No. 23-6841

IN THE SUPREME COURT OF THE UNITED STATES

RONALD D. HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. 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 considered the alleged error and offered a detailed explanation of why it would impose the same sentence regardless of the proper guidelines range.

2. Whether petitioner's conviction for resisting arrest, in violation of Mo. Ann. Stat. § 575.150.1 (West Supp. 2017), qualifies as a conviction for a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2023 WL 4636783.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2023. A petition for rehearing was denied on September 20, 2023 (Pet. App. 3a). On December 7, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including February 17, 2024. The petition for a writ of

certiorari was filed on February 20, 2024 (the Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea pursuant to a plea agreement in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-2a.

1. In September 2020, while on parole, petitioner participated in a shootout in a store parking lot in St. Louis, Missouri. Revised Presentence Investigation Report (PSR) ¶¶ 13-16. Bullets struck a public bus and an undercover law enforcement vehicle, but no person was hit. PSR ¶ 14. Petitioner possessed and fired a semi-automatic assault rifle during the shootout. PSR ¶ 16.

In October 2020, petitioner posted on Facebook several photographs of himself with firearms. Sent. Tr. 33-37. Then, in January 2021, he drove a stolen truck; led officers on a high-speed chase in a residential area; crashed into a light pole; and failed to escape on foot. PSR ¶¶ 18-19. Inside the truck, officers found two loaded handguns with flashlight or laser sight attachments and modified magazines that enabled each gun to hold

around 30 bullets. PSR ¶ 19. They found more ammunition and firearm paraphernalia at his home. PSR ¶ 20.

Petitioner subsequently pleaded guilty, pursuant to a plea agreement, to two counts of possessing a firearm after a felony conviction. D. Ct. Doc. 52 (Mar. 14, 2022).

2. Applying the 2021 version of the advisory Sentencing Guidelines, the Probation Office's presentence report calculated a total offense level of 29 and a criminal history category of IV, which produced an advisory range of 121 to 151 months of imprisonment.[1] PSR ¶¶ 40, 52, 80. In calculating that advisory range, the presentence report determined that petitioner's prior felony conviction under Missouri law for resisting arrest, see Mo. Ann. Stat. § 575.150 (West Supp. 2017), qualified as a "crime of violence," resulting in a base offense level of 22 under Sentencing Guidelines § 2K2.1(a)(3), see PSR ¶¶ 29, 48.

Petitioner raised a series of objections to the guidelines calculation, including that his prior Missouri conviction did not qualify as a "crime of violence" under the definition of that term in Sentencing Guidelines § 4B1.2(a)(1). D. Ct. Doc. 60, at 2-7 (July 5, 2022). Petitioner asserted that his correctly calculated guidelines range should be 70-87 months of imprisonment. Id. at 12. And in addition to challenging the guidelines calculations, petitioner submitted a detailed sentencing memorandum in which he

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[1] All references in this brief to the Sentencing Guidelines are to the 2021 version.

requested that the district court sentence him to 60 months of imprisonment regardless of how it resolved his guidelines objections, arguing that such a sentence was sufficient but not greater than necessary to achieve the sentencing purposes in 18 U.S.C. 3553(a). D. Ct. Doc. 67, at 9-10 (July 27, 2022).

At petitioner's sentencing hearing, the district court considered each of petitioner's objections to the guidelines calculation in the presentence report. Sent. Tr. 65-87. For each objection, the court cited the relevant paragraphs in the report, summarized the objection and the aspect of the guidelines calculation it would affect, and then provided petitioner an opportunity to offer additional information about his objections. Ibid. With respect to the crime-of-violence objection, the court acknowledged that petitioner was claiming that his "base offense level is calculated improperly," id. at 69, heard arguments from both sides on the issue, and then found that petitioner's argument was foreclosed by Eighth Circuit precedent. Id. at 68-77.

At the end of the discussion of all of petitioner's asserted errors in the guidelines calculation, the district court partially sustained one of petitioner's objections and rejected the others. Sent. Tr. 86-87. It then adjusted the guidelines range, in light of the partially sustained objection, to a lower range of 100 to 125 months of imprisonment. Ibid.[2] The court also observed that

[2] Had the district court sustained petitioner's crime-of-violence objection, his advisory guidelines range would have been

petitioner had been convicted on two separate counts of an offense that had a statutory maximum of 120 months, and that the two sentences could run concurrently or consecutively. Id. at 88.

