No. 16-9187

IN THE SUPREME COURT OF THE UNITED STATES

SANTIAGO SOLANO-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly exercised its discretion to deny relief on plain-error review of the calculation of petitioner's advisory Sentencing Guidelines range.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 847 F.3d 170.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2017. A petition for rehearing was denied on March 17, 2017 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on May 1, 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 Southern District of Texas, petitioner was convicted of illegally reentering the United States after having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). He was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A11.

1. Petitioner, a citizen of El Salvador, has illegally entered the United States on several different occasions. This case arises out of his third illegal reentry.

a. In 2012, petitioner pleaded guilty to illegally reentering the United States after having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). Pet. App. A2. The plea agreement stipulated that petitioner's 1995 New Jersey conviction for third-degree "Endangering the Welfare of a Child"[1] involved the sexual abuse of

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[1] The New Jersey statute provides:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child, or who causes the child harm that would make the child an abused or neglected child as defined in R.S.9:6–1, R.S.9:6–3 and P.L.1974, c. 119, s. 1 (C.9:6–8.21) is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree.

N.J. Stat. Ann. § 2C:24-4 (West Supp. 1994).

a minor and was therefore a "crime of violence" as defined by Sentencing Guidelines § 2L1.2 cmt. n.1(B)(iii) (2014). Pet. App. A2. Petitioner was sentenced to 27 months of imprisonment, followed by a two-year term of supervised release that commenced in October 2013. Ibid. He was removed in November 2013. Ibid.

b. In March 2014, petitioner was again arrested for illegally entering the United States. Pet. App. A2. He was removed without prosecution. Ibid. His probation officer filed a revocation petition, alleging that petitioner's illegal reentry had violated the terms of his supervised release, and the district court issued an arrest warrant. Ibid.

c. In December 2014, petitioner was once again arrested for illegally entering the United States. Pet. App. A2.

2. After his most recent arrest, a federal grand jury returned an indictment charging petitioner with one count of illegal reentry, in violation of 8 U.S.C. 1326. Pet. App. A2. Petitioner pleaded guilty to the latest illegal-reentry offense, without a plea agreement. Ibid.

The Probation Office drafted a presentence report ("PSR") assigning petitioner a base offense level of 8 under Section 2L1.2(a) of the Guidelines. Pet. App. A2. The Probation Office then added a 12-level enhancement under Section 2L1.2(b)(1)(A)(ii) because petitioner had previously been deported after a conviction for a "crime of violence." Id. at A2-A3. That enhancement was

based on the same 1995 New Jersey conviction for "Endangering the Welfare of a Child" that petitioner had admitted to be a "crime of violence" in his 2012 plea agreement. Ibid. The calculated offense level, in combination with a criminal-history category of III, resulted in an advisory Guidelines range of 30 to 37 months. Id. at A3. Petitioner did not object to the PSR's Guidelines calculations. Ibid.

The district court conducted a joint sentencing and revocation hearing and sentenced petitioner to 30 months of imprisonment, to be followed by three years of supervised release, for the latest illegal-reentry offense. Pet. App. A3. The court also revoked petitioner's prior supervised release and sentenced him to four months of imprisonment, to be served consecutively to the illegal-reentry sentence. Ibid.

3. The court of appeals affirmed. Pet. App. A1-A11.

Petitioner argued for the first time on appeal that the district court had committed reversible error in characterizing his child-endangerment conviction as a crime of violence under the Guidelines. Pet. App. A3. The court of appeals rejected that argument. It observed that, because petitioner did not object to the crime-of-violence enhancement at sentencing, he was required to satisfy the plain-error standard of review. Ibid. The court explained that, to establish plain error, petitioner "must show (1) an error; (2) that was clear or obvious; and (3) that affected

his substantial rights." Ibid. (citing Puckett v. United States, 556 U.S. 129, 135 (2009)). The court further explained that, even if petitioner could meet those first three requirements, the court retained "the discretion to remedy the error -- discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. at A3-A4 (quoting Puckett, 556 U.S. at 135).

The court of appeals agreed with petitioner that the district court had erred in treating the child-endangerment conviction as a crime of violence. Pet. App. A4-A9. Although the relevant state-court judgment stated that the factual basis for petitioner's crime involved sexual conduct, the court believed that the judgment did not reflect petitioner's assent to all of the facts therein, and thus could not be used to prove the nature of the conviction. Id. at A8-A9. The court next assumed for the sake of argument that petitioner had satisfied the second and third prongs of the plain-error test, namely, that the error was plain and affected petitioner's substantial rights. Id. at A9-A10.

