

No. 17-7210

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN KEARN, 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 government's view that a claim of error was preserved in the district court forecloses the court of appeals from determining that the claim was not preserved and applying plain-error review under Federal Rule of Criminal Procedure 52(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 863 F.3d 1299.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2017. A petition for rehearing was denied on October 2, 2017 (Pet. App. 33a). The petition for a writ of certiorari was filed on December 21, 2017. 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 District of Kansas, petitioner was convicted of production of child pornography by a parent, in violation of 18 U.S.C. 2251(b); distribution of child pornography, in violation of 18 U.S.C. 2252(a)(2); and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. 26a. He was sentenced to 292 months of imprisonment, to be followed by five years of supervised release. Id. at 27a-28a. The court of appeals affirmed. Id. at 1a-25a.

1. In 2013, petitioner began an email exchange with an Australian undercover police detective who was posing as a child pornographer. Pet. App. 3a. Petitioner introduced himself as a father of four and stated that he had found the detective on a website used to trade sexually explicit images of children. Presentence Investigation Report (PSR) ¶ 12. Petitioner sent the detective several images of young girls later identified as petitioner's daughters, including a photograph that showed the genitals of his youngest daughter, then four years old. Pet. App. 3a-4a; see PSR ¶¶ 13-18. Petitioner also sent the detective links to explicit videos of other young girls. Pet. App. 3a.

After analyzing data embedded in the digital images, the detective determined that petitioner had taken the photographs of his daughters with an iPhone shortly before sending the emails.

Pet. App. 4a. The detective referred his findings to authorities in the United States, who traced the IP address used to send some of the emails to petitioner's home in Kansas. Ibid. Investigators obtained a search warrant to search petitioner's home, where they recognized petitioner's daughters as the girls in the photos and found an iPhone of the same model used to create the images. Ibid. Investigators also obtained footage from petitioner's home security system, which showed petitioner present with his daughters and the iPhone at the time the photos were taken and also showed his daughters wearing the same clothes that the girls in the photos were wearing. Id. at 5a. A subsequent search of the iPhone revealed additional explicit images of children, including petitioner's four-year-old daughter. PSR ¶¶ 26-28.

2. A grand jury sitting in the District of Kansas indicted petitioner for production of child pornography by a parent, in violation of 18 U.S.C. 2251(b); distribution of child pornography, in violation of 18 U.S.C. 2252(a)(2); and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. 5a. Following a jury trial, petitioner was convicted of all charged offenses. Id. at 6a.

The Probation Office determined that petitioner was subject to a mandatory sentence of at least 15 years of imprisonment on the first count, a mandatory sentence of at least five years of imprisonment on the second count, and an advisory sentencing

guidelines range of 292 to 365 months of imprisonment. PSR ¶¶ 73-74. Petitioner was also subject to a mandatory term of at least five years of supervised release and to certain mandatory conditions of supervision, including registration as a sex offender. PSR ¶¶ 78, 83-85; see 18 U.S.C. 3583(k) (2012 & Supp. IV 2016). The PSR recommended several special conditions of supervision, including that petitioner "have no contact with any" minor except in certain limited circumstances, PSR ¶ 86, and that petitioner have "[n]o contact with the victim of the offense," PSR ¶ 88. Petitioner raised no objections to the PSR. PSR ¶ 105.

At sentencing, the district court confirmed that petitioner had read the PSR and discussed it with his counsel. 11/16/15 Sentencing Tr. (Sent. Tr.) 5-8. The court indicated that it intended to impose a sentence of 292 months of imprisonment and five years of supervised release, to include "all mandatory and special conditions that are set out in" the PSR. Id. at 32; see id. at 26-33. The court then stated that it would "hear from the parties with any sentencing comments or objections they wish to make." Id. at 33-34.

The government had "no objection to the Court's tentative sentence." Sent. Tr. 34. When asked for any "objections or other concerns," petitioner's counsel stated that he had "a couple of comments." Id. at 34-35. One was "in regard to the understanding of the victim and no contact with the victim." Id. at 35.

Petitioner's counsel stated that he was "wondering as with regards to all of [petitioner's] children if the Court might allow an exception that that is deemed in some fashion therapeutic benefit for the children." Ibid. Petitioner's counsel added that "there were three girls that are not involved in this out of the four." Ibid. The government responded by clarifying that the no-contact conditions of supervised release would not apply while petitioner was incarcerated and that, if the court imposed the sentence it had initially indicated, "all of [petitioner's] children will be of the age of majority by the time he completes his sentence." Id. at 36. The court agreed, stating that "as it applies to his children, given the sentence that I plan to impose, a concern about contact is obviated," and that if "somebody is still of minority age when he is under his term of supervised release, I think he would be in a position to present that issue at the time." Ibid. The court therefore declined to "modify the condition." Ibid.

The court then imposed the sentence that it had proposed, including "the special and mandatory conditions" of supervised release "that are spelled out in" the PSR. Sent. Tr. 40; see Pet. App. 29a (enumerating special conditions of supervision, including "[n]o contact with the victim of the offense").

