No. 10-9445

IN THE SUPREME COURT OF THE UNITED STATES

RENE PACHECO-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 erred in finding no reversible plain error in petitioner's sentence, where the sentence imposed was within the advisory Guidelines range used by the district court and would also have fallen within the range that petitioner contends is correct.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is available at 403 Fed. Appx. 941.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2010. The petition for a writ of certiorari was filed on February 8, 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 Western District of Texas, petitioner was convicted of illegal reentry after having been removed following conviction of an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). He was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-4.

1. On June 21, 2009, petitioner was arrested near Spofford, Texas, by United States Border Patrol agents. Agents determined that petitioner is a citizen of El Salvador and that he had entered the United States illegally. Agents further determined that on June 14, 2002, petitioner was removed to El Salvador after having been convicted of the felony offense of possession with intent to distribute cocaine. Petitioner did not obtain permission to reenter the United States after his removal. Presentence Investigation Report (PSR) ¶¶ 6-10.

Petitioner was charged in a one-count indictment with illegal reentry after having been removed following conviction of an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). Indictment 1. Petitioner pleaded guilty without a plea agreement. Pet. App. 1.

2. The probation officer prepared a PSR that recommended a total offense level of 21. Gov't C.A. Br. 4-6; PSR ¶ 51. The PSR

attributed nine criminal history points to petitioner; seven of those points were for three convictions in the District of Columbia Superior Court on which petitioner was sentenced on December 18, 2000. Two points were imposed for a Bail Act violation for which the PSR listed the "date of referral" as February 14, 2000; two points were imposed for a second Bail Act violation for which the date of referral was September 11, 2000; and three points for a conviction for possession with intent to distribute cocaine, for which the date of referral was also September 11, 2000. PSR ¶¶ 29, 31-32.[1] Petitioner's nine criminal history points placed him in criminal history category IV. The PSR therefore recommended an advisory Guidelines range of 57 to 71 months of imprisonment. PSR ¶ 51. Petitioner did not object to the PSR's Guidelines calculations. Pet. App. 2; Gov't C.A. Br. 6.

The district court sentenced petitioner to 57 months of imprisonment, to be followed by three years of supervised release. Pet. App. 1.

3. On appeal, petitioner contended for the first time that the district court had erred in calculating his criminal history category. Petitioner argued that the district court had committed

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[1] Petitioner received concurrent sentences of 90 days of imprisonment for the two Bail Act violations and a separate sentence of 20 months of imprisonment for the cocaine-possession charge. PSR ¶¶ 29, 31-32; see also Sentencing Guidelines § 4A1.1(a) and (b) (2009) (length of sentence of incarceration affects number of criminal history points imposed).

reversible plain error by imposing seven criminal history points for his three 2000 convictions; he contended that under Sentencing Guidelines § 4A1.2(a)(2), the three convictions should have counted as one because the sentences were imposed on the same day and the facts set out in the PSR did not indicate that the offenses were separated by intervening arrests. Pet. C.A. Br. 10-14. Petitioner contended that his 2000 convictions should have been grouped together as a single conviction and assigned three points, for a total of five points overall, which would have made his criminal history category III and his advisory Guidelines range 46 to 57 months.

The court of appeals affirmed in an unpublished, per curiam disposition. Pet. App. 1-4. The court applied the plain-error standard of review and assumed without deciding that petitioner could show a Guidelines error and that the error was clear or obvious. The court held, however, that petitioner had not satisfied the plain-error test because he had not shown that any error affected his substantial rights. Id. at 3-4. In order to do so, the court noted, petitioner must show a "reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." Id. at 3 (citation omitted). The court stated that it had "shown considerable reluctance in finding a reasonable probability that the district court would have settled on a lower sentence when the

defendant's sentence falls within both the correct and [allegedly] incorrect guideline ranges." Ibid. (citation and internal quotation marks omitted). That situation creates a possibility, but not (standing alone) a probability, of a lesser sentence. Ibid.

Here, the court noted that petitioner's sentence of 57 months of imprisonment fell within both the correct and allegedly incorrect Guidelines calculation. Because the district court had considered petitioner's arguments for a lesser sentence but nonetheless had declined to reduce his sentence, the court of appeals concluded that petitioner "ha[d] not demonstrated a 'reasonable probability that, but for the district court's [alleged] misapplication of the Guidelines, he would have received a lesser sentence.'" Id. at 4 (quoting United States v. Villegas, 404 F.3d 355, 364 (5th Cir. 2005)).