The court of appeals declined, however, to "exercise [its] discretion to remedy" any plain error. Pet. App. A11. It explained that such an exercise of discretion would be appropriate only if petitioner established the fourth prong of plain-error review, which requires a showing that "the error seriously affect[ed] the fairness, integrity or public reputation of

judicial proceedings." Id. at A10 (quoting United States v. Escalante-Reyes, 689 F.3d 415, 419 (5th Cir. 2012) (en banc)). The court noted that this fourth prong "is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." Ibid. (citation omitted). Instead, the court explained, the "types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." Ibid. (quoting United States v. Segura, 747 F.3d 323, 331 (5th Cir. 2014)).

The court of appeals concluded that "[t]his is not one of those rare cases." Pet. App. A10. The court observed that it had previously "declined to exercise [its] discretion to notice sentencing errors [when the facts involve] recidivistic behavior." Ibid. (second set of brackets in original) (quoting United States v. Martinez–Rodriguez, 821 F.3d 659, 666 (5th Cir. 2016)). In this case, petitioner had "been deported on four separate occasions," including "mere months before the illegal reentry with which this case is concerned." Id. at A10-A11. The court also reasoned that it was appropriate to consider petitioner's criminal history, which included the child-endangerment conviction and a conviction for aggravated assault with a deadly weapon. Id. at

A11. Finally, the court noted that petitioner's 30-month sentence was only six months outside the correct advisory Guidelines range, and well below the statutory maximum. Ibid.

ARGUMENT

Petitioner contends (Pet. 7-11) that the court of appeals misapplied the fourth prong of the plain-error standard. That contention lacks merit. The court's factbound decision is correct and does not conflict with any decision of this Court. In any event, even if the question presented merited review, this case would be a poor vehicle, as petitioner's sentence could alternatively be affirmed on the ground that no plain error occurred. In addition, petitioner's term of imprisonment has already expired. The petition for a writ of certiorari should be denied.

1. When a defendant fails to object to an alleged error in the district court, he may not obtain relief from that error on appeal unless he establishes "plain error" under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009). Reversal for plain error "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Young, 470 U.S. 1, 15 (1985) (citation and internal quotation marks omitted). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s]

substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (brackets in original) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)). If those prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Ibid. (internal quotation marks omitted; brackets in original) (quoting Young, 470 U.S. at 15). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

This Court has consistently held that a "per se approach to plain-error review is flawed" and that "[t]he fourth prong" of the plain-error standard "is meant to be applied on a case-specific and fact-intensive basis." Puckett, 556 U.S. at 142 (citation, emphasis, and internal quotation marks omitted). As a consequence, "a plain error affecting substantial rights does not, without more, satisfy" the fourth prong of plain-error review, "for otherwise the discretion afforded by Rule 52(b) would be illusory." Olano, 507 U.S. at 737. The Court has thus rebuffed efforts to eliminate the fourth prong or to collapse it into one of the other three. See, e.g., Puckett, 556 U.S. at 142-143 (rejecting contention "that the fourth prong of plain-error review * * * has no application" to claims involving breaches of plea agreements because "there may

well be countervailing factors in particular cases" even if the other three prongs are satisfied). And the Court has relied upon the fourth prong to affirm convictions despite obvious error. See United States v. Cotton, 535 U.S. 625, 632-633 (2002) (concluding that failure to allege drug quantity in indictment did not merit reversal under fourth prong where evidence of drug quantity was "overwhelming") (citation omitted); Johnson, 520 U.S. at 469-470 (same for error in jury instructions).

If there were any doubt as to courts of appeals' discretion under the fourth plain-error prong in Guidelines cases, this Court's recent decision in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), dispelled that doubt. The Court in Molina-Martinez held that, in light of the Guidelines' importance to federal sentencing, a district court's error in applying an incorrect Guidelines range "itself can, and most often will, be sufficient to show a reasonable probability of a different outcome" under the third plain-error prong. Id. at 1345. But the Court did not hold that such an error, without more, automatically satisfies the fourth prong as well. To the contrary, the Court made clear that, "[u]nder the Olano framework, appellate courts retain broad discretion in determining whether a remand for resentencing is necessary" in the particular circumstances of a case. Id. at 1348.

