No. 23-6244

IN THE SUPREME COURT OF THE UNITED STATES

EDMOND CARL WARRINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the special assessment required by 18 U.S.C. 3014(a) applies to each of a defendant's counts of conviction for the type of offense that it describes.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Warrington, No. 20-CR-133 (Jan. 19, 2022)

United States Court of Appeals (10th Cir.):

United States v. Warrington, No. 22-7003 (Aug. 11, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 78 F.4th 1158.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2023. On October 23, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including December 11, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted on three counts of sexual abuse in Indian country, in violation of 18 U.S.C. 1151, 1153, 2241, 2242, and 2246(2). Judgment 1. He was sentenced to concurrent terms of 144 months of imprisonment on each count, to be followed by five years of supervised release. Judgment 2-3. The court imposed an assessment of $300 and a special assessment of $15,000. Judgment 6; Pet. App. A1. The court of appeals affirmed. Pet. App. A1-A8.

1. Petitioner is a member of the Cherokee Nation. Pet. App. A2. He was caught "engaging in unlawful sexual activity with his mentally disabled, 18-year-old niece-by-adoption" within the territorial boundaries of the Muscogee Nation. Ibid. He was initially charged in Oklahoma state court, but after this Court decided McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), the federal government initiated its own prosecution and the State deferred prosecution. Pet. App. A2. A federal grand jury indicted petitioner on three counts of aggravated sexual abuse in Indian country, in violation of 18 U.S.C. 1151, 1153, 2241(a), and 2246(2); and three counts of sexual abuse in Indian country, in violation of 18 U.S.C. 1151, 1153, 2242, and 2246(2). Pet. App. A2.

2. Following a jury trial, petitioner was convicted on three counts of sexual abuse in Indian country. Judgment 1. The district court sentenced petitioner to concurrent terms of 144

months of imprisonment on each count, to be followed by five years of supervised release. Judgment 2-3.

Under 18 U.S.C. 3013(a), the court "shall" impose "on any person convicted of an offense against the United States" a monetary assessment. The amount depends on whether the defendant is an individual and on the seriousness of the conviction. See ibid. "[I]n the case of a felony," the court must assess "the amount of $100 if the defendant is an individual." 18 U.S.C. 3013(a)(2)(A). In Rutledge v. United States, 517 U.S. 292 (1996), this Court recognized that "[Section] 3013 requires a federal district court to impose a * * * special assessment for every conviction," rather than a single assessment per defendant. Id. at 301.

In 2015, Congress supplemented Section 3013 by enacting 18 U.S.C. 3014. See Justice for Victims of Trafficking Act of 2015 (JVTA), Pub. L. No. 114-22, § 101(a), 129 Stat. 228-230. Section 3014 provides that, "in addition to the assessment imposed under section 3013, the court shall assess an amount of $5,000 on any non-indigent person or entity convicted of an offense under" specified statutory provisions prohibiting sexual abuse, sexual exploitation, and human trafficking. 18 U.S.C. 3014(a). The assessments collected under Section 3014 are used to fund various programs for victims of abuse and trafficking. 18 U.S.C. 3014(c)-(e). After multiple extensions, Section 3014(a) is scheduled to sunset on December 23, 2024. See Consolidated Appropriations Act,

2023, Pub. L. No. 117-328, Div. X, § 101, 136 Stat. 5523 (2022); see also Pet. 2 n.1.

Pursuant to Sections 3013(a) and 3014(a), respectively, the district court imposed a $300 assessment and a $15,000 special assessment. Judgment 6. Petitioner did not object to the $15,000 special assessment in district court. Pet. App. A5.

3. The court of appeals affirmed. Pet. App. A1-A8. Petitioner argued for the first time on appeal that Section 3014 authorizes only a single $5000 assessment for a defendant in a particular case, even when that defendant is convicted of multiple qualifying offenses. Id. at A5. The court of appeals explained that the plain-error standard applied because petitioner failed to preserve his objection in district court. Ibid. And the court of appeals rejected petitioner's challenge because he could demonstrate neither that the district court had committed clear error in imposing the $15,000 special assessment, nor that it had committed any error at all. Id. at A5-A7.

As to whether any error was plain, the court of appeals observed that neither the Tenth Circuit nor this Court had addressed the question presented. Pet. App. A5. And it noted the existence of a shallow circuit conflict, with the Third and Ninth Circuits holding that Section 3014 applies on a per-count basis, see United States v. Johnman, 948 F.3d 612 (3d Cir. 2020), cert. denied, 141 S. Ct. 1047 (2021); United States v. Randall, 34 F.4th 867 (9th Cir. 2022), cert. denied, 143 S. Ct. 1061 (2023), and the Second

Circuit holding that it applies on a per-offender basis, see United States v. Haverkamp, 958 F.3d 145 (2020). Pet. App. A5. The court of appeals explained that the "inter-circuit conflict over the interpretation of § 3014's text" means that "if the special assessment is meant to be imposed on a per offender basis, it is not clear or obvious from the statutory text." Id. at A6.

The court of appeals further held that the district court had not erred in concluding that Section 3014 applies on a per-count basis. Pet. App. A6. The court of appeals explained that "'offense' is best read to refer to a discrete criminal act" and "'convicted' as normally understood is an offense-specific term." Ibid. (citation omitted). The court observed that Section 3014 is "closely tied" to Section 3013 -- which it cross-references -- and that "[i]t has long been established that sentencing courts must impose a separate special assessment under § 3013 for every conviction." Ibid. (citing Rutledge, 517 U.S. at 301). The court also pointed out the anomalous effects of petitioner's interpretation, under which "he would be subject to $15,000 in total JVTA assessments if he was tried for each count in separate proceedings but not in the instant case where all offenses were prosecuted in one proceeding." Id. at A7.

