

No. 10-10340

IN THE SUPREME COURT OF THE UNITED STATES

JAMIE WESEVICH, 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 petitioner established reversible plain error when the district court sentenced him within an erroneous advisory Guidelines range but his sentence also fell within the correct range, and petitioner identified nothing else in the record to establish a reasonable probability that the error affected his sentence.

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 18-21) is not published in the Federal Reporter but is available at 414 Fed. Appx. 620.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2011. The petition for a writ of certiorari was filed on May 4, 2011. 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 on one count of possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. 1-4.

1. On May 4, 2009, Joe McNabb and Robert Duran stole 20 firearms from a gun store in Corpus Christi, Texas, after crashing into the front of the store with a stolen Jeep to gain entry. An informant told federal investigators that petitioner's brother, Chad Wesevich, was selling the stolen firearms. After further investigation, investigators obtained a warrant to search the house where Chad Wesevich and petitioner resided. In petitioner's bedroom, investigators found eight firearms, including four of the firearms stolen in the May 4 robbery; and drugs and drug paraphernalia, including cocaine, marijuana, digital scales, rubber gloves, and plastic baggies. Gov't C.A. Br. 6-7; Presentence Investigation Report (PSR) ¶¶ 5-15; Sent. Tr. 26-48.

2. Petitioner pleaded guilty to one count of possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The Probation Office calculated petitioner's total offense level as 27. PSR ¶ 33. That computation included a

base offense level of 20; an increase of four levels because the offense involved 20 firearms; an increase of two levels because the firearms were stolen; an increase of four levels because the firearms were possessed in connection with another felony offense, namely possession of a controlled substance with intent to distribute; and a decrease of three levels for acceptance of responsibility. PSR ¶¶ 22-33; see Sentencing Guidelines §§ 2K2.1(a)(4)(A), (b)(1)(B), (b)(4) and (b)(6), 3E1.1 (2008).

The Probation Office determined that petitioner had 11 criminal history points, resulting in a criminal history category of V. PSR ¶¶ 34-41. The 11 points included two points for a conviction for unlawful carrying of a firearm and one point for a marijuana possession conviction. PSR ¶¶ 35-36. Both of those offenses were committed on the same day in November 1999, when petitioner was 17 years old. On December 10, 1999, he was sentenced to 12 months of probation for the marijuana possession. On October 20, 2003, his probation was revoked based on a new firearm-possession offense, and that same day, he was sentenced to 60 days of imprisonment for the unlawful carrying of a firearm in 1999. Ibid.; Gov't C.A. Br. 4-5.

A total offense level of 27 and a criminal history category of V results in a Guidelines range of 120 to 150 months of imprisonment. Because the statutory maximum sentence for a violation of 18 U.S.C. 922(g)(1) is ten years of imprisonment, 18

U.S.C. 924(a)(2), the PSR calculated petitioner's advisory Guidelines range as 120 months of imprisonment. PSR ¶¶ 64-65; see Sentencing Guidelines § 5G1.1(a) (2008).

Petitioner objected to the four-level enhancement for possessing a firearm in connection with another felony. Def.'s Objections to PSR 2-4. He also argued that he should receive a two-level reduction under Sentencing Guidelines § 3B1.2(b) for a minor role in the offense. Id. at 4-6. Petitioner did not object to the PSR's calculation of his criminal history category.

At sentencing, petitioner's counsel argued that the evidence was insufficient to support a finding that he had an intent to distribute the drugs found in his bedroom or that the drugs were connected to the firearms also found in the bedroom. Sent. Tr. 11-13. He also argued that petitioner should receive a minor-role adjustment because he was not involved in stealing or trafficking the firearms. Id. at 13. According to counsel, he was "trying to get [petitioner] some relief from the statutory maximum" of 120 months in prison and he thought "the minor role might be an appropriate way to do that." Ibid. Counsel also argued for a downward variance to 84 months of imprisonment in light of the factors set forth in 18 U.S.C. 3553(a), in particular the nature and circumstances of the offense. Sent. Tr. 95. He argued that petitioner possessed the firearms found in his bedroom but was not involved in the burglary of the gun store or selling the stolen

firearms. Id. at 96. He also argued that the quantity of drugs found in his bedroom was relatively small. Id. at 96-97. In further support of a variance, petitioner said at sentencing that he possessed the guns because he collected them and did not "have those guns to try to hurt anybody or inflict any kind of violence on anybody." Id. at 99.