Following the guidelines discussion, the district court gave both parties an opportunity to address the full range of statutory sentencing factors in 18 U.S.C. 3553(a). See Sent. Tr. 88-99. The court explained that it had reviewed petitioner's "very well-done" and "lengthy" sentencing memorandum, along with other materials that petitioner had submitted, and "wante[ed] to give [petitioner] a chance to tell [the court] anything you want to tell me about 3553(a) factors, or any other consideration." Id. at 88. Petitioner did so, and requested a 60-month sentence, emphasizing his personal "history and characteristics." Id. at 92; see id. at 88-94, 98-99. The government sought a 121-month sentence, which it explained that it had planned to request "no matter how" the court ruled on the guidelines objections, id. at 94-95, 98, given petitioner's "pattern of unlawful" and "risky behavior" and his criminal history, id. at 97; see id. at 94-98; see also id. at 98 (asking for a 121-month sentence "regardless of any of the guideline rulings").

The district court then announced and explained its sentence. Sent. Tr. 99-103. The court "start[ed]" with the Guidelines. Id. at 99. It explained that the guidelines calculations "were not

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84 to 105 months of imprisonment. See Pet. 16; Sentencing Guidelines Ch. 5, Pt. A.

simple," but that it had "tried to sift through all of" the information because "the guidelines calculations are very important." Ibid. The court further explained that, "after making its determination," it had "to consider all of the 3553(a) factors," listing those factors and describing its consideration of the "mitigating factors" advanced by petitioner, as well as the "nature and circumstances" of petitioner's offense and his "total background and history." Id. at 99-100.

The district court made clear that it was "troubled" by those latter factors. Sent. Tr. 100. It described petitioner's criminal history, including a resisting arrest conviction in which "he was flailing and kicking at the officer," and reiterated that it found "factors in his background and history * * * very troubling." Id. at 101. The court also found the "circumstances of both of [petitioner's current] offenses * * * incredibly incredibly dangerous, incredibly creating risk of harm to others." Id. at 102. The court observed that petitioner's first offense involved a "shootout" in a parking lot, in which "gunshots were going all over the place," and that it was "incredible that no one was killed or more seriously hurt." Id. at 101. And the court observed that during the second offense, petitioner led the police in a high-speed chase, "during the course" of which he "create[d] a risk of death or serious injury to any number of people." Id. at 102. The court explained that it found petitioner's actions -- driving a stolen vehicle, with "two guns in the car" -- to be "incredibly

frightening." Ibid. And it noted that the two offenses were committed "several months apart," meaning that "if [petitioner] was going to conform his conduct, he failed to do that, and all of this is occurring while he is on parole." Ibid.

In light of "[t]he nature and circumstances of the offense," and petitioner's "history and characteristics," the district court determined that "regardless of how [it] would have calculated the guideline range, regardless of that," "a substantial sentence [wa]s necessary and appropriate." Sent. Tr. 102. The court observed that it "could have considered running these sentences consecutive to one another, which would have given [petitioner] up to 240 months potentially." Ibid. But the court stated that petitioner was "25 years old" and "can certainly turn his life around." Ibid. Therefore, giving "consideration to all of these factors and circumstances, again regardless of how [it] would have calculated the guideline range, the [c]ourt believe[d] a sentence of 120 months on each of Counts 1 and 2 to run concurrently is the appropriate sentence in the case," along with a supervised release term of three years on each count. Id. at 103.

3. The court of appeals affirmed in an unpublished, nonprecedential decision. Pet. App. 1a-2a. The court found that, while petitioner had challenged the district court's determination that his Missouri resisting-arrest conviction qualified as a crime of violence under Guidelines § 2K2.1(a)(3), there was no need to address the merits of that challenge because "any error was

harmless." Id. at 2a. The court of appeals observed that the district court had "made clear at sentencing that, 'regardless of how' it 'calculated the [G]uideline[s] range,'" ibid. (brackets in original), petitioner "would receive the same 120-month sentence," ibid. And the court also observed that the district court had provided "reasons, including the fact that [petitioner] created a 'risk of harm to others' and had resisted arrest before," ibid., and cited Section 3553(a)'s mandate to "consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant." Ibid. (quoting 18 U.S.C. 3553(a)).

