No. 14-8740

IN THE SUPREME COURT OF THE UNITED STATES

ROY ELBERT CARLTON, 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 district court committed reversible plain error when it applied a two-level enhancement under Section 2D1.1(b)(4) of the advisory Sentencing Guidelines based on its finding that the object of petitioner's offense was the distribution of a controlled substance in a prison facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the Federal Reporter but is available at 2014 WL 6912498.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2014. The petition for a writ of certiorari was filed on March 5, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of possessing contraband in prison, in violation of 18 U.S.C. 1791(a)(2). He was sentenced to 27 months of imprisonment. The court of appeals affirmed. Pet. App. 1-11.

1. In 2006, petitioner was convicted of a federal drug offense in the United States District Court for the Western District of Texas. Presentence Investigation Report (PSR) ¶ 50. He was sentenced to 188 months of imprisonment, to be followed by 8 years of supervised release. See ibid. The Bureau of Prisons ordered petitioner to serve his sentence at the United States Penitentiary in Pollock, Louisiana (USP Pollock).

On February 20, 2010, petitioner's two minor children and their mother, Whitney Anderson, visited petitioner at USP Pollock. Before entering the facility, Anderson was provided with a "Notification to Visitor" form that informed her that she was prohibited from bringing contraband into the facility. Anderson signed the form, attesting that neither she nor the children had any prohibited items. In fact, Anderson had secreted marijuana into the tips of 40 to 50 latex gloves that she hid inside her bra. After entering the facility and before petitioner entered the visitor's room, Anderson transferred some of the marijuana to the toddler's clothing. After petitioner

entered the room, security cameras captured him reaching inside the toddler's clothing and ingesting packages while the child sat in his lap. Gov't C.A. Br. 4-6.

A technician monitoring the visit on surveillance cameras found petitioner's actions suspicious. Anderson was removed from the visiting room and taken first to the front lobby and then to a staff lounge. White latex containing marijuana was later found in both locations. Gov't C.A. Br. 5-6. Petitioner was also removed from the visiting room, searched, and placed in a dry cell (i.e., one with no running water). After several days, petitioner defecated in his bed. Technicians recovered five, off-white-colored, balloon-like objects that had been torn open. Subsequent testing revealed marijuana. Id. at 6.

2. A federal grand jury in the Western District of Louisiana returned an indictment charging petitioner with possession of contraband in prison, in violation of 18 U.S.C. 1791(a)(2). Following a jury trial at which Anderson testified for the government, petitioner was convicted of the charge.

The Probation Office calculated an advisory guidelines range of 24 to 30 months of imprisonment based on an adjusted offense level of 10 and a criminal history category of VI. PSR ¶ 85. Petitioner's offense level reflected a base offense level of 6, see U.S.S.G. 2P1.2(c)(1), enhanced by 2 levels because petitioner used a minor to commit the offense, PSR ¶ 27;

U.S.S.G. 3B1.4, and further enhanced by 2 additional levels because "the object of the offense was the distribution of a controlled substance in a prison," PSR ¶ 25; U.S.S.G. 2D1.1(b)(4). Petitioner filed written objections to both of the two-level enhancements. As relevant here, petitioner claimed that the Section 2D1.1 enhancement was inapplicable because he was convicted of possessing contraband, not distributing it to a third party. PSR First Addendum. The government defended the enhancement based its assertion that Anderson had testified at trial that petitioner "intended to pay off a debt to another inmate by providing that inmate marijuana." PSR Second Addendum.

At sentencing, petitioner withdrew his objection to the Section 3B1.4 enhancement but reiterated his objection to the Section 2D1.1 distribution enhancement. The government repeated its view that the Section 2D1.1 enhancement was appropriate based on Anderson's trial testimony. The district court shared the government's recollection of Anderson's testimony and asked petitioner's attorney to comment. In response, counsel stated, "that's what Ms. Anderson testified to, but besides her testimony, nothing else has been provided to prove that fact." Pet. App. 3. The district court overruled petitioner's objection to the Section 2D1.1 enhancement, noting that it would have "possibly agree[d]" with petitioner "absent the affirmative

testimony from [Anderson] that [the district court] believe[d] was unrebutted." Ibid. The district court accepted the advisory guidelines calculations and imposed a 27-month sentence.