2. a. The court of appeals did not abuse its discretion in concluding that petitioner failed to show that the district court's Guidelines error seriously affected the fairness, integrity, or public reputation of the proceedings. The court of appeals properly conducted a "case-specific and fact-intensive" inquiry, Puckett, 556 U.S. at 142, and based its discretionary determination on a number of factors, including petitioner's criminal record; his long history of being removed from (and illegally reentering) the United States; his deportation "mere months" before his unlawful reentry in this case; and the six-month discrepancy between the correct Guidelines range and his sentence, which was well beneath the 20-year statutory maximum. Pet. App. A10-A11. The court also noted earlier in its decision that, in a prior plea agreement, petitioner had affirmatively stipulated that his 1995 child-endangerment conviction involved the sexual abuse of a minor and thus qualified as a crime of violence under the Guidelines. Id. at A2. On those facts, the court of appeals correctly concluded that the district court's error did not reflect the sort of "powerful indictment against our system of justice" that requires reversal under the fourth plain-error prong. Id. at A11. That factbound determination does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

b. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 8-9) that the court of appeals' articulation of the fourth plain-error prong "implies a higher standard than the Supreme Court adopted in Olano." Pet. 9 (citing Olano, 507 U.S. at 736-737). In Olano, this Court repeatedly emphasized that a court of appeals retains discretion to determine whether it is necessary to correct an unpreserved "error [that] is 'plain' and 'affect[s] substantial rights.'" 507 U.S. at 735 (brackets in original). The Court made clear that, while a court of appeals has the authority to order correction of such an error, it "is not required to do so." Ibid. (emphasis added). The Court further explained that the court of appeals may exercise that discretion when it finds not only that the plain error affected the petitioner's substantial rights, but also that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. at 736 (emphasis added; brackets in original); see Puckett, 556 U.S. at 135.

The court of appeals in this case twice recited that "seriously affects" formulation of the fourth plain-error prong from Puckett and Olano. Pet. App. A3-A4, A10. It further elaborated by stating that errors warrant reversal when they "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." Id.

at A10 (citation omitted). The court did not appear to view the two formulations as requiring a different result on the facts of this case. See id. at A10-A11. Petitioner does not explain how the court's analysis would have turned out differently if the court had omitted its gloss on the Puckett and Olano standard. Nor does petitioner suggest any kind of error that would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," as Olano requires, 506 U.S. at 736, but would not also "serve as a powerful indictment against our system of justice," Pet. App. A11.

Petitioner contends (Pet. 9) that the court of appeals' description of the fourth plain-error prong "imposes an overly restrictive limitation" because the "adoption of a 'shock the conscience' standard would elevate plain error review to the level of substantive due process." That contention misreads the court's decision. The court stated that it exercises discretion to correct plain errors that, if left uncorrected, "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." Pet. App. A11 (emphasis added; citation omitted). In other words, the court indicated that an uncorrected error that "shock[s] the conscience" is a sufficient, but not necessary, condition for the discretionary correction of a plain error. Ibid. Consistent with that

understanding, the Fifth Circuit has regularly exercised its discretion to grant resentencing in other plain-error cases, without requiring that the uncorrected error "shock the conscience." See, e.g., United States v. Dias, No. 16-40862, 2017 WL 1048069, at *2 (Mar. 17, 2017) (per curiam); United States v. Rojas-Ibarra, 669 Fed. Appx. 269, 270 (2016) (per curiam); United States v. Miller, 657 Fed. Appx. 265, 270-271 (2016) (per curiam); United States v. Santacruz-Hernandez, 648 Fed. Appx. 456, 458 (2016) (per curiam); United States v. Martinez-Rodriguez, 821 F.3d 659, 666-667 (2016); United States v. Alegria-Alvarez, 471 Fed. Appx. 271, 275-276 (2012) (per curiam); United States v. Andino-Ortega, 608 F.3d 305, 311-312 (2010).

c. Petitioner also argues (Pet. 9-11) that the court of appeals' application of the fourth prong of plain-error review conflicts with this Court's decision in Henderson v. United States, 133 S. Ct. 1121 (2013). That argument lacks merit. In Henderson, this Court addressed the second prong of plain-error review, holding that, regardless of "whether a legal question was settled or unsettled at the time of trial, 'it is enough that an error be "plain" at the time of appellate consideration' for '[t]he second part of the * * * Olano test [to be] satisfied.'" Id. at 1130-1131 (brackets in original) (quoting Johnson, 520 U.S. at 468). In so doing, it rejected an approach that would involve "a grading system for trial judges." Id. at 1129. But it did so in part

because of the separate backstop provided by the fourth prong, which "restricts the appellate court's authority to correct an error to those errors that would, in fact, seriously affect the fairness, integrity, or public reputation of judicial proceedings." Ibid. Henderson's holding about the second prong is therefore unavailing to petitioner.

In any event, the court of appeals' decision here did not turn on whether the error called into question the competence or integrity of the district judge. Rather, the court focused entirely on petitioner's criminal record, his history of removal and reentry, his very recent deportation, and the minimal disparity between his sentence and the correct Guidelines range. Pet. App. A10-A11.

