

No. 17-7645

IN THE SUPREME COURT OF THE UNITED STATES

TASMINE SHAWAUN BOATWRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined on plain-error review, after examining the particular reasons given by the district court for the below-Guidelines sentence it imposed in the circumstances of this case, that sentencing error under Tapia v. United States, 564 U.S. 319 (2011), did not affect petitioner's substantial rights.

2. Whether 18 U.S.C. 922(g)(1) exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is not published in the Federal Reporter but is reprinted at 713 Fed. Appx. 871.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2017. The petition for a writ of certiorari was filed on January 30, 2018. 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 Middle District of Florida, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1-A6.

1. In June 2015, an officer on patrol in Lakeland, Florida, saw petitioner walking in the middle of the roadway. Presentence Investigation Report (PSR) ¶ 5. The officer exited his police cruiser and directed petitioner to stop. Ibid. Petitioner ignored the officer's commands and continued to walk away. Ibid. The officer followed petitioner, who began to flee while also reaching into his pants pocket. Ibid. The officer warned petitioner that he would use his taser if petitioner did not stop. Ibid. When petitioner did not stop, the officer deployed his taser. Ibid. Petitioner's hand emerged from his pocket with a loaded semi-automatic pistol, which fell to the ground. PSR ¶¶ 6-7. Police later determined the firearm had been reported stolen. PSR ¶ 7.

At that time, petitioner was under "community control" after having been convicted in state court of aggravated battery with a firearm and possession of a firearm by an adjudicated delinquent, for which petitioner had been sentenced as a youthful offender. PSR ¶¶ 27-28. Based on petitioner's possession of a firearm and

other violations of community-control conditions, however, the Florida state court revoked petitioner's community control and sentenced him to nine years of imprisonment. Ibid.

2. a. A federal grand jury in the Middle District of Florida returned an indictment charging petitioner with possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-3. Petitioner pleaded guilty without a plea agreement. PSR ¶ 10.

In its presentence report, the Probation Office calculated a total offense level of 23 and a criminal history category of V, yielding an advisory Sentencing Guidelines range of 84 to 105 months of imprisonment. PSR ¶¶ 21, 31, 71. Petitioner objected to those calculations, but the district court overruled his objections. Pet. App. B13-B18.

b. At sentencing, petitioner's counsel advocated for a term of imprisonment that was both concurrent and coterminous with petitioner's state sentence, "so that he can get out of custody as soon as possible, get under Federal supervision, [and] get the counseling and treatment, structure and support that he clearly needs, that his friends and family know that he needs." Pet. App. B21. In his allocution, petitioner stated that, although he had previously "had no intention of changing [his] lifestyle and [his] character," id. at B22-B23, he had now concluded that he needed to "get [him]self in order" because he had a "one-year old daughter and a fiancée," id. at B23. Petitioner also stated that he

"underst[oo]d [he] need[ed] help" in order to "cope with [his] past." Ibid.

The government suggested that a sentence within the guidelines range of 84 to 105 months would ordinarily be warranted in light of petitioner's criminal history. Pet. App. B29-B30; see id. at B29 (noting that petitioner had "shown himself to be * * * a really violent individual"). The government stated, however, that "in looking at [petitioner's] personal characteristics," what was "most important [for him] is that he get some help * * * for his mental health issues and his drug issues." Id. at B30. The government ultimately agreed that it would be appropriate for the district court to impose a below-Guidelines sentence that would run concurrently with petitioner's state sentence. Ibid. But the government opposed petitioner's proposal that the sentence be coterminous with the state sentence, which would require a significant variance below the guidelines range and would neither "serve [petitioner]" nor "protect the community." Ibid.; see id. at B29 (noting that petitioner was "essentially asking" for a "three-and-a-half year[]" sentence, or "half" the guidelines range). The government instead proposed a sentence that was below the Guidelines but that extended two years beyond petitioner's state sentence, and noted that such a sentence would allow petitioner to "get[] some help * * * and some training before he's released back" into the community. Id. at B30-B31.

