No. 13-8744

IN THE SUPREME COURT OF THE UNITED STATES

AARON VIDAL-MALDONADO, PETITIONER

v.

UNITED STATES OF AMERICA

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

# BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

JOCELYN SAMUELS
Acting Assistant Attorney General

DENNIS J. DIMSEY
NATHANIEL S. POLLOCK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

## QUESTIONS PRESENTED

1. Whether sufficient evidence supports petitioner's convictions for violating an arrestee's constitutional rights, in violation of 18 U.S.C. 242, where petitioner held the arrestee down while his subordinates repeatedly punched and kicked the arrestee; announced, following that assault, that "this one's mine"; took the arrestee not to a hospital, but to a police station, where the arrestee was again assaulted; and did not stop his subordinates from committing assaults while the arrestee was prone and handcuffed.

2. Whether the district court committed plain error under the Ex Post Facto Clause when, in calculating the single advisory Sentencing Guidelines range for a series of offenses considered as a group under the Guidelines, it used the version of the Guidelines in effect at the time of the last relevant offense.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A55) is reported at 736 F.3d 573.

## JURISDICTION

The judgment of the court of appeals was entered on November 22, 2013. The petition for a writ of certiorari was filed on February 14, 2014. 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 District of Puerto Rico, petitioner was convicted on one count

of deprivation of rights under color of law, and aiding and abetting, in violation of 18 U.S.C. 242 and 2; one count of deprivation of rights under color of law, in violation of 18 U.S.C. 242; one count of making false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001; and one count of obstruction of justice, in violation of 18 U.S.C. 1512(b)(3). Judgment 1. He was sentenced to 200 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3.

1. Petitioner, a sergeant with the San Juan Municipal Police Department, was the highest-ranking officer present when an arrestee, José Antonio Rivera-Robles (Rivera), was assaulted and killed by petitioner's subordinates. Pet. App. A4-A6. In the early morning hours of July 20, 2003, petitioner arrived at a gas station where Rivera, who had previously gone joyriding in a patrol car while under the influence of cocaine, was lying face-down on the ground with an officer straddling him. Id. at A4. Petitioner helped to handcuff Rivera and then restrained him while other officers encircled him, repeatedly kicked him in the head and upper body with booted feet, and punched him in the face. Id. at A4-A5. Petitioner eventually ordered that Rivera be taken to the station house, announcing that "[t]his one's mine, this one's mine." Id. at A5.

Upon arrival at the station house, Rivera fell on the ground, barely conscious. Pet. App. A5. An officer struck him in the face while petitioner looked on. Ibid. Officers then carried Rivera into the station house, dropped him on the floor, and removed his handcuffs. Ibid. Although Rivera was "practically disfigured" and his breathing was labored, petitioner insisted that "[t]his mother f***er is faking it." Ibid.; Gov't C.A. Br. 11. Medical personnel were eventually called, but were unable to revive Rivera, who was pronounced dead at the scene. Pet. App. A5; Gov't C.A. Br. 11. The autopsy showed that Rivera suffered trauma injuries to roughly 30 places on his body and that he died from brain hemorrhaging. Pet. App. A5. Although a defense expert opined that it was "a medically reasonable probability" that Rivera died from cocaine use, the coroner and two forensic pathologists agreed that Rivera died from the assaults. Id. at A5-A6.

During an internal police-department investigation, petitioner admitted his presence at the gas station, but falsely asserted that nobody had assaulted Rivera. Pet. App. A6. In 2008, the Federal Bureau of Investigation began looking into the incident. Ibid. Petitioner again falsely asserted that no assault had occurred. Ibid.

2. A federal grand jury returned a multi-defendant indictment charging petitioner with one count of depriving Rivera of his constitutional right to be free of unreasonable force by

assaulting him, and aiding and abetting in an assault, in violation of 18 U.S.C. 242 and 2 (Count 1); one count of depriving Rivera of his constitutional right to be free of unreasonable force by kicking him, in violation of 18 U.S.C. 242 (Count 3); one count of depriving Rivera of his constitutional right to be free of unreasonable force by failing to intervene to stop subordinate officers from assaulting him, in violation of 18 U.S.C. 242 (Count 4); one count of making a false statement in a federal investigation, in violation of 18 U.S.C. 1001 (Count 9); and one count of obstruction of justice, in violation of 18 U.S.C. 1512(b)(3) (Count 15). Indictment 1-3, 6-7, 9. After a 26-day trial, the jury convicted petitioner on all of those counts, except for the count charging petitioner with kicking Rivera (Count 3). Pet. App. A7.