ARGUMENT

Petitioner contends (Pet. 4-7) 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. In any event, resolution of the question presented would not benefit petitioner, because any error did not affect petitioner's Guidelines range at all, and petitioner

therefore cannot establish an effect on his substantial rights even on his own theory. Further review is not warranted.[2]

1. The district court, without objection from petitioner, applied an advisory Guidelines range of 57 to 71 months and sentenced petitioner to 57 months. On appeal, petitioner contended that the correct range was 46 to 57 months. The court of appeals did not address the merits of that contention, but correctly concluded that absent additional evidence, petitioner had not shown that the error had any effect on his substantial rights.

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," "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. When

[2] A similar question is presented in Guerrero-Campos v. United States, petition for cert. pending, No. 10-9746 (filed Mar. 23, 2011), and Wesevich v. United States, petition for cert. pending, No. 10-10340 (filed May 4, 2011).

a defendant claims plain error under Rule 52(b), in contrast to 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 57 to 71 months of imprisonment, rather than 46 to 57 months, affected his substantial rights. Pet. App. 2-3.

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.[3] 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 incorrect ranges. Indeed, the Commission originally designed the Sentencing Table with overlapping ranges in order to "discourage unnecessary litigation." Sentencing Guidelines Chap. 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.

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

As the court of appeals noted, petitioner's sentence of 57 months fell within both the Guidelines range employed by the district court and the Guidelines range that petitioner contends would have been used absent the purportedly incorrect scoring of his criminal history. Pet. App. 3-4. Although the district court did sentence petitioner at the bottom of the advisory Guidelines range (as calculated by the court), petitioner pointed to nothing else in the record suggesting that the lower, overlapping range would have changed the ultimate sentence. On the facts of this case, therefore, the court of appeals correctly concluded that petitioner had failed to carry his burden of demonstrating a "reasonable probability that, but for the district court's [alleged] misapplication of the Guidelines, he would have received a lesser sentence." Id. at 4 (citation omitted).[4]

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[4] 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."). Accordingly, even if the court of appeals should have applied that principle here 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.

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 principally 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. 6-7 (relying on Third and Tenth Circuit cases decided before Booker). Those cases did hold that a Guidelines error may well affect 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, petitioner contends that the correct Guidelines range was 46 to 57 months; the district court considered sentences within that range, either because they overlapped with the incorrect range (57 to 71 months) or because petitioner asked the court to vary downward.[5] The district court's brief explanation for that sentence (the adequacy of which petitioner does not challenge) gives no suggestion of a reasonable likelihood that the court would have selected a different sentence if the court had concluded that the correct advisory Guidelines range included the sentence imposed (57 months) but also extended 11 months lower.

b. Petitioner cites (Pet. 6) only one post-Booker case, the Seventh Circuit's decision in United States v. Garrett, 528 F.3d 525 (2008), but that case is also inapposite. In Garrett, the district court explained that it wanted to impose a sentence at the middle of the Guidelines range, but because of a Guidelines error the sentence was actually above the correct Guidelines range. Id. at 526, 530. The Seventh Circuit therefore concluded that the

[5] The statutory maximum term is 20 years of imprisonment, and there is no mandatory minimum. 8 U.S.C. 1326(b)(2).

error likely "affect[ed] [the court's] selection of the particular sentence." Id. at 530. The court briefly stated in dictum that "even if a sentence imposed is within the correct as well as the incorrect Guideline range" -- which was not the case in Garrett -- "the case must still be remanded for resentencing," ibid., but the court did not purport to abandon the established principle that the ultimate question is whether the defendant has shown a reasonable probability that the district court would likely have imposed a different sentence. The single sentence of dictum from Garrett does not create a conflict calling for this Court's review.

c. Since Booker, the Tenth Circuit has not reached the question presented in any published decision, but in unpublished decisions has concluded that errors in computing an advisory Guidelines range did not affect substantial rights. See United States v. Cosey, 399 Fed. Appx. 380, 383-384 (2010); United States v. Owens, 394 Fed. Appx. 504, 509-510 (2010).[6]

The Third Circuit, too, has not squarely reached the question presented in any post-Booker case governed by the plain-error

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[6] Petitioner cites (with a "cf." signal, Pet. 6) one post-Booker decision of the Tenth Circuit, United States v. Martinez-Jimenez, 464 F.3d 1205 (2006). That case did not apply the plain-error standard or, indeed, any harmless-error standard, because the court found no error. Id. at 1209-1212. The court noted only in passing that the sentence was at the high end of the range the defendant urged was correct, but the low end of the range the district court used, and that there was no indication that the district court "would have imposed an identical sentence if Ms. Martinez-Jimenez's criminal history category was IV instead of V." Id. at 1208-1209.