3. Petitioner appealed, renewing his challenges to the two sentencing enhancements. The court of appeals affirmed. Pet. App. 1-11.

a. With respect to the Section 2D1.1 enhancement, petitioner argued that the district court had erred in imposing the enhancement on the basis of Anderson's testimony. Petitioner explained that Anderson "was never asked at trial why she brought the marijuana into the facility," and her testimony "does not reveal any statements or assertions that Anderson transferred the marijuana to [petitioner] for him to repay a debt, pay a debt, or in any way transfer the marijuana to anyone within the [prison]." Pet. C.A. Br. 7.

The government, in its brief, conceded that petitioner was correct that Anderson had not testified that the marijuana was given to petitioner to repay a debt, but argued that petitioner was not entitled to be resentenced. Gov't C.A. Br. 7-8, 10. The government contended that petitioner had invited the error when he agreed with the government's recollection of Anderson's testimony at sentencing. Id. at 12-13, 15. The government further argued that, even if petitioner's claim was reviewable

for plain error, no such error had occurred, as petitioner's attempted receipt of a large number of small, individually packed containers of marijuana supported an inference that petitioner intended to distribute the marijuana. Id. at 15-17.

b. The court of appeals rejected petitioner's challenge to the Section 2D1.1 enhancement. The court characterized the claim as resting on "a clearly erroneous factual finding; namely, that Anderson testified at trial that [petitioner] needed the marijuana to repay a debt to another inmate." Pet. App. 4. The court acknowledged that petitioner had "agreed with this characterization of Anderson's testimony at the sentencing hearing," but it applied plain-error review "out of an abundance of caution." Id. at 5.

The court of appeals explained that "the district court's error is a mistake in fact as to what Anderson testified." Pet. App. 5. Under the Fifth Circuit's decision in United States v. Lopez, 923 F.2d 47 (5th Cir. 1991) (per curiam), the court stated, such a factual error "can never constitute plain error" because it "could have been cured by bringing it to the district court's attention at sentencing." Pet. App. 5 (quoting Lopez, 923 F.2d at 50).

Judge Prado issued a concurring opinion. Pet. App. 6-11. He argued that the Lopez rule -- "that factual-finding mistakes are not cognizable on plain-error review of a criminal sentence"

-- was contrary to the text of the plain-error rule, Supreme Court precedent and the practice in every other circuit. Id. at 6. Although Judge Prado would have held that the error in this case amounted to reversible plain error, he concurred in the judgment on the ground that Lopez was controlling. Id. at 9; see also id. at 10 ("[A]bsent Lopez, I would vacate [petitioner's] sentence and remand for resentencing.").

ARGUMENT

Petitioner contends (Pet. 5-9) that this Court should grant review to address whether the court of appeals erred in denying plain-error relief on his challenge to the calculation of his offense level under the advisory Sentencing Guidelines. The judgment of the court of appeals is correct, and its unpublished decision does not warrant further review. This Court has previously denied certiorari in several cases involving the question that petitioner presents, see Goodley v. United States, 134 S. Ct. 904 (2014) (No. 13-6415); Laver v. United States, 134 S. Ct. 682 (2013) (No. 13-5996); Amaya v. United States, 549 U.S. 1283 (2007) (No. 06-7863), and there is no reason for a different result here.

1. Petitioner does not dispute the court of appeals' threshold determination that his claim, to the extent reviewable at all (see pp. 10-11, infra), was reviewable only for plain error under Federal Rule of Criminal Procedure 52(b). On plain-

error review, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" United States v. Marcus, 560 U.S. 258, 262 (2010) (brackets in original) (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)).

Petitioner challenges the ground on which the court of appeals denied him plain-error relief. The court stated that "[u]nder our precedent, [q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." Pet. App. 5 (quoting United States v. Lopez, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam)). Petitioner contends that the court of appeals should instead have performed a case-specific analysis of the prerequisites for plain-error relief. That argument does not merit this Court's review.

