

No. 17-8041

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO MONTEIRO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible plain error under the Sixth Amendment by calculating petitioner's advisory Sentencing Guidelines range based in part on its factual findings about the drug quantity involved in petitioner's offenses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 871 F.3d 99.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2017. A petition for rehearing was denied on December 14, 2017 (Pet. App. A33). The petition for a writ of certiorari was filed on March 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to possess with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. 846 (Count 1); two counts of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Counts 2 and 3); and conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 (Count 4). Judgment 1; see D. Ct. Doc. 162, at 1-5 (Sept. 9, 2014). The district court sentenced petitioner to 250 months of imprisonment, to be followed by eight years of supervised release. Pet. App. A7. The court of appeals affirmed. Id. at A1-A32.

1. Petitioner was a drug dealer who robbed other drug dealers. Gov't C.A. Br. 4. In 2011, petitioner and his associates agreed to sell a large quantity of oxycodone pills to two other drug dealers, but instead robbed the other dealers of \$225,000 when they arrived to buy the pills. Presentence Investigation Report (PSR) ¶¶ 12-17. During the robbery, one of petitioner's associates hit one of the robbery victims in the head with a pistol. PSR ¶ 16.

In 2012, petitioner began selling heroin to a friend (CW-1). Gov't C.A. Br. 7; PSR ¶¶ 28-29. For a year, petitioner sold CW-1 50 to 100 grams of heroin every two weeks. Gov't C.A. Br. 7; PSR ¶ 28. CW-1 also saw other customers purchasing drugs

from petitioner at petitioner's home, and accompanied petitioner when he left his home to deliver drugs to other customers. PSR ¶ 29.

CW-1 began assisting federal law enforcement officers in their investigation of petitioner. Gov't C.A. Br. 7-8. On February 15, 2013, CW-1 made a controlled purchase of 96.4 grams of heroin from petitioner and a confederate. PSR ¶¶ 30-36. Petitioner agreed to sell an additional 50 grams of heroin to CW-1, and accepted \$3250 for the drugs, but did not deliver the heroin he had agreed to provide. PSR ¶¶ 37, 40-47. Three days after petitioner accepted that money for drugs, agents arrested petitioner at his home and executed a search warrant there. PSR ¶¶ 49-50. They recovered .10 grams of heroin at petitioner's home, in addition to cash, a vacuum sealer, baggies, and substances that can be used as cutting agents for heroin. PSR ¶ 50.

2. A grand jury in the District of Massachusetts returned a superseding indictment charging petitioner and two associates. D. Ct. Doc. 162. Petitioner was charged with conspiring to possess with intent to distribute 100 grams or more of heroin from in our about March 2012 until in or about March 1, 2013, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(B)(i) (Count 1); possession of heroin with intent to distribute on or about February 15, 2013, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 2); possession of 100 grams of heroin with intent to distribute on or

about March 1, 2013, in violation of 21 U.S.C. 841(a)(1), (b)(1)(B)(i), and 18 U.S.C. 2 (Count 3); conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 (Count 4); and using, carrying, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (ii) and 18 U.S.C. 2 (Count 5). D. Ct. Doc. 162 at 1-6. The government also filed a notice of petitioner's prior drug felony conviction pursuant to 21 U.S.C. 851, triggering enhanced statutory penalties. D. Ct. Doc. 40, at 1-2 (May 2, 2013); see 21 U.S.C. 841(b)(1)(B)(i) (specifying minimum term of imprisonment of ten years, and maximum sentence of life, for federal heroin offenses that involve "100 grams or more of a mixture or substance containing a detectable amount of heroin").

The jury found petitioner guilty on Counts 1 through 4 and acquitted him on Count 5. D. Ct. Doc. 282, at 1-4 (Apr. 7, 2015). In connection with Count 1, the jury made the drug-weight findings necessary to trigger the statutory penalties of 21 U.S.C. 841(b)(1)(B)(i). D. Ct. Doc. 282, at 1-2. The jury found beyond a reasonable doubt that the heroin conspiracy in Count 1 "involved 100 grams or more of" heroin and that the quantity of 100 grams or more was "was attributable to and reasonably foreseeable by" petitioner. Id. at 1-2. With respect to Count 3, charging possession of heroin with intent to distribute on or about one particular date in March 2013, the jury did not find "beyond a

reasonable doubt that 100 grams or more of a mixture and substance containing heroin was attributable to and reasonably foreseeable by" petitioner, as necessary to trigger enhanced statutory penalties for that count. Id. at 3.