The court of appeals rejected petitioner's contrary arguments. Pet. App. A6-A7. The court reasoned that, although Section 3013 "establishes * * * varying assessment amounts based on the class of the offense of conviction" and Section 3014 establishes

a "high assessment amount for all [relevant] offenses," that distinction "merely signif[ies] Congress' judgment * * * about the severity of the offenses covered under" Section 3014. Ibid. As for legislative history, the court observed that the contemporaneous statements cited by petitioner "merely convey what is evident from the text of the statute: that defendants convicted of a qualifying offense are subject to a $5,000 assessment." Id. at A7.

ARGUMENT

Petitioner contends (Pet. 10-11) that the $5000 special assessment required by 18 U.S.C. 3014(a) applies only once to a defendant in a particular case, regardless of how many qualifying offenses are included in the conviction. The court of appeals correctly rejected that contention on plain-error review. Although petitioner asserts (Pet. 6-10) that the circuits are divided over the proper interpretation of Section 3014(a), that conflict merely underscores that petitioner cannot demonstrate plain error. In any event, the disagreement among the circuits is limited and does not warrant this Court's review. This Court has twice recently denied petitions for writs of certiorari raising the same question presented. See Randall v. United States, 143 S. Ct. 1061 (2023) (No. 22-6109); Johnman v. United States, 141 S. Ct. 1047 (2021) (No. 19-8799). The same course is appropriate here.

1. The court of appeals correctly affirmed the district court's imposition of a $15,000 assessment under Section 3014(a). Because petitioner failed to object to the assessment, his

challenge is subject to plain-error review. See Fed. R. Crim. P. 52(b). "[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it," United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004), and requires, among other things, a showing that the district court erred and that the error is "clear" or "obvious," United States v. Olano, 507 U.S. 725, 734 (1993) (citation omitted), and not "subject to reasonable dispute," Puckett v. United States, 556 U.S. 129, 135 (2009).

Petitioner cannot show that it is clear and beyond reasonable dispute that Section 3014(a) authorizes only a single $5000 assessment in a case in which the defendant is convicted of multiple qualifying offenses. To the contrary, petitioner's observation (Pet. 6-10) that the Second Circuit has disagreed with the Third, Ninth, and Tenth Circuits on this issue makes clear that any error was far from "obvious." Olano, 507 U.S. at 734 (citation omitted).

In any event, the district court did not err by imposing the assessment. Section 3014(a) directs the court to "assess an amount of $5,000 on any non-indigent person or entity convicted of an offense under" certain federal statutory provisions. 18 U.S.C. 3014(a). As the Third Circuit has explained, "how many assessments a court must impose turns on the meaning of the phrase 'convicted of an offense.'" United States v. Johnman, 948 F.3d 612, 617 (2020), cert. denied, 141 S. Ct. 1047 (2021). The word "'offense'" "refer[s] to a discrete criminal act," and the use of the singular

"'an'" before "'offense'" indicates that "'each offense' requires a separate assessment." Ibid.

That understanding is strongly reinforced by the "settled" interpretation of the phrase "'convicted of an offense'" in 18 U.S.C. 3013, which requires an assessment for each count of conviction. United States v. Randall, 34 F.4th 867, 875 (9th Cir. 2022), cert. denied, 143 S. Ct. 1061 (2023). The use of the same phrase in Section 3014 suggests Congress intended a similar meaning. And the interlocking character of the two provisions confirms that interpretation. Because Section 3013 requires courts to impose assessments on a per-count basis, Section 3014's requirement for the court to impose an assessment "in addition to the assessment imposed under section 3013," 18 U.S.C. 3014(a), indicates that Section 3014 should also operate on a per-count basis.

Petitioner's contrary reading is unpersuasive. His insistence (e.g., Pet. 11) that Section 3014 requires a "single $5,000 assessment" is irrelevant. Even with the addition of the non-statutory modifier "single," that point sheds no light on whether the statute requires a single assessment per defendant in a particular case or per count in that case. Petitioner's interpretation would also produce anomalous results. If the government had filed charges against petitioner in three separate prosecutions rather than one, Section 3014's text would have required each district court in those separate cases to apply a $5000 assessment to the particular offense before it. Section 3014's proper

application should not turn on the "happenstance" of charging decisions. Randall, 34 F.4th at 876 (citation omitted).

2. Petitioner correctly notes (Pet. 6-10) that the Second Circuit has taken the opposite position of the Third, Ninth, and Tenth Circuits, concluding instead that Section 3014 allows only one $5000 assessment against a defendant in a case involving multiple qualifying counts of conviction. Compare United States v. Haverkamp, 958 F.3d 145 (2d Cir. 2020), with Pet. App. A6; Randall, supra; Johnman, supra. But that narrow disagreement did not arise until 2020, and as petitioner concedes, none of the other cases that he cites (Pet. 9-10) actually analyzed the question presented. Petitioner does not identify any exceptional circumstances that might warrant review of such a conflict.

Review is especially unwarranted given Section 3014(a)'s current sunset date. By its terms, Section 3014(a) will cease to have effect after "December 23, 2024." 18 U.S.C. 3014(a). As a result, unless Congress enacts new legislation to extend its operation, any decision that this Court might render on the question presented would have limited prospective significance.

In any event, this case would be a poor vehicle for further review because it arises in a plain-error posture. See, e.g., Pet. App. A2 ("[W]e conclude that the [district] court did not commit plain error."); id. at A7 (holding that petitioner's "argument fails on both the first and second prong of the plain error test"). Even if the Court were persuaded that the assessment

should be applied on a per-offender basis, petitioner would not be entitled to relief, as any error below was not "clear" or "obvious." Olano, 507 U.S. at 734 (citation omitted); see p. 7, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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