As an initial matter, this case is an unsuitable vehicle for reviewing the question presented. Petitioner's untimely objection to the sentence enhancement under Sentencing

Guidelines 2D1.1(b)(4) would not justify plain-error relief even under the approach petitioner advocates. The district court's factual finding that petitioner intended to use the marijuana to repay a debt, based solely on the court's incorrect impression that Anderson had testified to that intent, did constitute an error that was "clear or obvious." See Marcus, 560 U.S. at 262; United States Bank Nat'l Ass'n v. Verizon Comm'ns, Inc., 761 F.3d 409, 431 (5th Cir. 2014) ("A finding is 'clearly erroneous' when there is no evidence to support it."). But petitioner cannot demonstrate a reasonable probability that his sentence would have been different but for the error, or that the error seriously affected the integrity of the proceedings. As the government explained below, the undisputed record evidence supported the conclusion that petitioner intended to distribute the marijuana. Anderson testified that she brought petitioner 40 to 50 glove tips containing marijuana. Gov't C.A. Br. 16. Petitioner's plan to receive a large number of small, individually packaged containers of marijuana supports an inference that he intended to distribute the marijuana. See, e.g., United States v. Majors, 328 F.3d 791, 796 (5th Cir. 2003) (packaging of cocaine in 25 small individual bags supported a finding of intent to distribute); United States v. Thomas, 294 Fed. Appx. 124, 137 (5th Cir. 2008) (unpub.) ("many small

parcels of drugs support a finding of intent to distribute because their packaging is inconsistent with personal use").

In addition, it is not clear that petitioner is entitled even to plain-error review of his belated objection to the enhancement. Petitioner affirmatively stated at sentencing that he agreed with the recollections of the government and the district court that Anderson had testified that petitioner was going to use the marijuana to pay off a debt. Pet. App. 2-3. That representation constituted invited error, which is tantamount to waiver and therefore precludes appellate review. See Johnson v. United States, 318 U.S. 189, 200-201 (1943); see Olano, 507 U.S. at 732-733 (1993) ("Deviation from a legal rule is 'error' unless the rule has been waived."); United States v. Campbell, 764 F.3d 874, 879 (8th Cir. 2014) ("Whether couched as invited error or more generally as a waiver, the result is the same -- this court will not conduct plain-error review."). Although "the erroneous fact that infected [petitioner's] sentencing * * * originated from the government," Pet. App. 9 n.4 (Prado, J., concurring), petitioner nevertheless invited the court's error by expressly adopting the government's representation. See United States v. Silvestri, 409 F.3d 1311, 1337 (11th Cir. 2005) (defendant invited error by stating that a proposed jury instruction was "acceptable"); United States v. Coffman, 574 Fed. Appx. 541, 565 (6th Cir. 2014) (defendant

invited error by agreeing to document-review process employed by government).

Petitioner's assertion of a conflict in the circuits provides no basis for further review. According to petitioner, ten other circuits follow the rule he advocates. See Pet. 5. Thus, even according to petitioner, any conflict on this issue is exceedingly narrow. And in any event, the question presented is the subject of an intra-circuit conflict that more properly should be resolved by the court of appeals itself. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Although the Fifth Circuit stated in United States v. Lopez, supra, that challenges to factual findings are not remediable on plain-error review, in practice the court has applied that rule inconsistently. See United States v. Claiborne, 676 F.3d 434, 441 (5th Cir. 2012) (Prado, J., concurring) (observing that "the rule from Lopez'" has not "been consistently adhered to by our court"); see also id. at 439 (Jones, C.J., concurring) (acknowledging that "a few opinions of this court fail to follow Lopez," but arguing that most do). Not only does the court of appeals have published precedent that follows the approach advocated by petitioner, see, e.g., United States v. Pattan, 931 F.2d 1035, 1042-1043 (5th Cir. 1991), cert. denied, 504 U.S. 958 (1992), but it has

also previously expressed doubt about whether Lopez survived this Court's subsequent decision in United States v. Olano, supra. See United States v. Rodriguez, 15 F.3d 408, 416 n.10 (5th Cir. 1994).

By declining to seek en banc review in this case, petitioner denied the Fifth Circuit the opportunity to "bring [itself] in line with its sister circuits." Pet. 5. This Court need not and should not intervene at this point to resolve an issue that the court of appeals itself could still productively reevaluate in an appropriate case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2015