3. Petitioner does not contend that a circuit conflict exists regarding the proper application of the fourth plain-error prong. As the government has previously acknowledged, however, the approach of a few circuits is arguably in some tension with this Court's directive to conduct "a case-specific and fact-intensive" inquiry, Puckett, 556 U.S. at 142. See Br. in Opp., United States v. Patino-Almendariz, No. 16-7920, cert. denied, 137 S. Ct. 2118 (2017). In particular, the Tenth Circuit has adopted a presumption that relief should be granted under the fourth plain-error prong where a clear Guidelines error affects the defendant's substantial rights under the third prong. See United States v.

Sabillon-Umana, 772 F.3d 1328, 1333 (2014). And the First and Ninth Circuits have stated that they "ordinarily" will grant relief in such cases. United States v. Figueroa-Ocasio, 805 F.3d 360, 374 (1st Cir. 2015); see United States v. Joseph, 716 F.3d 1273, 1281 (9th Cir. 2013).

But any disparity in the courts of appeals' application of the fourth plain-error prong in Guidelines cases is largely attributable to differences in how those courts choose to exercise their discretion, rather than disagreements over the legal standards for plain error. All circuits, including those that have adopted a general presumption of resentencing for Guidelines errors, agree that the fourth prong requires the exercise of judicial discretion. See, e.g., Figueroa-Ocasio, 805 F.3d at 367; Joseph, 716 F.3d at 1277, 1281; United States v. Meacham, 567 F.3d 1184, 1190 (10th Cir. 2009). The existence of variations in appellate courts' exercise of that discretion, including different approaches to the question of how often resentencing should be granted to correct an unpreserved claim of Guidelines error, does not warrant this Court's review. Cf. Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (noting that courts of appeals may "vary considerably" in their exercise of supervisory authority). This Court recently denied certiorari in Patino-Almendariz, p. 14 supra, and the same result is warranted here.

4. Even if the question presented merited review, this case would be an unsuitable vehicle.

a. The particular formulation of the fourth plain-error prong is unlikely to affect the outcome in petitioner's case. Not only did the court below reach the correct result under that prong, but it could alternatively have affirmed petitioner's sentence on the ground that no plain error occurred. See Pet. App. A9 (assuming, without deciding, that error was plain).

An error is plain when it is "clear or obvious, rather than subject to reasonable dispute." Puckett, 556 U.S. at 135. Petitioner had previously admitted in the plea agreement underlying a prior illegal reentry conviction that his New Jersey conviction met the Guidelines' definition of a "crime of violence." Pet. App. A2. And as the court of appeals acknowledged, it had previously stated that "state court judgment[s] fall within the scope of documents a court may consider" in applying the modified categorical approach. Pet. App. A8 (brackets in original) (quoting United States v. Garcia-Arellano, 522 F.3d 477, 480, cert. denied, 555 U.S. 880 (2008)). Before this case, however, the Fifth Circuit had "not yet had occasion to elaborate on how a judgment may be used." Id. at A8-A9. In the decision below, the court determined for the first time that only a portion of a state-court judgment may be consulted. Ibid. The question thus was not beyond

"reasonable dispute" at the time of the court of appeals' decision. Puckett, 556 U.S. at 135; see Gov't C.A. Br. 25-26.

b. In addition, petitioner's 30-month term of imprisonment has already expired. According to the Federal Bureau of Prisons, petitioner was released on April 26, 2017.[2] Because petitioner's Guidelines challenge affects only the length of his sentence rather than his underlying conviction, the case became moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot."). The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because criminal convictions generally have "continuing collateral consequences" beyond just their sentences. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But the "presumption of collateral consequences" does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges an action that affected only the length of his term of imprisonment, his completion of that prison term moots an appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact

[2] See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (last visited July 28, 2017) (search for inmate register number 12126-265).

requirement," id. at 14, and that those consequences are "likely to be redressed by a favorable judicial decision," id. at 7.

Petitioner cannot make that showing here. To be sure, after completing his term of imprisonment, petitioner is still required to serve a three-year term of supervised release. But in United States v. Johnson, 529 U.S. 53, 54 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. The Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." See 529 U.S. at 60. But, as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009).

Even if that possibility were sufficient to prevent the case from becoming technically moot, it has limited practical consequence, and would not warrant this Court's review of the

question presented. Petitioner is an alien and became subject to removal from the country upon completion of his prison sentence. See PSR 1 (listing Department of Homeland Security detainer). Given the likelihood of removal (if it has not occurred already), petitioner would receive limited practical benefit even if the district court were to shorten his term of supervised release.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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