The Probation Office prepared a presentence report. The Probation Office grouped petitioner's drug convictions together, PSR ¶ 58, and concluded that the base offense level for those convictions was 30, because petitioner was "accountable for at least 1.4 kilograms of heroin." PSR ¶ 61; see Sentencing Guidelines § 2D1.1(c)(5) (2014) (specifying base offense level of 30 for at least one kilogram, but not more than three kilograms of heroin). The Probation Office arrived at that figure by adding the amounts from petitioner's 96.4-gram sale to CW-1, the .10 grams that police found in petitioner's home, and petitioner's heroin sales to CW-1 over the course of approximately a year. PSR ¶ 60. After including adjustments for aggravating characteristics, PSR ¶¶ 62-64, the Probation Office determined that petitioner's total offense level was 38, PSR ¶ 68. With a criminal history category of IV, the Probation Office calculated petitioner's advisory Sentencing Guidelines range to be 324 to 405 months of imprisonment. PSR ¶ 144.¹

¹ The PSR set petitioner's overall offense level based on the drug counts, rather than the robbery count, because the "[d]rug [c]ounts yield[ed] [a] higher adjusted offense level" than the

Petitioner acknowledged before the district court that the court should determine the drug quantity applicable under the Sentencing Guidelines by making findings under a preponderance-of-the-evidence standard regarding the quantity reasonably attributable to, or foreseeable by, petitioner. Sentencing Mem., D. Ct. Doc. 336, at 9 (Aug. 19, 2015) ("At sentencing, the government must prove drug quantities by a preponderance of the evidence. * * * The court is required to make an individualized finding as to the quantity of drugs attributable to, or foreseeable by, a particular defendant."). Petitioner did not argue that Alleyne v. United States, 570 U.S. 99 (2013), or other Sixth Amendment precedents barred the use of such drug-quantity determinations in the sentencing process. See Pet. C.A. Br. 22 (acknowledging that defense had not raised an Alleyne argument at sentencing). Instead, petitioner disputed the drug-quantity calculations in the PSR solely on the ground that the testimony of CW-1 was "not sufficiently reliable" to support inclusion of drugs that were not actually seized in the case. D. Ct. Doc. 336, at 10; see Sent. Tr. 10-15.

The district court adopted the Probation Office's drug-weight calculations. Sent. Tr. 36. After rejecting a weapons-related

robbery count. PSR ¶ 59 (citing Sentencing Guidelines § 3D1.3(a) (2014)).

enhancement in the PSR and accepting the PSR's remaining enhancements, the court determined petitioner's offense level to be 36, id. at 38, and calculated an advisory Guidelines range of 262 to 327 months of imprisonment, id. at 39, 74. The court sentenced petitioner to a below-Guidelines term of 250 months of imprisonment on Counts 1 to 3, id. at 77, and to a term of 240 months of imprisonment on Count 4, all to be served concurrently, id. at 78.

3. The court of appeals affirmed. Pet. App. A1-A32. For the first time on appeal, petitioner claimed that his sentence contravened Alleyne because the district court determined his sentence in part using drug-quantity calculations that had not been made by a jury. Pet. C.A. Br. 19-28.

The court of appeals rejected that claim, finding no error under Alleyne. Pet. App. A29-A31. The court explained that Alleyne "held that 'any fact that increases the mandatory minimum'" sentence "'is an 'element' that must be submitted to the jury' and is required to be proven 'beyond a reasonable doubt.'" Id. at A29 (quoting Alleyne, 570 U.S. at 103). It observed that "[n]o Alleyne error occurred in calculating [petitioner's] statutory minimum sentence because the drug quantity that triggered the ten-year minimum was proven to the jury beyond a reasonable doubt." Id. at A30; see 21 U.S.C. 841(b)(1)(B)(i). The court rejected petitioner's argument that "the district court committed an

Alleyne error when it calculated" petitioner's Sentencing Guidelines range and "determined by a preponderance of the evidence that more than one kilogram of heroin was attributable to him." Pet. App. A30. The court noted that "the Guidelines are merely discretionary, see United States v. Booker, 543 U.S. 220, 259 (2005), and Alleyne explicitly noted that its holding did 'not mean that any fact that influences judicial discretion must be found by a jury.'" Ibid. (citation omitted). As a result, the court of appeals observed, it had "routinely rejected [the] exact Alleyne argument" raised by petitioner. Ibid.

ARGUMENT

Petitioner contends (Pet. 5-10) that the district court violated his Sixth Amendment rights through judicial fact-finding regarding drug quantity in calculating his advisory Sentencing Guidelines range. Petitioner cannot demonstrate error, let alone the plain error required to prevail on his claim, and his contention does not implicate any conflict among the courts appeals. This Court has also recently and repeatedly denied review of similar claims.² Further review is unwarranted.

² See, e.g., Estrada v. United States, 137 S. Ct. 1063 (2017) (No. 16-5631); St. Hill v. United States, 137 S. Ct. 619 (2017) (No. 16-5364); Krum v. United States, 137 S. Ct. 41 (2016) (No. 15-8875); Hebert v. United States, 137 S. Ct. 37 (2016) (No. 15-1190); Smith v. United States, 135 S. Ct. 704 (2014) (No. 13-10424); Jones v. United States, 135 S. Ct. 8 (2014) (No. 13-10026); Garcia v. United States, 565 U.S. 1160 (2012) (No. 11-6626);

1. Because petitioner did not raise a Sixth Amendment claim in the district court, his Sixth Amendment argument is reviewable only for plain error. See Fed. R. Crim. P. 52(b); Puckett v. United States, 556 U.S. 129, 135 (2009). As a result, petitioner would be entitled to relief only if he could show (1) an error, (2) that is “clear or obvious, rather than subject to reasonable dispute,” (3) that “affected [his] substantial rights,” and (4) that “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted).