3. Petitioner appealed, asserting several evidentiary and instructional errors. Pet. App. 7a. The court of appeals rejected those contentions and affirmed the conviction. Id. at 7a-24a.

Petitioner also contended that the district court abused its discretion by imposing a condition of supervised release precluding petitioner from having contact with the victim of the offense, his youngest daughter. Pet. App. 24a. Specifically, petitioner argued that the condition was not "reasonably related" to the offense of conviction, as required by 18 U.S.C. 3583(d)(1) (2012 & Supp. IV 2016), and impinged on his "fundamental right of familial association." Pet. App. 24a-25a (citation omitted). The government's responsive brief stated that petitioner had "objected to the imposition of the no-contact condition" at sentencing and that the court of appeals should accordingly review the district court's decision for abuse of discretion. Gov't C.A. Br. 53. The government contended that the district court had not abused its discretion in imposing the condition, given the danger that petitioner posed to his daughter. Id. at 54-56.

The court of appeals affirmed the imposition of the condition. Pet. App. 24a-25a. The court determined that petitioner had not raised at sentencing the objections he asserted on appeal -- that the condition lacked a reasonable relationship to the offense and violated his right of familial association -- and that he had "waived" his challenge to the condition "by failing to argue for plain error." Id. at 25a; see id. at 7a. The court added, however, that petitioner could "petition the court" to remove the no-contact

condition "based on changed circumstances at the time of his release." Id. at 25a n.4.

ARGUMENT

Petitioner contends (Pet. 7-20) that the court of appeals lacked authority to apply plain-error review because the government viewed petitioner as having preserved his claim. That contention lacks merit. A federal court may adopt its own interpretation of the law, including the applicable standard of review, notwithstanding the submissions of the parties. No conflict exists in the circuits on that settled principle. Moreover, the question presented has limited practical importance in this case, because petitioner remains free to challenge the no-contact condition at the time of his release. This Court's review is not warranted.

1. The court of appeals had authority to treat petitioner's challenge to the no-contact condition as forfeited and to apply plain-error review despite the parties' view that petitioner preserved his objection and that an abuse-of-discretion standard of review should apply.

a. Federal Rule of Criminal Procedure 51(b) "tells parties how to preserve claims of error" in federal criminal cases. Puckett v. United States, 556 U.S. 129, 135 (2009). As relevant here, a party must "inform[] the court -- when the court ruling or order is made or sought -- of * * * the party's objection to the

court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). Failure to follow that rule precludes a party from raising the unpreserved issue on appeal unless the party can demonstrate a "plain error that affects substantial rights." Fed. R. Crim. P. 52(b); see Puckett, 556 U.S. at 135; United States v. Olano, 507 U.S. 725, 732 (1993); Pet. App. 7a-8a.

Here, both parties stated to the court of appeals that petitioner preserved his objection to the condition of supervised release precluding him from contact with the victim of his child pornography offense, his youngest daughter. See Pet. C.A. Br. 48; Gov't C.A. Br. 53. The parties thus indicated their belief that the court should review petitioner's particular appellate challenges to the district court's imposition of the condition for abuse of discretion. Ibid.; see, e.g., United States v. Mike, 632 F.3d 686, 691 (10th Cir. 2011) ("When the defendant objects to a special condition of supervised release at the time it is announced, this Court reviews for abuse of discretion.").

The court of appeals, however, determined that petitioner had not adequately preserved the claims he was advancing. Pet. App. 7a, 25a. Citing the "relevant portion of the sentencing colloquy," the court explained that petitioner had not presented the district court with either of the specific grounds raised on appeal -- that the condition lacked a reasonable relationship to the offense and that it violated his right of familial association. Id. at 25a.

The court accordingly concluded that petitioner could not succeed on appeal unless he could show plain error. Ibid.

b. Petitioner does not contest the court of appeals' reading of the sentencing transcript. And although the government did not argue below that petitioner had failed to adequately preserve his objection, the court reasonably interpreted the colloquy between petitioner's counsel and the district court as failing to bring to the court's attention the claims of error he pressed on appeal. Cf., e.g., United States v. Simmons, 587 F.3d 348, 357 (6th Cir. 2009) ("If * * * defense counsel had made a more specific objection, the judge might have defended his decision and [the court of appeals], in turn, would have the benefit of his explanation in assessing the adequacy of the proceedings."), cert. denied, 559 U.S. 1079 (2010). In any event, the factbound issue of how best to read the sentencing transcript in this particular case would not warrant this Court's review.

Petitioner argues (Pet. 7) for a broad rule that a court of appeals "cannot sua sponte review [an] issue for plain error" when the "government agrees that [the] issue was properly preserved." That position is unsound. A court of appeals has independent authority to interpret federal statutes or rules of procedure, and the parties' joint view on the proper resolution of a legal question, such as the applicable standard of review, "is by no means dispositive." Roberts v. Galen of Va., Inc., 525 U.S. 249,

253 (1999) (per curiam); accord, e.g., Grove City Coll. v. Bell, 465 U.S. 555, 562 n.10 (1984) (explaining that a party's concession regarding interpretation of statute was "not binding"); see also NASA v. Nelson, 562 U.S. 134, 163 n.* (2011) (Scalia, J., concurring in the judgment) ("We are not bound by a litigant's concession on an issue of law.").