The court rejected a minor-role adjustment, emphasizing that petitioner's criminal history showed that "he's a man that has weapons and mixes them with drugs." Sent. Tr. 13-14. According to the court, if petitioner had a minor role here "it would be the first time he ever had a minor role in any criminal conduct probably in his life." Ibid. After hearing testimony from officers who conducted the search about the drugs, drug paraphernalia, and loaded guns they found in petitioner's bedroom, the court rejected petitioner's objection to an enhancement for possessing the firearms in connection with another felony. Id. at 73-74. Finally, the court rejected the request for a downward variance. Id. at 100. The court emphasized that petitioner kept a loaded firearm on his night stand and a loaded firearm "laying next to the cocaine on [his] bed rail." Id. at 98. The court also found petitioner's explanation for possessing the firearms "disingenuous," noting that "[p]eople don't usually have loaded guns lying around on their bed * * * for collection purposes." Id. at 99.

3. Petitioner appealed. For the first time on appeal, petitioner argued that the district court erred when it assessed three criminal history points for offenses that he committed when he was 17 years old, and he contended that the mistake amounted to reversible plain error. Pet. C.A. Br. 10-12. Petitioner had been sentenced to only 60 days for the offenses and had been released from confinement more than five years before committing the firearm possession offense in this case. As a result, petitioner contended, he should have received no criminal history points for the two offenses; his criminal history score should have been eight; and his criminal history category should have been IV. Ibid.; see Sentencing Guidelines § 4A1.2(d). A total offense level of 27 and a criminal history category of IV result in a Guidelines range of 100 to 125 months of imprisonment. Because of the ten-year statutory maximum, the advisory Guidelines range that should have applied to petitioner became 100 to 120 months of imprisonment. See Sentencing Guidelines § 5G1.1(c)(1) (2008).

The government agreed that it was error to assign petitioner three criminal history points for the 1999 convictions and that the error was clear and obvious. Gov't C.A. Br. 8, 12-13. The government also agreed that the error affected petitioner's substantial rights, citing three unpublished decisions of the court of appeals that predated this Court's decision in United States v. Booker, 543 U.S. 220 (2005). Gov't C.A. Br. 7, 8, 12-13 (citing

United States v. Hall, 88 Fed. Appx. 28 (5th Cir. 2004); United States v. De La Torre, 75 Fed. Appx. 923 (5th Cir. 2003), cert. denied, 540 U.S. 1139 (2004)). The government concluded that the case should be remanded for resentencing with the benefit of the correct advisory Guidelines range. Id. at 14.

4. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 18-21. Because petitioner "did not object to his sentence [in the district court] on the grounds of an incorrect criminal history calculation," the court of appeals concluded that it would apply the plain-error rule and could grant relief only if (1) the district court committed error; (2) the error was clear and obvious; (3) the error affected the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id. at 19. The court acknowledged that the parties agreed that the erroneous calculation of petitioner's criminal history was clear and obvious, but stated that petitioner "must still show * * * that his substantial rights have been affected by this erroneous calculation." Id. at 19-20.

The court of appeals concluded that petitioner had failed to carry his burden. The court explained that, where the defendant seeks to establish reversible plain error based on an incorrectly calculated Guidelines range and a sentence that "falls within both the correct and incorrect guidelines, we do not assume, in the

absence of additional evidence, that the sentence affects [the] defendant's substantial rights." Pet. App. 20 (quoting United States v. Blocker, 612 F.3d 413, 416 (5th Cir.) (per curiam), cert. denied, 131 S. Ct. 623 (2010)). The court found no facts in the record that would "indicate a reasonable probability[,] rather than the mere possibility[,] that the district court would have imposed a lesser sentence had it been aware of the proper advisory guidelines range." Ibid. The court noted that, to the contrary, "the record here is clear that [the] district court considered and rejected requests for a lesser sentence." Id. at 21 n.2. Specifically, the "district court twice rejected arguments that [petitioner] should be subject to a lower sentence, either in the form of a minor role reduction or as a downward variance from the advisory guidelines range." Id. at 20. Accordingly, the court of appeals concluded that petitioner had not shown any effect on his substantial rights. Ibid.

