No. 16-9587

IN THE SUPREME COURT OF THE UNITED STATES

AURELIANO VILLARREAL-GARCIA, 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 in determining that errors in the calculation of petitioner's advisory Sentencing Guidelines range did not warrant relief on plain-error review because they did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is available at 2017 WL 1323521.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2017. The petition for a writ of certiorari was filed on June 13, 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, in violation of 8 U.S.C. 1326. He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. The district court also revoked petitioner's supervised release on a prior conviction for illegal reentry and sentenced him to a consecutive 12-month term of imprisonment. The court of appeals affirmed. Pet. App. A1-A2.

1. Petitioner, a Mexican citizen, was removed from the United States in 2004, 2007, and 2008. Presentence Investigation Report (PSR) ¶¶ 43, 48. His 2008 removal followed a guilty plea for illegally reentering the United States after having been removed. PSR ¶ 36. In June 2014, petitioner again pleaded guilty to illegally reentering the United States after having been removed. PSR ¶ 37. He was sentenced to 15 months of imprisonment, to be followed by three years of supervised release. Ibid. In April 2015, after his release from prison, petitioner was removed to Mexico. PSR ¶¶ 9, 37. Several months later, he was again found in the United States. Petitioner admitted that he had entered unlawfully by crossing the Rio Grande River. PSR ¶¶ 2, 7.

2. A federal grand jury returned an indictment charging petitioner with illegally reentering the United States after

having been removed, in violation of 8 U.S.C. 1326. Indictment 1. Petitioner pleaded guilty to that offense without a plea agreement. PSR ¶ 3.

The Probation Office determined that petitioner's total offense level under the Sentencing Guidelines was 10 and his criminal-history category was VI, resulting in an advisory Guidelines range of 24 to 30 months in prison. PSR ¶¶ 15-24, 26-40, 58.[1] Petitioner did not object to the Probation Office's recommended Guidelines calculations, and the district court adopted them. See 6/16/16 Supervised Release Hr'g and Sentencing Tr. (Sent. Tr.) 3-6; 6/23/16 Statement of Reasons 1. The court sentenced petitioner to a total of 36 months of imprisonment. Sent. Tr. 7. That sentence included 24 months for petitioner's illegal-reentry offense and a consecutive sentence of 12 months for the revocation of petitioner's supervised release. Ibid.; Pet. App. A1.

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[1] Petitioner was assessed three criminal-history points for a state conviction for possession of cocaine, PSR ¶ 32; six points for two prior illegal-reentry convictions, PSR ¶¶ 36-37; one point each for two state convictions for misdemeanor evading arrest, PSR ¶¶ 33, 35; and two points because he was on supervised release at the time he committed the new offense, PSR ¶ 39. Petitioner also had several prior convictions that resulted in no criminal history points, including criminal trespass (1986), evading arrest (1988), possession of marijuana (1988), possession of cocaine (1994), misdemeanor assault (1997), and resisting arrest (2004). See PSR ¶¶ 26-31, 34.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A2.

Petitioner argued for the first time on appeal that the district court had erred in concluding that his two sentences "must be served consecutively," Sent. Tr. 7. Pet. App. A1; see Pet. C.A. Br. 21-28. Petitioner also argued for the first time that the district court should have assigned two criminal-history points to his 2007 illegal-reentry offense rather than three points, which would have lowered his criminal-history category to V. Pet. App. A2; see Pet. C.A. Br. 11, 13-20; see also Sentencing Guidelines § 4A1.1(a) (providing that three points are awarded only if the sentence for the offense "exceed[s]" 13 months).

The court of appeals reviewed petitioner's forfeited claims under the plain-error standard. Pet. App. A1-A2; see Fed. R. Crim. P. 52(b). It concluded that petitioner had satisfied the first three prongs of that standard by showing (1) "an error," (2) "that is clear or obvious," and (3) "that affects his substantial rights." Pet. App. A1. The court agreed with petitioner that, in stating that the two sentences must run consecutively, the district court relied on abrogated precedent and thus did not recognize that it "has discretion to make its sentences run concurrently (or partially concurrently) with the previously imposed sentence for supervised release revocation (although the [Sentencing] Commission recommends that the sentence imposed be consecutive to

that for revocation)." Ibid. (brackets, citation, ellipses, and internal quotation marks omitted). The court of appeals also agreed that petitioner's criminal-history category should have been V rather than VI, which would have reduced his advisory Guidelines range by three months. Id. at A2. The court concluded that petitioner had shown that the two errors affected his substantial rights because, had the district court imposed concurrent sentences at the bottom end of the correctly calculated Guidelines ranges, petitioner's total sentence would have been 15 months lower. Id. at A1 (citing Molina-Martinez v. United States, 136 S. Ct. 1338, 1346-1348 (2016)).