To be sure, "a federal court does not have carte blanche to depart from the principle of party presentation," and circumstances exist in which sua sponte consideration of an argument not raised by the parties amounts to an abuse of discretion. Wood v. Milyard, 566 U.S. 463, 472 (2012) (finding abuse of discretion where court of appeals raised a statute-of-limitations defense on its own initiative). But petitioner does not argue that the court of appeals abused its discretion by declining to adopt the parties' view about the applicable standard of review, and petitioner identifies no support for his categorical assertion that a court of appeals may never apply Rule 52(b) unless the government advocates doing so. To the contrary, it is well-settled that questions regarding the preservation of legal arguments are "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 121 (1976). There is "no general rule." Ibid.

c. To the extent that petitioner suggests (Pet. 7-10) that other courts of appeals would view themselves as powerless to apply plain-error review in the circumstances of this case, that suggestion is incorrect. Although courts of appeals often do not apply plain-error review to unpreserved objections when the government does not press a forfeiture argument, see Pet. 8 (collecting examples), none of the cases cited by petitioner holds that a court of appeals lacks authority to apply Rule 52(b) in that circumstance. The cases cited by petitioner from the Eighth and Tenth Circuits (Pet. 9) likewise recognize that courts of appeals have "discretion" to determine whether to apply plain-error review to an unpreserved objection when no party urges them to do so. See United States v. Rodebaugh, 798 F.3d 1281, 1314 (10th Cir. 2015) (per curiam) (noting that waiver "is discretionary, not mandatory," and deciding to invoke plain-error review despite the government's waiver); id. at 1308 (Matheson, J., dissenting) (recognizing that "[t]his panel has discretion to overlook the Government's waiver" but concluding that "I would choose not to exercise it here"); United States v. Bain, 586 F.3d 634, 639 n.4 (8th Cir. 2009) (per curiam) (noting that "[a] party's concession on the standard of review does not bind the court"), cert. denied, 562 U.S. 946 (2010). The cases cited by petitioner therefore do not conflict with the decision below on the question presented.

Indeed, the Tenth Circuit has itself declined to apply plain-error review to a forfeited claim of error on some occasions when the government has not asserted a forfeiture argument. See, e.g., United States v. Heckenlied, 446 F.3d 1048, 1049 n.3, cert. denied, 549 U.S. 924 (2006); United States v. Reider, 103 F.3d 99, 103 n.1 (1996); cf. United States v. McGehee, 672 F.3d 860, 873 n.5 (2012) (noting that “a colorable argument could be advanced that we should overlook [defendant’s] apparent failure to preserve his acceptance-of-responsibility argument because the government forfeited the right to object to it,” but ultimately applying plain-error review). Thus, any distinctions among the courts of appeals on when to apply plain-error review in the absence of a government request to do so amount at most to permissible variations in default circuit practice not warranting this Court’s review. See Singleton, 428 U.S. at 121 (leaving preservation decisions “primarily to the discretion of the courts of appeals”); cf. Fed. R. App. P. 47 (permitting courts of appeals to develop local “rules governing its practice”); Thomas v. Arn, 474 U.S. 140, 146 (1985) (explaining that “courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation”).

2. Petitioner briefly suggests (Pet. 9) that the position adopted by the court of appeals here conflicts with the Eighth Circuit’s decision in Bain because the court here concluded that

petitioner's failure to argue plain error precluded a finding of plain error. Although it is atypical and potentially undesirable to hold a party responsible for omitting argument on a matter that the opposing party did not put in issue, the court did not indicate that it would always apply such an approach, see Pet. App. 25a, and the Eighth Circuit in Bain did not purport to categorically preclude it. This issue, moreover, falls outside petitioner's question presented, which asks the Court only to decide whether a court of appeals may "sua sponte invoke plain error review on appeal." Pet. i. In addition, petitioner does not argue that he could show plain error, cf. Pet. 20 (arguing that petitioner would be entitled to relief if plain-error review does not apply), so any resolution of this question would be unlikely to change the ultimate result.

This Court's review is unwarranted for the further reason that the question presented has limited practical importance in the context of petitioner's case. Petitioner's core objection is that he will not be released from prison before his daughters become adults, and that a no-contact condition will not be justified at that time because he does not present a danger to adults. See Pet. 20. Neither of his predictions is necessarily true. Petitioner's sentence could potentially be reduced in light of future legislative or administrative developments, cf. 18 U.S.C. 3582(c)(2); Dorsey v. United States, 567 U.S. 260, 263-

264 (2012), and a court could find that he presents a continuing danger to his daughters, cf. Gov't C.A. Br. 55. Regardless, as the courts below recognized, petitioner will be able to argue at the time of his release that the no-contact condition should be lifted. See Pet. App. 25a n.4, 32a; cf. 18 U.S.C. 3583(e)(2) (authorizing a district court to "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release" by complying with specified procedures); Fed. R. Crim. P. 32.1(c) (specifying procedures for modifying conditions of supervised release). Accordingly, no sound reason exists for further review now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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