ARGUMENT

Petitioner contends (Pet. 18-27) that the court of appeals erred in affirming his sentence based on its determination that any error in the calculation of his advisory guidelines range did not affect the sentence imposed and was therefore harmless. That contention lacks merit, and the court's unpublished, nonprecedential decision does not conflict with any decision of this Court or implicate a disagreement among the courts of appeals that merits this Court's review. The court of appeals' decision was correct, and there is no disagreement in the courts of appeals on this issue that merits this Court's review. This Court has repeatedly and recently denied petitions for writs of certiorari that have raised similar issues.[3] The same result is warranted here. And

[3] See Brooks v. United States, 143 S. Ct. 585 (2023) (No. 22-5788); Irons v. United States, 143 S. Ct. 566 (2023) (No. 22-242); Brown v. United States, 141 S. Ct. 2571 (2021) (No. 20-

petitioner's further contention of guidelines error in his case likewise provides no sound basis for certiorari.

1. As the government recently explained in its brief in opposition in Kinzy v. United States, petition for cert. pending, No. 23-578 (filed Nov. 27, 2023), the courts of appeals have consistently recognized that the procedural errors in sentencing described in Gall v. United States, 552 U.S. 38 (2007), do not automatically require a remand for resentencing, and that ordinary appellate principles of harmless-error review apply. Gov't Br. in Opp. at 6-7, Kinzy, supra (No. 23-578).[4] As the government also explained, that consensus view draws support from Molina-Martinez v. United States, 578 U.S. 189 (2016), in which this Court considered the application of plain-error review to procedural errors in sentencing. Gov't Br. in Opp. at 7-8, Kinzy, supra (No. 23-578). Molina-Martinez explained that where the "record" in a case

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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, 584 U.S. 980 (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). The pending petition for a writ of certiorari in Kinzy v. United States, No. 23-578 (filed Nov. 27, 2023), also raises a similar issue.

[4] We have served petitioner with a copy of the government's brief in opposition in Kinzy.

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." 578 U.S. at 200.

Accordingly, 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. 2a. The "record" in this case makes clear that the district court would have determined that "the sentence it chose was appropriate irrespective of the Guidelines range," Molina-Martinez, 578 U.S. at 200. The district court not only stated that explicitly at two points in the sentencing, Sent. Tr. 102-103, it also provided detailed "reasons" for its determination, Pet. App. 2a.

Specifically, the district court recounted petitioner's "very troubling" criminal history, including his prior conviction for "resisting arrest," in which "he was flailing and kicking at the officer." Sent. Tr. 101. The court also provided a detailed description of the "incredibly incredibly dangerous" facts of petitioner's offenses that caused the court to find that "regardless of how [it] would have calculated the guideline range," "a substantial sentence [wa]s necessary and appropriate," id. at 102.

The court explained that, while petitioner was on parole, he participated in a parking-lot shootout where it was "incredible that no one was killed or more seriously hurt," id. at 101, and -- just a few months later -- a high speed chase in a stolen car containing multiple guns, id. at 101-102.

In these circumstances, the court of appeals correctly determined that any error in the calculation of petitioner's guideline sentence was harmless because petitioner would have "receive[d] the same 120-month sentence" "'regardless of how'" the guidelines range was calculated. Pet. App. 2a.

2. As the government further explained in its brief in opposition in Kinzy, supra, there is no division in the circuits warranting this Court's intervention regarding the application of harmless error review to alleged procedural errors in sentencing. Gov't Br. in Opp. at 12-16, Kinzy, supra (No. 23-578). The additional court of appeals decisions petitioner cites (Pet. 22-24) do not suggest otherwise.

Petitioner primarily relies (Pet. 22-23) on the Seventh Circuit's decision in United States v. Asbury, 27 F.4th 576 (2022). But in Asbury, the Seventh Circuit rejected the application of harmless error in a case where the court had made "a simple assertion that any latent errors in the guidelines calculation would make no difference in the choice of sentence," without specifying which potential guidelines errors it had in mind, or how its alternative sentence was connected to specific Section 3553(a)

factors. Id. at 581; see id. at 580-583. Here, in contrast, the district court identified and discussed several alleged errors in the guidelines calculation, including the alleged misclassification of petitioner's prior Missouri conviction as a crime of violence, and then provided a detailed explanation of the Section 3553(a) factors that prompted the court's determination that it would have issued the same sentence regardless of how it calculated the guidelines range. See pp. 4-7, supra.