c. The district court imposed a sentence of 70 months of imprisonment, to be followed by three years of supervised release. Pet. App. B37; Judgment 2-3. In fashioning its sentence, the court emphasized that it was concerned "about not just [petitioner], but the public," given petitioner's history of violence and recidivism. Pet. App. B33; see id. at B33-B34. But the court also observed that petitioner had experienced a difficult upbringing, had untreated mental health issues, and had expressed a desire to change. Id. at B29, B32-B34. Based on those considerations, the court stated that "a sentence within the guidelines range" of 84 to 105 months would be inappropriate. Id. at B34. Applying the factors set forth in 18 U.S.C. 3553(a), the court determined that a 70-month sentence would "protect[] the public from further crimes" and was "sufficient but not greater than necessary to comply with the statutory purposes of sentencing." Pet. App. B35-B36. The court also stated that it was imposing a sentence "greater than the time [petitioner] ha[d] remaining on [his] State court charges" because it "agree[d] with [the government] that [petitioner] need[ed] an opportunity" and that petitioner could "receive some of the treatment that [he] need[s]" upon transfer to federal custody. Id. at B34. Petitioner renewed his prior objections to the guidelines calculations, but did not raise any new objections. Id. at B40.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A6. Among other things, the court

rejected petitioner's argument that the district court had committed reversible plain error by considering petitioner's need for rehabilitation in formulating its sentence, in contravention of this Court's decision in Tapia v. United States, 564 U.S. 319 (2011). Pet. App. A5; see Tapia, 564 U.S. at 321 (holding that "the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation"). The court of appeals noted that under Eleventh Circuit precedent, "Tapia error occurs where the district court considers rehabilitation when crafting a sentence of imprisonment," even if that consideration was not a "'dominant' factor in the sentencing court's calculus." Pet. App. A5 (quoting United States v. Vandergrift, 754 F.3d 1303, 1310 (11th Cir. 2014)). The court accordingly found that petitioner satisfied the first and second prongs of plain-error review (which require an error that is clear or obvious) because the district court had "considered prison's rehabilitative benefits in the course of crafting the sentence." Ibid.

The court of appeals determined, however, that petitioner could not satisfy the third and fourth prongs of plain-error review, because the district court's consideration of rehabilitation had not "affected [petitioner's] substantial rights," Pet. App. A5, or "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," id. at A6 (citation omitted). The court of appeals found that "nothing

in the record suggests that the [district] court would have imposed a lighter sentence had it not mentioned [the] opportunities" for treatment in federal prison, and the court of appeals accordingly determined that petitioner had "not shown a reasonable probability" that he would have received a shorter sentence "but for the error." Ibid. "On the contrary," the court observed, "it appears that the very reason the [district] court imposed a sentence 14 months below the low end of the guideline range" was that "programs available to [petitioner] in federal prison would allow [him] not to be a danger to the public" upon his release. Ibid.

Petitioner also argued for the first time on appeal that the statute of conviction, 18 U.S.C. 922(g)(1), exceeded Congress's power under the Commerce Clause and therefore was unconstitutional both facially and as applied to him. Pet. App. A3. The court of appeals rejected petitioner's argument, explaining that it was "foreclosed by binding precedent." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-13) that the court of appeals erred in determining that error under Tapia v. United States, 564 U.S. 319 (2011), did not affect his substantial rights or the fairness of the sentencing proceedings under the third and fourth prongs of plain-error review. The court's factbound determinations on those case-specific prerequisites for plain-error relief do not conflict with the decision of any other court of appeals.

Petitioner also contends (Pet. 13-14) that 18 U.S.C. 922(g)(1) exceeds Congress's authority under the Commerce Clause. Petitioner forfeited that contention below, and the court's decision rejecting it does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. a. 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. 2 & n.1, 6-7), he did not raise his Tapia-based claim in district court and it thus is reviewable only for plain error. To prevail under that standard, a defendant must establish 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)). An error "'affect[s] substantial rights'" when it is "prejudicial," meaning that it "affected the outcome of the

district court proceedings.” Olano, 507 U.S. at 734 (citation omitted). To show prejudice, a defendant generally must show “a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.” United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004) (brackets and citation omitted).

b. The court of appeals correctly determined that petitioner failed to carry his burden of establishing the third and fourth prongs of plain-error review. As the court explained, although the district court discussed petitioner’s needs for rehabilitation at sentencing in a manner inconsistent with circuit precedent interpreting Tapia, see Pet. App. A5, petitioner had not shown a “reasonable probability” he would have received a shorter term of imprisonment absent discussion of those needs. Id. at A6. The court of appeals observed that the district court had explained that the “§ 3553(a) factors driving its sentence included the nature and circumstances of the offense, the history and characteristics of the defendant, and the need to protect the public.” Ibid.; see id. at B36 (relying upon these factors at sentencing).

