain error where “the district court encouraged [the defendant] to use his time in prison to create a transitional plan for his release”); Vandergrift, 754 F.3d at 1312 (no plain error where “[t]he sentencing transcript reflects that [the defendant’s] ‘rehabilitative needs clearly constituted only a minor fragment of the court’s reasoning’” and “[t]he court’s primary considerations were for the safety of the public and deterring others from similar conduct”) (citation omitted); United States v. Payne, 462 Fed. Appx. 579, 582 (6th Cir. 2012) (no plain error where “the record reflects that the district court based its sentence primarily on [the defendant’s] extensive criminal record, not his need for medical treatment”).

And to the extent that this issue arises with any frequency, it is in the plain-error context. A defendant who objects in district court to the perceived consideration of rehabilitation in setting the length of his prison term all but assures that the court will clarify (or, if necessary, correct) its approach. The court of appeals’ decision in this case similarly encourages clarity in sentencing, see Pet. App. 12a, further diminishing the importance of the question presented, which accordingly does not warrant further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Solicitor General

NICOLE M. ARGENTIERI  
Acting Assistant Attorney General

DAVID M. LIEBERMAN  
Attorney

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