At sentencing, petitioner raised no objection to the Sentencing Guidelines calculations in the amended presentence investigation report (PSR), which the district court adopted. Pet. App. 44. Applying the November 2009 version of the Guidelines manual, the PSR grouped all four of petitioner's offenses together for purposes of calculating a single offense level. PSR ¶ 32; see id. § 3D1.2(b) (2009) (requiring grouping for offenses with the same victim "connected by a common criminal objective or constituting part of a common scheme or plan"); id. § 3D1.2(c) (2009) (requiring grouping "[w]hen one of the counts embodies

conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts"); Guidelines § 3D1.2 comment. (n.5) (2009) (listing "obstruction of justice" as an example of an offense that may be grouped under Section 3D1.2(c)).[1] The PSR calculated a total offense level of 39 for the group of four offenses: a base offense level of 29, plus a six-level enhancement for commission of an offense under color of law, a two-level enhancement for a handcuffed victim, and a two-level enhancement for obstruction of justice. PSR ¶¶ 33-34, 36-37, 41. In combination with petitioner's criminal history category of I, petitioner's advisory Guidelines range was 262-327 months. PSR ¶¶ 44, 60. After considering the sentencing factors, the district court ultimately imposed a below-Guidelines sentence that included a total of 200 months of imprisonment: 200 months on the Section 242 counts and 59 months on the false-statement and obstruction-of-justice counts, all to run concurrently. Pet. App. A44; Judgment 2.

3. The court of appeals affirmed. Pet. App. A1-A55. The court found the evidence sufficient to support petitioner's Section 242 convictions. Id. at A35-A36. On the first Section 242 conviction (Count 1), the court reasoned that "a reasonable juror

[1] The sentencing transcript includes a statement by the district court that it was applying the 2001 version of the Sentencing Guidelines, C.A. App. 654-655, but that appears to be either a misstatement by the court or a mistranscription.

could have concluded that [petitioner] willfully associated himself with the violation of Rivera's civil rights and participated in th[e] violation as something he wished to bring about." Id. at A36. The court observed that "multiple witnesses testified that [petitioner] helped hold Rivera down on the ground while the officers under his supervision encircled and repeatedly kicked Rivera"; that petitioner said "'this one's mine, this one's mine' as [he] transported the badly injured Rivera back to the station house"; and that "at the station house, he stood by and watched as Rivera was assaulted further." Ibid. (brackets omitted).

On the second Section 242 conviction, the court of appeals held that petitioner had sufficient notice that failing to stop the assault by his subordinates would violate Rivera's constitutional rights and that petitioner was criminally liable under Section 242 for that course of conduct. Pet. App. A36-A38. The court concluded that petitioner "cannot plausibly suggest that allowing his subordinates to repeatedly and violently assault a handcuffed suspect constituted anything other than an act of apparent unlawfulness and a clear violation of Rivera's civil rights," observing that as a trained officer, petitioner "would have known that kicking and punching a restrained suspect who posed no threat to others went well beyond the acceptable use of force." Id. at A37. The court further reasoned that, under circuit precedent, "a supervisor can be held liable for his failure to intervene to

protect an arrestee from his subordinates' excessive use of force when his 'action or inaction is affirmatively linked . . . to that behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference.'" Id. at A37-A38 (brackets omitted) (quoting Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002)). "In this case," the court continued, "the jury heard that [petitioner] held Rivera on the ground while officers kicked him, permitted an officer to punch the handcuffed Rivera in the face without comment, told his officers 'this one's mine' as he transported a severely injured Rivera to the station house rather than a hospital, and again watched without intervening as Rivera was further assaulted at the station house. [Petitioner's] supervisory 'acquiescence or gross negligence amounting to deliberate indifference' as to the repeated assaulting of Rivera by his subordinates was thus well-documented." Id. at A38.

The court of appeals additionally determined that the Ex Post Facto Clause did not preclude application of the Sentencing Guidelines' "one book" rule, Sentencing Guidelines § 1B1.11(b)(3). Pet. App. A43-A53. Under that rule, the district court used the version of the Guidelines in effect at the time petitioner committed the latest of his grouped offenses (the false-statement and obstruction counts) rather than the more lenient version in effect at the time he committed the earliest of his grouped

offenses (the Section 242 counts). See Sentencing Guidelines § 1B1.11(b)(3) ("If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.").[2] Because petitioner had made no ex post facto objection in district court, the court of appeals reviewed the issue "only for plain error." Pet. App. A45. It concluded, "consistent with the findings of an overwhelming majority of [its] sister circuits," that "the one book rule does not violate the Ex Post Facto Clause as applied to a series of grouped offenses like [petitioner's]." Id. at A49; see id. at A49-A50 (citing cases). The court emphasized that its resolution of this particular case did not "suggest that all applications of the one book rule will in all cases satisfy the Ex Post Facto Clause's requirements." Id. at A52.