“[M]ost significantly,” the court of appeals determined, “nothing in the record suggests that the [district] court would have imposed a lighter sentence had it not mentioned opportunities” for treatment “that it hoped would positively affect [petitioner] (and therefore the public safety).” Pet. App. A6. “On the

contrary," the court observed, "it appears that the very reason the [district] court imposed a" below-Guidelines sentence was that "programs available to [petitioner] in federal prison would allow [him] not to be a danger to the public when he was released from imprisonment." Ibid. The court thus reasoned that because the error it had found was likely favorable to petitioner, petitioner had failed to show the error affected his substantial rights or would "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." Ibid. (citation omitted).

c. The court of appeals' determinations on the third and fourth prongs of plain-error review do not conflict with the decisions of any other circuit court. As an initial matter, the court's unpublished decision establishes no precedent and thus necessarily does not create a conflict meriting this Court's review. And petitioner identifies no precedential decision (or even another nonprecedential decision) by the Eleventh Circuit that he believes conflicts with the decisions of other circuits.¹

¹ The court of appeals' decision also does not conflict with any decision of this Court, and petitioner does not contend that it does. Indeed, in Tapia itself, after determining that the district court had erred in relying upon rehabilitation as a justification for lengthening Tapia's sentence, the Court "le[ft] it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed." 564 U.S. at 335 (citing Fed. R. Crim. P. 52(b); Olano, 507 U.S. at 731; and United States v. Marcus, 560 U.S. 258, 266-267 (2010)). The Court thus contemplated that, notwithstanding the existence of a Tapia error, no resentencing would be required in cases where a defendant fails to satisfy all of the elements of plain-error review. Cf. Marcus,

In any event, the court of appeals' approach is consistent with the law applied in other circuits. Petitioner does not dispute that the question whether a Tapia error seriously affected a defendant's "substantial rights" is a case-specific inquiry that requires the reviewing court to determine, on the record before it, whether the defendant has shown a "reasonable probability" that correcting the error would yield a sentence more favorable to the defendant. United States v. Marcus, 560 U.S. 258, 262 (2010). The different outcomes in the cases cited by petitioner (Pet. 8-11) do not reflect the adoption of any conflicting legal approaches, but instead the courts' application of the third prong of plain-error review to different factual scenarios. See United States v. Wooley, 740 F.3d 359, 369 (5th Cir. 2014); United States v. Cazeau, 518 Fed. Appx. 139, 141 (4th Cir. 2013); United States v. Tapia, 665 F.3d 1059, 1061-1063 (9th Cir. 2011) (Tapia II); United States v. Cordery, 656 F.3d 1103, 1108 (10th Cir. 2011). Indeed, in other circumstances, the circuits identified by petitioner have -- like the decision below -- found that Tapia error did not warrant plain-error relief.²

560 U.S. at 266-267 (finding error, but remanding to consider "whether the error at issue in this case satisfie[d]" the third and fourth prongs of plain-error review).

² See, e.g., United States v. Galvan Escobar, 872 F.3d 316, 321-322 (5th Cir. 2017) (even assuming a Tapia error, finding that the defendant "failed to meet the third plain-error prong" because there was no "reasonable probability of a lower sentence

Moreover, each of the principal cases on which petitioner relies (Pet. 8-10) involved circumstances in which the reviewing court found that the sentencing court had lengthened a defendant's term of imprisonment in an effort to promote the defendant's rehabilitation. See Wooley, 740 F.3d at 369 ("We conclude that Wooley's rights were substantially affected when the sentencing court ordered a significant upward variance, over three times the length of the Guidelines's recommendation, based predominantly upon its concern for his perceived substance-abuse problem."); Cazeau, 518 Fed. Appx. at 141 (defendant satisfied third prong when the "record amply support[ed] [his] contention that his sentence of incarceration was likely increased on the basis of the district court's clearly-expressed belief that he could benefit from drug treatment while in prison"); Tapia II, 665 F.3d at 1061-1062 (defendant satisfied third prong where the district court said that a "lesser sentence" would not "provide for sufficient time" for defendant to undergo drug treatment); Cordery, 656 F.3d

on remand'") (citation omitted); United States v. Bennett, 698 F.3d 194, 201-202 (4th Cir. 2012) (finding that any Tapia error did not affect a defendant's substantial rights because the defendant's "rehabilitative needs clearly constituted only a minor fragment of the court's reasoning"), cert. denied, 568 U.S. 1218 (2013); United States v. Hinton, 474 Fed. Appx. 108, 109 (4th Cir.) (finding no reasonable probability that the defendant would have received a shorter sentence), cert. denied, 568 U.S. 968 (2012); United States v. Lewis, 459 Fed. Appx. 742, 744-745 (10th Cir.) (finding that the defendant failed to show that Tapia error affected his substantial rights), cert. denied, 568 U.S. 1030 (2012).

at 1108 (defendant satisfied third prong where “both parties agree that the court’s emphasis on its calculation of [drug treatment] eligibility suggests a reasonable probability that the sentence would have been lower without this consideration”).