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. Vasquez-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 Vasquez-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 court of appeals 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 Vasquez-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, Vasquez-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. Vasquez-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 Vasquez-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. Id. 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 and the Guidelines ranges overlap.[7] In the absence of such a decision, the general statements from the Third Circuit cases discussed above do not create a conflict warranting this Court's review.

3. In any event, this case would be a poor vehicle to review the court of appeals' application of the substantial-rights prong of the plain-error test to overlapping Guidelines ranges, because any error by the district court did not in fact affect petitioner's Guidelines range at all. Accordingly, petitioner cannot show any effect on his substantial rights.

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[7] 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 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.

If petitioner was arrested on separate occasions for the offenses that resulted in his December 2000 sentencing in the District of Columbia Superior Court, then each of those offenses triggers criminal-history points. Sentencing Guidelines § 4A1.2(a)(2) (2009) ("Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)."). And if petitioner properly received at least five points for those three offenses, plus two points for his other criminal history (which petitioner does not dispute), then his criminal history category remains IV and his Guidelines range unchanged. See Sentencing Guidelines Chap. 5, Pt. A (sentencing table) (criminal history scores of 7-9 points are all in category IV).

Petitioner incorrectly contends (Pet. 2) that "documents from the proceedings in [petitioner's] cases indicated that he was arrested for all three offenses on the same day." That is not correct. As petitioner told the court of appeals, "[n]either the complaint nor the judgment state[s] when [petitioner] was arrested for" the first two offenses. Pet. C.A. Br. 11 nn.5-6. The PSR also did not expressly state when petitioner was arrested, but it did state that proceedings on the first of petitioner's three offenses were initiated on February 14, 2000, whereas proceedings on the other two were initiated on September 11, 2000. The PSR

also noted that "[o]ffense information" for the first two offenses had been "requested and was not received at the time the [PSR] was prepared." PSR ¶¶ 29, 31-32. Because petitioner made no objection to the PSR, the date of arrest was not definitively resolved in the district court.

According to the records of the United States Attorney's Office for the District of Columbia, petitioner was arrested on February 14, 2000, for the first offense, and on September 11, 2000, for the second and third offenses -- the same dates that the PSR listed as the dates the three proceedings were initiated.[8] Accordingly, petitioner was arrested for the first offense before he committed the other offenses, and he properly received two criminal history points for the first offense. He should have received three points for the second and third, grouped together. See Sentencing Guidelines §§ 4A1.1(a) and (b), 4A1.2(a)(2)(B); note 1, supra. Petitioner's total criminal history score therefore should have been seven, not nine, but his criminal history category would still be IV.

On plain-error review, petitioner bears the burden to establish not only that "plain," "clear," or "obvious" error

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[8] The government would lodge copies of these electronic records with the Clerk if the Court so requests. The government did not submit these records to the court of appeals, but did note that petitioner had failed to establish that the arrest dates were all the same and, thus, had failed to establish a plain Guidelines error. See Gov't C.A. Br. 7.

occurred, but also that it affected his substantial rights. Olano, 507 U.S. at 734. Thus, to succeed on his argument that prejudice may be inferred from an effect on his Guidelines range, petitioner must show at least that the error did, in fact, affect the Guidelines range -- i.e., not only that the district court should have inquired into the dates of his past arrests, but that if it had conducted such an inquiry it would have imposed fewer than seven total criminal-history points. Because petitioner is properly subject to seven points, petitioner cannot carry his burden to show that the district court erred in a way that affected his substantial rights. Although the PSR did not specifically state that the dates of initiation were also the dates of petitioner's arrests, the information in the PSR was sufficient to allow the district court to infer (especially in light of petitioner's failure to object or to request additional records) that petitioner was arrested on at least two occasions and should receive at least five criminal-history points for the three 2000 convictions, enough to justify the Guidelines range that the court actually used. Accordingly, any error did not affect petitioner's Guidelines range, and absent such an effect, petitioner cannot show any reasonable likelihood that the district court would have imposed a different sentence. Resolution of the question presented therefore would not affect petitioner's ability to show an effect on his substantial rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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