ARGUMENT

Petitioner contends (Pet. 12-16) that the court of appeals misapplied the plain-error rule by declining to find that the district court's application of the incorrect Guidelines range presumptively affected his substantial rights. That claim lacks merit, and the court of appeals' decision does not create a

conflict with any holding of another court of appeals that warrants this Court's review. Further review is not warranted.¹

1. The district court, without objection from petitioner, applied an advisory Guidelines range of 120 months, the statutory maximum. The district court then decided to impose that maximum sentence on petitioner. Petitioner established on appeal that the correct range would have been 100 to 125 months and that by operation of the statutory maximum the range became 100 to 120 months; petitioner's sentence therefore was within the correct range. The court of appeals correctly concluded that petitioner had not established any effect on his substantial rights because the record as a whole demonstrated that it was not reasonably probable that petitioner would obtain a different sentence if he were resentenced under the correct Guidelines range. Although the government took a different position in its brief to the court of appeals, the government has concluded that the court of appeals' decision is correct for the reasons set forth below.

To obtain relief on a forfeited claim, petitioner must meet the plain-error standard. Fed. R. Crim. P. 52(b). To show reversible plain error, petitioner must demonstrate (1) that the district court committed an error; (2) that the error was "plain,"

¹ A similar question is presented in Pacheco-Garcia v. United States, petition for cert. pending, No. 10-9445 (filed Feb. 8, 2011), and Guerrero-Campos v. United States, petition for cert. pending, No. 10-9746 (filed Mar. 23, 2011).

"clear," or "obvious"; (3) that the error "affect[ed] [his] substantial rights"; and (4) that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citation omitted). This Court has explained that, "in most cases," the requirement of an effect on substantial rights "means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." Id. at 734. Under the plain-error standard of Rule 52(b), unlike the harmless-error standard of Rule 52(a), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Ibid. The defendant's burden on plain-error review is to show a reasonable probability that, absent the error, the result of the proceeding would have been different. See, e.g., United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004) (adopting the same standard for plain-error cases as for other "cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief," which "requir[es] the showing of 'a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.'" (citation omitted; second brackets in original)).

Applying the third prong of plain-error review in this case, the court of appeals correctly held that petitioner had not met his

burden of showing that using an advisory Guidelines range of 100 to 120 months of imprisonment, rather than a Guidelines recommendation of 120 months, affected his substantial rights. Pet. App. 19-20.

While the advisory Guidelines range forms the “starting point and the initial benchmark,” district judges “may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in [18 U.S.C.] 3553(a).” Pepper v. United States, 131 S. Ct. 1229, 1241 (2011) (citation omitted). It would be one thing to presume that a reasonable probability exists that a judge might have imposed a different sentence if the judge imposed a within-range sentence, but the correct range does not overlap with the incorrect range that the judge actually applied. In that circumstance, the sentence actually imposed would reflect a departure (or variance) from the correct range when the court has not necessarily disagreed with the Guidelines’ advice.² Cf. 18 U.S.C. 3553(c)(2) (requiring the court to give a “specific reason” for a non-Guidelines sentence). But it is quite different when the judge has already selected a sentence within the correct range. Under those circumstances, even if the court commits a Guidelines error, the court’s sentence accords with the Sentencing Commission’s advice, because of the overlap between the correct and

² Even then, on plain-error review, reversal is not automatic. See, e.g., United States v. Dickson, 632 F.3d 186, 191 (5th Cir.), cert. denied, No. 10-10278 (May 31, 2011); United States v. Davis, 602 F.3d 643, 649-650 (5th Cir. 2010).

incorrect ranges. Indeed, the Commission originally designed the Sentencing Table with overlapping ranges in order to "discourage unnecessary litigation." Sentencing Guidelines Ch. 1, Pt. A (intro. comment. 1, § 4(h), at 11) (2010). "Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes." Ibid. That point has added force in an advisory Guidelines regime.