By contrast, in this case, the court of appeals found that the district court’s consideration of the rehabilitative benefits of prison led it to shorten defendant’s sentence relative to the Guidelines, inasmuch as the court understood that “programs available to [petitioner] in federal prison would allow [him] not to be a danger to the public when he [i]s released” even if he served a shorter sentence. Pet. App. A6. Thus, even assuming the court of appeals was correct in concluding that a district court commits Tapia error in such circumstances, cf. Tapia, 564 U.S. at 329 n.5 (reserving question whether federal law “prohibit[s] courts from imposing less imprisonment in order to promote a defendant’s rehabilitation”) (citation omitted), it permissibly determined that the district court’s consideration of rehabilitation in this case did not affect defendant’s substantial rights or implicate the fundamental fairness of his sentence.³ And

³ To the extent disagreement may exist among the courts of appeals regarding what constitutes a Tapia error, that disagreement is not implicated here because the court of appeals decided that issue in petitioner’s favor. Cf., e.g., United States v. Del Valle-Rodríguez, 761 F.3d 171, 175 & n.2 (1st Cir.) (declining to adopt the Eleventh Circuit’s rule that “any consideration of rehabilitation by a sentencing court amounts to a Tapia error”), cert. denied, 135 S. Ct. 293 (2014).

petitioner's brief assertion (Pet. 7 n.2) of disagreement with the court of appeals' reading of the sentencing record in this case is wholly factbound and does not warrant this Court's review.

2. Petitioner separately contends (Pet. 13-14) that Section 922(g)(1) exceeds Congress's authority under the Commerce Clause. The court of appeals' decision rejecting that argument does not conflict with any decision of this Court or another court of appeals. Following this Court's decision in United States v. Lopez, 514 U.S. 549 (1995), on which petitioner relies (Pet. 13-14), the courts of appeals uniformly have held that Section 922(g)'s prohibition against possessing a firearm that has previously moved in interstate commerce falls within Congress's Commerce Clause authority.⁴ The Court has recently and repeatedly denied petitions for writs of certiorari challenging the

⁴ See, e.g., United States v. Weems, 322 F.3d 18, 25-26 (1st Cir.), cert. denied, 540 U.S. 892 (2003); United States v. Santiago, 238 F.3d 213, 215-217 (2d Cir.) (per curiam), cert. denied, 532 U.S. 1046 (2001); United States v. Singletary, 268 F.3d 196, 198-205 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); United States v. Gallimore, 247 F.3d 134, 137-138 (4th Cir. 2001); United States v. Daugherty, 264 F.3d 513, 518 (5th Cir. 2001), cert. denied, 534 U.S. 1150 (2002); United States v. Henry, 429 F.3d 603, 619-620 (6th Cir. 2005); United States v. Williams, 410 F.3d 397, 400 (7th Cir. 2005); United States v. Stuckey, 255 F.3d 528, 529-530 (8th Cir.), cert. denied, 534 U.S. 1011 (2001); United States v. Davis, 242 F.3d 1162, 1162-1163 (9th Cir.) (per curiam), cert. denied, 534 U.S. 878 (2001); United States v. Dorris, 236 F.3d 582, 584-586 (10th Cir. 2000), cert. denied, 532 U.S. 986 (2001); United States v. Scott, 263 F.3d 1270, 1271-1274 (11th Cir. 2001) (per curiam), cert. denied, 534 U.S. 1166 (2002).

constitutionality of Section 922(g)(1) under the Commerce Clause.⁵

The same result is warranted here, particularly given that petitioner's claim was not raised in district court and therefore is subject to review only for plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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⁵ See Kitchen v. United States, No. 17-7521 (May 14, 2018); Massey v. United States, 138 S. Ct. 500 (2017) (No. 16-9376); Moorefield v. United States, 138 S. Ct. 154 (2017) (No. 16-9549); Brice v. United States, 137 S. Ct. 812 (2017) (No. 16-5984); Pulley v. United States, 137 S. Ct. 81 (2016) (No. 15-9452); Isom v. United States, 137 S. Ct. 45 (2016) (No. 15-9109); Crouch v. United States, 137 S. Ct. 43 (2016) (No. 15-8974); James v. United States, 136 S. Ct. 2509 (2016) (No. 15-8227); Moore v. United States, 136 S. Ct. 2488 (2016) (No. 15-8601); Fisk v. United States, 136 S. Ct. 2485 (2016) (No. 15-7855); Delgado v. United States, 136 S. Ct. 2485 (2016) (No. 15-7850); Gibson v. United States, 136 S. Ct. 2484 (2016) (No. 15-7475); Lockamy v. United States, 136 S. Ct. 852 (2016) (No. 15-7047); Dixon v. United States, 136 S. Ct. 280 (2015) (No. 15-5768); Torres-Colon v. United States, 136 S. Ct. 185 (2015) (No. 15-5104).