The court of appeals recognized that under this Court's decision in Peugh v. United States, 133 S. Ct. 2072 (2013), the Sentencing Guidelines are subject to the requirements of the Ex

[2] The version of the Guidelines in effect when petitioner committed the latest of his grouped offenses was the November 2007 version. Pet. App. A47. The district court actually used the November 2009 version of the Guidelines to calculate petitioner's advisory sentencing range. Id. at A47 n.11. Both the November 2007 and November 2009 versions, however, would have yielded the same range, and petitioner has not contended that the use of the November 2009 version rather than the November 2007 version was itself erroneous. Ibid.

Post Facto Clause. Pet. App. A49. The court reasoned, however, that petitioner's offense level "is properly viewed not as a consequence of an ex post facto violation, but as the direct result of his decision to engage in closely related offense conduct in 2008." Id. at A52. The court observed that petitioner had "concede[d] that, had he consulted the Guidelines" in effect when he committed his earliest offenses -- a version of the Guidelines that included both the one-book rule and the grouping rule -- "he 'could have suspected . . . that any punishment for his § 242 offenses could be enhanced (under the one-book rule) were there to be a subsequent amendment and were he to commit another federal offense after that amendment took effect.'" Id. at A51; see id. at A52. Notwithstanding such notice, he "nevertheless elected to proceed with the commission of obstruction offenses that would trigger the application of the revised Guidelines" in place at the time of those obstruction offenses. Id. at A52.

ARGUMENT

Petitioner contends that his failure to stop his subordinates from assaulting Rivera was not unlawful under 18 U.S.C. 242 (Pet. 10-13) and that the application of the one-book rule to his grouped offenses violated the Ex Post Facto Clause (Pet. 13-18). Those contentions lack merit and do not warrant this Court's review.

1. Petitioner does not dispute that Section 242, which prohibits the "willful[]" deprivation of constitutional rights

"under color of * * * law," 18 U.S.C. 242, makes it unlawful for police officers to assault defenseless suspects like Rivera. He contends, however, that the statute does not proscribe what he characterizes as his "inaction" in the particular circumstances of this case. Pet. 10 (capitalization and emphasis omitted). The court of appeals correctly rejected that argument. Pet. App. A35-A38; see Hamling v. United States, 418 U.S. 87, 124 (1974) ("The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals.").

The court of appeals did not view the facts of this case as amounting to "inaction" by petitioner. Rather, as to both Section 242 counts, the court of appeals focused on petitioner's physical restraint of Rivera at the gas station while officers under petitioner's supervision beat Rivera; petitioner's declaration that "this one's mine, this one's mine" as Rivera was transported to the station house rather than a hospital; and petitioner's failure to stop his subordinates from again assaulting Rivera at the station house. Pet. App. A36, A38 (brackets omitted). That conduct clearly included willful acts -- including petitioner's physical participation in the gas-station assault -- that would support conviction on Count 1, which charged petitioner with assaulting and aiding and abetting the assault of Rivera. Indictment 1-2. The evidence also supported conviction on Count 4, which charged

petitioner with failing to intervene to prevent officers "under his supervision" from harming Rivera. Indictment 3. The jury could readily have viewed petitioner's conduct -- including his statement that "this one's mine" -- as encouraging or condoning the multiple assaults. See Pet. App. A37-A38.

Petitioner correctly observes (Pet. 4-5) that this Court's decision in United States v. Lanier, 520 U.S. 259 (1997), precludes conviction under Section 242 unless a defendant has "fair warning" that his conduct will violate the victim's rights. Id. at 264-272. He errs, however, in contending (Pet. 10-11) that he had no such fair warning here. As the court of appeals explained (Pet. App. A37-A38), circuit precedent at the time of the assaults at issue here -- in particular, Wilson v. Town of Mendon, 294 F.3d 1 (1st Cir. 2002) -- made clear that a "supervisory officer may be held liable for the behavior of his subordinate officers where his 'action or inaction is affirmatively linked . . . to that behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference.'" Id. at 6 (quoting Lipsett v. University of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988) (some quotation marks and alterations omitted)); see ibid. ("An officer may be held liable not only for his personal use of excessive force, but also for his failure to intervene in appropriate circumstances to protect an arrestee from the excessive