As the court of appeals noted, petitioner's sentence of 120 months fell within both the Guidelines range employed by the district court and the Guidelines range that should have been used absent the incorrect scoring of his criminal history. Pet. App. 19. Moreover, the district court rejected petitioner's arguments for a lower sentence, including an argument for a minor role adjustment and a downward variance based on the nature and circumstances of the offense. Id. at 20. Petitioner pointed to nothing in the record suggesting that the lower, overlapping range would have changed the ultimate sentence. To the contrary, the district court consciously decided to impose the statutory maximum sentence based on petitioner's conduct and criminal history. The court of appeals properly looked to all the facts of this case, not just the error in computing the Guidelines range, and correctly concluded that petitioner had failed to carry his burden of demonstrating "a reasonable probability" that, but for the error in

the computation of his advisory Guidelines range, "the district court would have imposed a lesser sentence." Ibid.³

2. The approach taken by the decision below does not conflict with any decision of another court of appeals. Although one court of appeals has made statements, in distinguishable contexts, that are in some tension with the Fifth Circuit's approach, there is no square circuit conflict, and further review is not warranted here.

a. Petitioner relies on cases decided while the Guidelines were still mandatory, before this Court's decision in United States v. Booker, 543 U.S. 220 (2005). See Pet. 12-15 & nn.3-5. Those cases did hold that a Guidelines error may well affect

³ The court of appeals has concluded in other cases that a sentence at the low end of the advisory Guidelines range may be persuasive, but not dispositive, evidence of a reasonable probability that the district court would have imposed a different sentence had it used a different Guidelines range. See, e.g., United States v. Rodriguez-Gutierrez, 428 F.3d 201, 205 (5th Cir. 2005) ("[S]entences falling at the absolute minimum of the Guidelines provide the strongest support for the argument that the judge would have imposed a lesser sentence. Although we do not hold that this fact alone will establish that the * * * error affected the defendant's substantial rights, we do consider it to be highly probative * * * ."), cert. denied, 546 U.S. 1193 (2006); id. at 205-206 ("To clarify, we do not * * * suggest that every sentence imposed at the absolute minimum of the range provided by the Guidelines will necessarily compel reversal by this Court."). Because of the statutory maximum's effect on both the incorrect and the correct Guidelines range, this case does not involve a true bottom-of-Guidelines-range sentence. Even if it did, however, and even if the court of appeals should have given that fact significance as a matter of circuit law -- a fact-bound question that does not warrant further review -- its failure to do so in this unpublished disposition has no effect on circuit precedent.

substantial rights even when “guideline ranges overlap.” United States v. Osuna, 189 F.3d 1289, 1295 (10th Cir. 1999); accord United States v. Knight, 266 F.3d 203, 207-208 (3d Cir. 2001) (Guidelines error presumptively affects substantial rights even when the ranges overlap, “unless the record shows that the sentence was unaffected by the error”).

But the question whether a district court would have imposed the same sentence even under a different Guidelines range is quite different now that the Guidelines are advisory. Under advisory Guidelines, the district court has discretion to impose any sentence between the statutory minimum and maximum, not just a sentence within the incorrectly calculated advisory Guidelines range. In deciding on the appropriate sentence, the court takes all of the relevant factors into account, without any presumption in favor of a Guidelines sentence. Gall v. United States, 552 U.S. 38, 50 (2007). That discretion reduces the risk that an error in the range has affected the outcome, when the sentence imposed lies within the correct range.