Petitioner cannot demonstrate error, much less error that is “clear or obvious, rather than subject to reasonable dispute,” Marcus, 560 U.S. at 262 (citation omitted), in the district court’s making factual findings regarding drug quantity to inform its choice of a sentence within the statutory range authorized by the jury’s verdict. This Court has consistently explained that district courts may find facts that are relevant in selecting a sentence within the statutory range for an offense of conviction. In United States v. Booker, 543 U.S. 220 (2005), for example, this Court explained that it had “never doubted the authority of a judge

Culberson v. United States, 562 U.S. 1289 (2011) (No. 10-7097); Taylor v. United States, 562 U.S. 1181 (2011) (No. 10-5031); Gibson v. United States, 559 U.S. 906 (2010) (No. 09-6907).

to exercise broad discretion in imposing a sentence within a statutory range.” Id. at 233. That practice, Booker explained, was constitutionally permissible, because “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.” Ibid.

Since Booker, this Court has repeatedly reaffirmed that courts may find facts when sentencing within the statutory range that is established by a jury verdict or guilty plea. See, e.g., Alleyne v. United States, 570 U.S. 99, 116 (2013) (explaining that, within statutory limits, “broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment”); Rita v. United States, 551 U.S. 338, 352 (2007) (stating that the Court’s “Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence”); Cunningham v. California, 549 U.S. 270, 285 (2007) (stating that “there was no disagreement among the Justices” that judicial fact-finding under the Sentencing Guidelines “would not implicate the Sixth Amendment” if the Guidelines were advisory).

The sentence in petitioner’s case is consistent with these principles. Consistent with Alleyne, the district court submitted to the jury the drug-quantity determinations that were relevant to establishing the statutory minimum and maximum sentences, and then

imposed a sentence within the statutory range authorized by the jury's findings. The court's finding of additional facts regarding drug quantity in order to calculate petitioner's Sentencing Guidelines range was permissible because Alleyne permits judicial fact-finding regarding facts that do not alter the statutory minimum or maximum sentences. See 570 U.S. at 116.

2. Petitioner is mistaken in contending (Pet. 10-12) that the decision below conflicts with the Ninth Circuit's decision in United States v. Pimental-Lopez, 859 F.3d 1134 (2017). In Pimental-Lopez, a jury found a defendant guilty of possession with intent to distribute methamphetamine and conspiracy to commit the same offense. Id. at 1139. The jury also checked off a box on the verdict form indicating that it had found beyond a reasonable doubt that the quantity of methamphetamine attributable to the defendant was "less than 50 grams." Ibid. The district court nevertheless found that the defendant was responsible for more than 4.5 kilograms of methamphetamine and used that quantity in its sentencing calculations. Id. at 1139-1140. The court of appeals vacated the sentence on the ground that "[s]pecial findings . . . are dispositive of the questions put to the jury." Id. at 1140 (citation omitted). It concluded that once the jury had determined beyond a reasonable doubt that an offense involved "less than 50 grams," the district court could not conclude that the offense involved "more than 50 grams," because doing so would

contradict the jury's special findings. Ibid. The court emphasized that Alleyne and the related "Apprendi line of cases" were "beside the point" in this analysis. Ibid. It agreed that those decisions "leave it up to the district judge to find any facts bearing on sentencing, other than those that would increase the statutory sentencing range." Ibid. But it found the case at hand to be controlled by the separate principle that judges may not "contradict[] juries as to findings of fact [that the jurors] have been asked to make." Ibid. It also distinguished cases in which the jury merely declined to find a particular drug quantity beyond a reasonable doubt. Id. at 1141. The court explained that those cases were distinct from cases like the one before it, in which the jury made "an affirmative finding that the amount in question is less than a particular amount." Id. at 1141.

Pimental-Lopez is consistent with the decision below. The Ninth Circuit agreed with the court in this case that Alleyne and related decisions allow district courts to "find any facts bearing on sentencing, other than those that would increase the statutory sentencing range." 859 F.3d at 1140. Pimental-Lopez rejected a district court's findings regarding drug quantity only because the findings contradicted a factual determination that the jury had made regarding the "upper limit of the quantity of illegal drugs involved in Pimental-Lopez's crimes." Id. at 1141. Here, however, petitioner's jury did not make a finding regarding the "upper limit

of the quantity of illegal drugs” attributable to petitioner. Ibid. And the court’s determination that the government established petitioner’s responsibility for more than one kilogram of heroin, by a preponderance-of-the-evidence standard, did not contravene any finding that the jury did make. Specifically, that court’s finding was consistent with the jury’s determinations that the government did prove beyond a reasonable doubt that petitioner’s conspiracy offense “involved 100 grams or more of” heroin and that the government did not prove beyond a reasonable doubt that petitioner possessed with intent to distribute 100 grams or more of heroin on or about March 1, 2013. D. Ct. Doc. 282, at 1-3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2018