The court of appeals, however, "decline[d] to exercise [its] discretion to correct this plain error." Pet. App. A2. It explained that such an exercise of discretion would be appropriate only if petitioner established the fourth requirement for plain-error relief, which requires a showing that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. at A1 (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)). For several reasons, the court found that the specific circumstances of petitioner's case did not meet that standard. First, it observed that the Sentencing Commission recommends that a sentence for a criminal offense run consecutively to a sentence for the revocation of supervised release. Id. at A2 (citing U.S.S.G. § 7B1.3, cmt. n.4). Second, it emphasized

petitioner's recidivism, noting that he had previously been deported at least four times, that this was his third felony reentry conviction, and that "[p]rior terms of imprisonment and supervised release do not appear to have had a deterrent effect on this defendant." Ibid. Third, the court considered petitioner's extensive criminal history of drug possession. Ibid. Fourth, it explained that "the correct [cumulative] Guidelines range would have been 21 months to 45 months," and that petitioner had received a total sentence of 36 months, squarely within that range. Ibid.

ARGUMENT

Petitioner contends (Pet. 9-18) that the court of appeals' decision misapplies the plain-error standard and conflicts with decisions of other courts of appeals. Those contentions lack merit. The court's factbound, unpublished decision is correct. And petitioner significantly overstates the extent of the disagreement among the circuits over whether a Guidelines error usually or presumptively satisfies the fourth prong of the plain-error standard, which is largely attributable to differences in how those courts exercise their discretion rather than a dispute over the legal standards governing plain-error review. In any event, even if a circuit conflict existed on that issue, this case would be a poor vehicle for resolving it. This Court recently denied a petition for a writ of certiorari in Patino-Almendariz v.

United States, 137 S. Ct. 2118 (2017), which raised a similar claim, and the same result is warranted here.

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 reversible "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. This 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).

2. a. The court of appeals did not abuse its discretion in concluding that petitioner failed to show that the district court's calculation of his advisory Guidelines range 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 the Sentencing Commission's recommendation of consecutive sentences upon revocation of supervised release; petitioner's long history of being removed from (and illegally reentering) the United States; petitioner's repeated felony convictions for such illegal reentry; petitioner's extensive history of drug crimes; and the fact that petitioner's sentence fell in the middle of the correct aggregate Guidelines range. Pet. App. A2. On those facts, the court of appeals correctly concluded that the district court's mistaken calculation did not represent the sort of serious error that requires reversal under the fourth plain-error prong. Ibid. That factbound determination does not merit 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. 10) that a Guidelines error that results in a "reasonable probability" of a longer sentence -- and thus "affects substantial rights" under the third plain-error prong -- presumptively also affects "the fairness, integrity, or public reputation of judicial proceedings" under the fourth plain-error

prong. But this Court has never collapsed the third and fourth prongs of the plain-error standard. To the contrary, the Court has repeatedly explained that if the first "three prongs are satisfied, the court of appeals has the discretion to remedy the error -- discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Puckett, 556 U.S. at 135 (brackets in original; emphasis omitted) (quoting Olano, 507 U.S. at 736).

Contrary to petitioner's assertion (Pet. 11-13), errors affecting sentencing are no exception. Puckett itself involved an alleged breach of the government's agreement to seek a Guidelines reduction at sentencing as a condition of the defendant's plea. See 556 U.S. at 133-134. This Court rejected the argument that such an error was not amenable to plain-error review, holding instead that a defendant must satisfy all four prongs of the plain-error standard to obtain relief. Id. at 135, 142-143. As the Court explained, although the error was "undoubtedly a violation of the defendant's rights, * * * the defendant has the opportunity to seek vindication of those rights in district court." Id. at 136 (citation omitted). "[I]f he fails to do so," the Court held, "Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others." Ibid.

Any doubt on that point is dispelled by this Court's recent decision in Molina-Martinez v. United States, 136 S. Ct. 1338

(2016). 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, presumptively 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 particular circumstances. Id. at 1348. Molina-Martinez therefore refutes petitioner's claim (Pet. 12-13) that something "uniqu[e]" and "extraordinar[y]" about Guidelines errors requires a special plain-error test that all but eliminates judicial discretion.

Petitioner further contends (Pet. 15-16) that the court of appeals' consideration of his criminal history and other factual circumstances conflicts with this Court's decision in Williams v. United States, 503 U.S. 193 (1992). That case, however, considered only the circumstances in which a preserved claim of error in applying the then-mandatory Guidelines required a remand for resentencing. Id. at 202-203. Nothing in Williams undermines the court of appeals' determination that petitioner's unpreserved objection to his advisory Guidelines range did not satisfy the fourth requirement for plain-error relief. See, e.g., Puckett,

556 U.S. at 143 (considering defendant's criminal history in concluding that the government's failure to request a Guidelines reduction did not "compromise the public reputation of judicial proceedings"); Cotton, 535 U.S. at 632-633 (affirming defendant's conviction under the fourth prong based on the strength of the government's evidence at trial); Johnson, 520 U.S. at 470 (same).

c. Petitioner separately contends (Pet. 15) that the court of appeals' application of the plain-error standard conflicts with 18 U.S.C. 3742(f)(1). Section 3742(f)(1) provides, in relevant part, that "[i]f the court of appeals determines that * * * the sentence was * * * imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." Ibid.