Here, for example, the correct Guidelines range was 100 to 120 months; the district court considered sentences within that range, either because they overlapped with the incorrect range (120 months) or because petitioner asked the court to vary downward. The district court ultimately rejected the request for a variance and selected the statutory maximum sentence of 120 months,

emphasizing the particular circumstances of this case that supported that sentence. Nothing about that decision indicates a reasonable likelihood that the court would have selected a different sentence if the court had been aware that the correct advisory Guidelines range included the sentence imposed (120 months) but also extended twenty months lower.

b. Petitioner relies (Pet. 12-14) principally on the Third Circuit's pre-Booker decision in Knight, 266 F.3d at 207-208. But the Third Circuit has not squarely reached the question presented in any post-Booker case governed by the plain-error standard, although the reasoning of some of its post-Booker decisions (none of which petitioner cites) is in tension with the reasoning of the court below. In United States v. Vazquez-Lebron, 582 F.3d 443 (2009), the Third Circuit stated that "[i]n the post-Booker era, very few procedural errors by a District Court will fail to be prejudicial, even when the Court might reasonably have imposed the same sentence under the correct procedure." Id. at 446. And in United States v. Langford, 516 F.3d 205 (2008), the Third Circuit stated that it adhered to its pre-Booker precedent on prejudice from Guidelines errors, even in advisory Guidelines cases. Id. at 216-218. Neither case, however, creates a square conflict warranting this Court's review at this time.

Although Vazquez-Lebron was a plain-error case, it involved an unusual type of Guidelines error and did not involve overlapping

Guidelines ranges. The defendant received a one-level downward departure for substantial assistance to the prosecution, see Sentencing Guidelines § 5K1.1, so his advisory Guidelines range changed from 46 to 57 months to 41 to 51 months. The district court then imposed a sentence of 48 months of imprisonment, which was within both the adjusted and unadjusted range. 582 F.3d at 444. The Third Circuit concluded that the sentence misapplied the substantial-assistance Guideline because “the sentence reached after granting a [substantial-assistance] departure motion must be less than the bottom of the otherwise applicable Guidelines range,” which in *Vazquez-Lebron*’s case meant less than 46 months. *Id.* at 445 (quoting *United States v. Floyd*, 499 F.3d 308, 312-313 (3d Cir. 2007)). Thus, *Vazquez-Lebron* was not truly a case of overlapping Guidelines ranges: although a sentence of 48 months could be permissible, it could be permissible only as an upward variance from the Guidelines range, *id.* at 445 n.2, and the district court did not state that it was varying upward. The court of appeals concluded that “the District Court’s intentions [we]re not at all clear,” and that if the district court had “applied the correct guideline range, it might have sentenced the defendant differently.” *Id.* at 446-447. The court therefore concluded that the Guidelines error was not harmless. *Ibid.* *Vazquez-Lebron* is unlike this case because the Third Circuit concluded that the

sentence actually imposed was not a permissible within-Guidelines sentence at all.

Langford, which the Third Circuit cited in Vazquez-Lebron, was a harmless-error case in which the government, not the defendant, bore the burden of proof. Because there was “nothing in the record to indicate that the District Court would have imposed the same sentence under a lower Guidelines range,” and the sentence was “at the low end[point] of the erroneous Guidelines range” actually used, the court held that the government had not carried the burden of showing harmlessness. 516 F.3d at 219 & n.5; see id. at 208. The court acknowledged, however, that in examining whether the Guidelines error affected the sentence actually imposed, “[t]he overlap [between the correct and incorrect Guidelines ranges] may be helpful,” although “it is the sentencing judge’s reasoning, not the overlap alone, that will be determinative.” Id. at 216.

Accordingly, although some statements in post-Booker cases from the Third Circuit suggest that that court might disagree with the Fifth Circuit’s application of the substantial-rights prong in this case, the Third Circuit has not squarely addressed that question in any case like this one, in which the burden is on the defendant, the Guidelines ranges overlap, and the record is otherwise silent.⁴ In the absence of such a decision, the general

⁴ The Third Circuit in Langford cited United States v. Wood, 486 F.3d 781 (3d Cir.), cert. denied, 552 U.S. 855 (2007), as a plain-error case that postdated Booker. In Wood, the Guidelines

statements from the Third Circuit cases discussed above do not create a conflict warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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error was based on the Ex Post Facto Clause, and it resulted in a three-level enhancement; as a result, the correct and incorrect Guidelines ranges did not overlap. The government conceded that the error affected substantial rights, and the court of appeals did not discuss the issue. Id. at 790.