No. 17-5532

IN THE SUPREME COURT OF THE UNITED STATES

JOSE PENA-TRUJILLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated due process by relying on factual information in the Presentence Investigation Report about petitioner's state parole status to add two points to petitioner's criminal history score under Sentencing Guidelines § 4A1.1(d), where the Probation Office explained that it had confirmed the information with the relevant state agencies and petitioner did not contest the information's correctness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-3a) is not published in the Federal Reporter but is reprinted at 690 Fed. Appx. 965.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2017. The petition for a writ of certiorari was filed on August 3, 2017. 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 Central District of California, petitioner was convicted of unlawfully reentering the United States following removal, in violation of 8 U.S.C. 1326. Pet. App. 2a-3a. He was sentenced to 46 months of imprisonment, to be followed by three years of supervised release. Judgment 1. The court of appeals affirmed. Pet. App. 2a-3a.

1. In March 1999, petitioner was convicted of a California state felony drug-trafficking offense and sentenced to three years of imprisonment. Gov't C.A. Br. 2. In September 2000, petitioner was released on parole and immediately removed from the United States. Ibid. One month later, petitioner illegally returned to the United States. Id. at 3.

In December 2013, petitioner was arrested by California state authorities for a drug-trafficking offense and, as a result, was found by federal immigration authorities. Gov't C.A. Br. 3. Following his conviction on the California charges and release from jail in December 2014, petitioner was charged by complaint with unlawfully reentering the United States following removal, in violation of 8 U.S.C. 1326. Ibid. Pursuant to a binding fast-track plea agreement, petitioner pleaded guilty to an information charging him with the same offense. Ibid. In the plea agreement, petitioner waived the right to appeal his conviction and any portion of his sentence except his criminal history category. Ibid.

2. Because the parties had agreed in the plea agreement on a Sentencing Guidelines total offense level of 19 and stipulated to a sentence at the bottom of the applicable Guidelines advisory range, the Probation Office prepared a modified Presentence Investigation Report (PSR) limited to criminal history. See Gov't C.A. Br. 3.

The Probation Office conducted a criminal record inquiry through the Justice Data Interface Controller System and obtained arrest and court records from several sources in California. PSR ¶ 7; see Gov't C.A. Br. 3-4. Based on this inquiry, the Probation Office found that petitioner was on parole from September 11, 2000, until September 11, 2003, in Los Angeles County Superior Court Docket, No. BA176577. PSR ¶ 10. Because petitioner was on parole in October 2000 when he committed the unlawful reentry offense for which he was being sentenced, the Probation Office added two criminal history points under Sentencing Guidelines § 4A1.1(d) (2014). PSR ¶ 13; see Gov't C.A. Br. 4. Section 4A1.1(d) requires the sentencing court to add two criminal history points "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." Sentencing Guidelines § 4A1.1(d) (2014).

Petitioner had a total of eight criminal history points, resulting in a criminal history category of IV and a Guidelines range of 46 to 57 months. PSR ¶¶ 14, 20; see Gov't C.A. Br. 4-5.

Petitioner objected to the PSR's assessment of two criminal history points under Section 4A1.1(d), arguing that "there is no evidence in the record that [he] was on parole at the time that he entered the United States." C.A. E.R. 47. In response, the Probation Office stated in an addendum to the PSR that it had obtained information from the California Department of Corrections confirming that petitioner was paroled on September 11, 2000, and discharged from parole on September 11, 2003. PSR Addendum 1; see Gov't C.A. Br. 5. The Probation Office explained that because petitioner illegally reentered in October 2000, he was on parole at the time of the offense of conviction. Ibid. The Probation Office noted that, although petitioner claimed there was a lack of evidence that he was on parole, he had not disputed the fact that he was on parole. Ibid.

3. Before the sentencing hearing, the district court issued a sentencing memorandum finding a total offense level of 19, a criminal history category of IV, and a Guidelines range of 46 to 57 months. C.A. E.R. 6-9. In the memorandum, the court denied petitioner's objection to the two criminal history points assessed under Section 4A1.1(d). Id. at 7-8. The court explained that the PSR indicated that petitioner "was admitted to parole on September 11, 200[0], and discharged on September 11, 2003," and that he

"concedes his illegal return on or about October 11, 2000." Id. at 8.[1]

At the sentencing hearing, petitioner's counsel stated that he had no additional comments after confirming that he had reviewed the district court's draft sentencing memorandum and submitted on the prior filings. C.A. E.R. 12. Petitioner himself stated that he had received a translation of the PSR and the draft sentencing memorandum, had discussed both with his counsel, and had no further comments. Id. at 12-13. Based on the parties' stipulations in the plea agreement and the modified PSR prepared by the Probation Office, the court found that it had sufficient information to exercise its sentencing authority and sentenced petitioner to 46 months of imprisonment, to be followed by three years of supervised release. Id. at 6, 13-16. After announcing the sentence, the court explained that "the balance of the government's proposed findings are covered by [the] sentencing memorandum." Id. at 16.

4. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 2a-3a. Petitioner argued that the district court violated Federal Rule of Criminal Procedure 32(i)(3)(B) by failing to resolve the dispute regarding whether he was on parole when he committed the offense and thus was subject to the two additional criminal history points under section

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[1] The district court's sentencing memorandum included a typographical error stating that petitioner's parole began on September 11, 2001. C.A. E.R. 8. In light of its express reference to PSR paragraph 10, the court apparently meant September 11, 2000. See PSR ¶ 10. Petitioner does not contend otherwise.

§ 4A1.1(d). Pet. C.A. Br. 15-24. He also asserted that, in relying on the PSR, the court violated his due process right to be sentenced on the basis of accurate information. Id. at 25-41.