That statute does not control this case. Although it requires a remand for certain sentencing errors that a defendant has properly preserved, it does not eliminate plain-error review in cases where a defendant fails to preserve a claim of error in the calculation of his advisory Guidelines range. Petitioner fails to cite any decision interpreting Section 3742(f)(1) to require an automatic remand in that circumstance, and multiple courts have rejected the argument that petitioner now raises. As the D.C. Circuit explained, "the plain-error doctrine was well entrenched as a background legal principle when Congress [enacted Section

3742(f)(1)],” and it is therefore “fanciful to suppose that Congress intended § 3742(f)(1) to override that doctrine.” United States v. Saro, 24 F.3d 283, 286 (1994); see United States v. Mendoza, 543 F.3d 1186, 1190 n.2 (10th Cir. 2008) (stating that plain-error review applies to sentencing errors notwithstanding Section 3742(f)). Petitioner’s argument also conflicts with Molina-Martinez, which explained –- albeit without directly addressing Section 3742(f)(1) –- that “appellate review of [Guidelines] error[s] is governed by Federal Rule of Criminal Procedure 52(b).” 136 S. Ct. at 1343.

In any event, petitioner failed to raise any argument regarding Section 3742(f)(1) in the court of appeals. This Court’s “traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below.” United States v. Williams, 504 U.S. 36, 41 (1992) (citation and internal quotation marks omitted); see Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to review claim “without the benefit of thorough lower court opinions to guide our analysis of the merits”). Petitioner offers no reason to depart from that usual practice here.

3. Petitioner contends (Pet. 10-11, 14-15) that the Fifth Circuit’s “unforgiving approach” conflicts with other circuits’ application of the fourth prong of the plain-error standard to

Guidelines errors. That purported conflict does not warrant this Court's review.

a. The courts of appeals have generally followed this Court's directive to conduct "a case-specific and fact-intensive" inquiry. Puckett, 556 U.S. at 142. Some circuits, however, have taken an approach to Guidelines errors that is arguably in tension with that directive. As petitioner notes (Pet. 13-14), the Tenth Circuit has adopted a presumption that relief is warranted under the fourth plain-error prong when 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). Two other courts of appeals 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).[2]

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

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[2] Petitioner suggests (Pet. 11) that the D.C. Circuit has said the same. But in In re Sealed Case, 573 F.3d 844 (D.C. Cir. 2009), the court of appeals did not apply a clear presumption in favor of relief. Instead, it "exercise[d] [its] discretion" to correct a plain sentencing error after considering "the facts of th[e] case" and possible "countervailing factors." Id. at 853 (quoting Puckett, 556 U.S. at 143).

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).

b. Petitioner also overstates the extent to which the Fifth Circuit denies relief pursuant to the fourth plain-error prong. For example, petitioner cites (Pet. 17) this Court's suggestion in Molina-Martinez that "the Fifth Circuit stands generally apart from other Courts of Appeals." 136 S. Ct. at 1345. But that statement referred only to the Fifth Circuit's since-abrogated view of the third plain-error prong, not the practice that petitioner challenges here. See ibid. In addition, although petitioner cites (Pet. 15 n.5) a handful of recent cases in which the Fifth Circuit has exercised its discretion not to remand under the fourth plain-error prong, that court has repeatedly exercised its discretion to grant resentencing in other cases. See

Pet. C.A. Br. 27; see also, e.g., United States v. Escobedo, No. 16-41188, 2017 WL 3027218, at *2 (July 17, 2017) (per curiam); 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).

4. Even if the question presented merited review, this case would be a poor vehicle because petitioner is unlikely to meaningfully benefit from any decision in his favor. Petitioner's term of imprisonment is due to expire in June 2018.[3] It is unclear that any decision by this Court in petitioner's favor would result in resentencing appreciably in advance of his release date. And because a prisoner who serves too long a term of imprisonment is not automatically entitled to receive credit against his term of supervised release, see United States v. Johnson, 529 U.S. 53, 54 (2000), a decision that does not affect petitioner's release date would not likely benefit him at all. Indeed, even if the district

[3] See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (last visited Aug. 15, 2017) (search for inmate register number 80145-179).

court were to shorten his term of supervised release, petitioner would receive limited practical benefit because he is an alien subject to removal upon completion of his prison sentence. See PSR 1 (listing Department of Homeland Security detainer).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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