Petitioner similarly errs in suggesting (Pet. 23) that the decision below conflicts with the Second Circuit's analysis in United States v. Seabrook, 968 F.3d 224 (2020), and United States v. Bennett, 839 F.3d 153 (2016). In both cases, the record before the court of appeals left it unconvinced 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") (citation omitted); see also Bennett, 839 F.3d at 163 (observing that the district court "returned multiple times" to the guidelines range). Moreover, the Second Circuit has made clear that it will credit the kind of "unequivocal[]" statements at issue in this case under appropriate circumstances. United States v. Jass, 569 F.3d 47, 68 (2009), cert. denied, 558 U.S. 1159, and 559 U.S. 1087 (2010).

Petitioner also fails to adequately support his suggestion (Pet. 23) that his appeal necessarily would have proceeded differently in the Ninth and Tenth Circuits. Unlike the district court in this case, the district court in United States v. Williams, 5 F.4th 973 (9th Cir. 2021), had selected a within-guidelines sentence and provided "no explanation of why an above-Guidelines sentence would be appropriate." Id. at 978. And in United States v. Gieswein, 887 F.3d 1054, cert. denied, 139 S. Ct. 279 (2018), the Tenth Circuit accepted the kind of "highly detailed explanation for the sentence imposed" that the district court provided here. Id. at 1061, see id. at 1061-1063; cf. United States v. Peña-Hermosillo, 522 F.3d 1108, 1117 (10th Cir. 2008) (declining to find harmlessness based on the district court's "cursory explanation for its alternative rationale" under Section 3553(a)).

Finally, while petitioner suggests (Pet. 24) that the decision below may be in tension with the approaches of the Fourth and Sixth Circuits, both of those circuits have found harmlessness based on district court statements akin to the ones in this case. See United States v. Gomez-Jimenez, 750 F.3d 370, 382-383 (4th Cir.), cert. denied, 574 U.S. 917, and 574 U.S. 944 (2014); see also United States v. Collins, 800 Fed. Appx. 361, 362 (6th Cir. 2020) (citing cases). Petitioner cites no decision from either circuit declining to find harmlessness in circumstances like those here.

3. In any event, this case would be an unsuitable vehicle for resolving the question presented. Although petitioner frames the guidelines issue as a separate question presented, see Pet. i, he offers little argument on it, see Pet. 25-26; identifies no conflict in the circuits regarding the classification of that particular state offense, see Phillips v. Washington Legal Found., 524 U.S. 156, 167 (1998) (noting the "deference given the views of a federal court as to the law of a State within its jurisdiction"); and does not address this Court's consistent practice of leaving Guidelines questions to the Sentencing Commission, see Braxton v. United States, 500 U.S. 344, 347-349 (1991). And the Eighth Circuit's recent decision in United States v. Brown, 73 F.4th 1011, 1016 (2023), makes clear that he would not prevail even if the court below were to set aside harmless-error principles.

Before the court of appeals, petitioner asserted that his prior Missouri conviction for "the felony version of resisting arrest by force," under Mo. Ann. Stat. § 575.150.1 (West Supp. 2017), did not qualify as a crime of violence under the definition in Sentencing Guidelines § 4B1.2. Pet. App. 2a. Since petitioner's appeal, the Eighth Circuit has confirmed that Missouri's felony-level resisting-arrest statute "is divisible into multiple offenses," and that the first of the three offense -- resisting arrest by using or threatening the use of violence or physical force -- constitutes "a crime of violence under the guidelines." Brown, 73 F.4th at 1016; accord United States v. Shockley, 816

F.3d 1058, 1063 (8th Cir. 2016). And the relevant documents in this case confirm that petitioner was convicted for that first type of arrest resistance. D. Ct. Doc. 63-1, at 1, 4 (July 12, 2022); see Shepard v. United States, 544 U.S. 13, 16 (2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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