Although petitioner objected in the district court to the application of Section 4A1.1(d), he did not object to the court's resolution of the matter or challenge the court's compliance with Rule 32 or due process. C.A. E.R. 43-48. The court of appeals applied de novo review notwithstanding the absence of any objection in the district court -- based on Rule 32, due process, or any other ground -- after the Probation Office had submitted its addendum. Pet App. 3a. The court concluded that the district court had satisfied the requirements of Rule 32 because it had expressly determined that petitioner had been on parole when he unlawfully reentered the United States. Ibid. The court also stated that the district court properly relied on the PSR in making its determination. Ibid.

ARGUMENT

Petitioner contends (Pet. 13-20) that the district court violated due process by relying on factual information in the PSR regarding his criminal history.[2] 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 circuit conflict exists on whether a bare objection to

[2] Petitioner does not renew his claim that the district court violated Federal Rule of Criminal Procedure 32(i)(3)(B).

factual statements in a PSR requires the government to introduce evidence in support of those statements, this Court has repeatedly and recently denied certiorari raising that issue, and this case in any event does not squarely present that issue because petitioner did not dispute the accuracy of the factual statement that he was on parole at the time of reentry. Further review is not warranted.

1. The court of appeals correctly upheld the district court's reliance on factual information in the PSR whose accuracy petitioner did not dispute. 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 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) (2014).

When factual information in a PSR is not "reasonably in dispute," however, a district court may accept it as true. Sentencing Guidelines § 6A1.3(a) (2014). Federal Rule of Criminal Procedure 32(i)(3)(A) authorizes a court, without further inquiry, to adopt "any undisputed portion of the [PSR] as a finding of fact." Fed. R. Crim. P. 32(i)(3)(A). For "any disputed portion of the [PSR] 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 followed those procedural requirements in determining petitioner's sentence. Petitioner did not contest the accuracy of the information in the PSR describing the Probation Office's criminal record inquiry and review of California arrest and court records, or the accuracy of the conclusion that he was on parole when he committed the illegal reentry offense. Petitioner argued only that there was "no evidence in the record" that he was on parole at the time that he entered the United States. C.A. E.R. 47. He did not present evidence to the contrary, nor, when given the opportunity at the sentencing hearing, did he argue that he was in fact not on parole when he illegally reentered. Id. at 12-13. Because the factual information in the PSR was not in dispute, the court permissibly accepted that information as true. Due process does not require the government to introduce "documentary support" (Pet. 17) to corroborate facts in the PSR obtained from criminal history databases in the absence of any rebuttal evidence or a specific basis for doubting the accuracy of those facts.

2. Although, as petitioner explains (Pet. 18-20), a narrow conflict exists among the courts of appeals on whether a bare objection to factual statements in a PSR requires the government to introduce evidence to support those statements, that conflict is not directly implicated in this case and does not warrant the Court's review.

Consistent with the decision below, a majority of the courts of appeals have held that notwithstanding a defendant's objection to a PSR's factual statements, a district court may rely on the PSR "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 PSR, 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); see generally Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 26.6(a), at 1119 (2d ed. 1992) (The "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 evidence showing the inaccuracies contained in the report.”) (citation omitted).

The Eighth Circuit has held that when a defendant objects to a factual statement in the PSR, 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. Hartstein, 500 F.3d 790, 796 (2007), cert. denied, 552 U.S. 1102 (2008); United States v. Jenners, 473 F.3d 894, 897-898 (2007). 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 PSR’s factual representation.” United States v. Stapleton, 268 F.3d 597, 598 (2001). The Eleventh and D.C. Circuits appear to have rejected reliance on disputed factual statements in a PSR, at least in certain instances. See 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 positions on the question. Compare United States v. Ary, 518 F.3d 775, 787 (2008) (“When a defendant objects [to a fact stated in the PSR], 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) (holding that “a district court is free to rely on” “a PSR’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, 134 S. Ct. 1921 (2014), and United States v. Barnett, 828 F.3d 1189, 1192-1193 (2016) (holding that the district court permissibly relied on the PSR because, although the defendant had objected to the PSR's findings, he had failed to make specific allegations of factual inaccuracy).

That narrow conflict would not warrant this Court's review even if this case implicated it. Indeed, this Court has recently and repeatedly denied petitions for writs of certiorari that raised substantially the same issue. See, e.g., Santos Peru v. United States, No. 16-8398, 2017 WL 1037346 (Oct. 2, 2017); Gutierrez v. United States, 136 S. Ct. 583 (2015) (No. 15-5043); Marroquin-Salazar v. United States, 136 S. Ct. 80 (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); Aguilar v. United States, 552 U.S. 1232 (2008) (No. 07-7091). The same result is warranted here.

In any event, this case does not directly implicate the conflict. As explained above, see pp. 8-9, supra, petitioner did not dispute the accuracy of the factual information in the PSR describing his parole status in October 2000. To the contrary, he argued only that additional affirmative evidence was required to support the PSR's finding. See Pet. 13. In that circumstance, every circuit would allow the sentencing court to rely on the PSR's recounting of those facts. See, e.g., United States v. Bledsoe, 445 F.3d 1069, 1073 (8th Cir. 2006) (court could rely on factual allegations in PSR where the defendant "objected not to the facts themselves, but only to the [PSR's] recommendation based on those facts") (citation and internal quotation marks omitted); Warren, 737 F.3d at 1286 (court properly relied on PSR where defendant's objection raised not "factual inaccuracies" in the PSR, but a claim that conduct underlying his prior arrests "should be off-limits"); Price, 409 F.3d at 444 (the government's "burden is triggered whenever a defendant disputes the factual assertions in the [PSR]") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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