use of force by his fellow officers.") (citing Gaudreault v. Municipality of Salem, 923 F.2d 203, 207 n.3 (1st Cir. 1990), cert. denied, 500 U.S. 956 (1991)). Petitioner suggests (Pet. 11-12) that the standard in Wilson is inapplicable to "decisions made in haste in fast-moving, chaotic situations," but any such limitation would not help him in this case, where his prolonged course of conduct through multiple assaults and a change of locale cannot be analogized to split-second decisionmaking. Equally unavailing is petitioner's assertion (ibid.) that Wilson failed to provide fair warning because the particular defendant in Wilson was ultimately found not to be liable. Regardless of the outcome of Wilson itself, the decision clearly set forth the standard that the court of appeals applied in petitioner's case -- a standard that had also been announced and applied in other cases before Wilson. See Lipsett, 864 F.2d at 902 (1st Cir. 1988) (deriving the standard from a "body of case law").

Petitioner does not identify any court of appeals that would have reversed a Section 242 conviction on the facts of this case. See, e.g., United States v. Reese, 2 F.3d 870, 890 (9th Cir. 1993) (concluding, in a Section 242 prosecution, that "a police sergeant who stands by and watches while officers under his command use excessive force and refuses to order them to stop may thereby 'subject' the victim to the loss of his or her right to be kept free from harm while in official custody or detention"), cert.

denied, 510 U.S. 1094 (1994). And contrary to petitioner's suggestion (Pet. 12), the court of appeals' decision, which simply applies prior circuit precedent to the facts of this case, does not expand the scope of criminal liability. Petitioner's fact-bound challenge to his Section 242 convictions accordingly does not warrant this Court's review.

2. Petitioner's Ex Post Facto Clause challenge to the one-book rule likewise does not warrant review.

a. In Peugh v. United States, 133 S. Ct. 2072 (2013), this Court addressed an ex post facto challenge by a defendant who had completed his criminal conduct in 2000, but whose advisory Guidelines range was calculated under the 2009 version of the Sentencing Guidelines in effect at the time of his sentencing. Id. at 2078-2079. Like every circuit but one to have addressed a similar issue, the Court concluded that use of the later Guidelines, which recommended a higher sentencing range for the defendant's offenses, violated the Ex Post Facto Clause. Ibid.; see id. at 2079 n.1, 2088.

In this case, unlike in Peugh, the district court did not employ a version of the Sentencing Guidelines that completely post-dated petitioner's course of criminal conduct. Petitioner does not dispute that his offenses were properly grouped for purposes of determining a single offense level under the Guidelines; that he committed the final criminal act in that course of conduct in 2008;

or that the district court properly calculated the Guidelines range applicable at the time of that act. See note 2, supra. The decision below correctly joined the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits in concluding that no violation of the Ex Post Facto Clause occurs in that circumstance.[3]

This Court has observed that "central to the ex post facto prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed'" when the defendant committed the acts that triggered that punishment. Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting Weaver v. Graham, 450 U.S. 24, 30 (1981)). Those concerns are not implicated by applying the one-book rule to offenses that are grouped to determine the advisory Guidelines range. As the court of appeals explained, the defendant has fair notice of the consequences of his criminal conduct before he commits it. Pet. App. A51-A52. The one-book rule puts the

[3] See United States v. Kumar, 617 F.3d 612, 628 (2d Cir. 2010), cert. denied, 131 S. Ct. 2931 (2011); United States v. Siddons, 660 F.3d 699, 707 (3d Cir. 2011); United States v. Lewis, 235 F.3d 215, 218 (4th Cir. 2000), cert. denied, 534 U.S. 814 (2001); United States v. Kimler, 167 F.3d 889, 893 (5th Cir. 1999); United States v. Duane, 533 F.3d 441, 449 (6th Cir. 2008); United States v. Hallahan, 744 F.3d 497, 514 (7th Cir. 2014); United States v. Anderson, 570 F.3d 1025, 1033 (8th Cir. 2009); United States v. Weiss, 630 F.3d 1263, 1278 (10th Cir. 2010); United States v. Bailey, 123 F.3d 1381, 1405–1407 (11th Cir. 1997); see also Pet. App. A49-A50.

defendant on notice that, if he commits a series of offenses and is prosecuted for those offenses in a single proceeding, the version of the Guidelines in effect when he commits the last offense will be used to sentence him for the entire group of offenses. Ibid.

In addition, application of the one-book rule to grouped offenses does not permit the government to increase the defendant's Guidelines range beyond what was prescribed when the defendant committed the last of the series of acts that triggered that range. The Guidelines range is determined for the offenses as a group, and the group includes a course of offense conduct that was not completed until after the new version of the Guidelines took effect. Thus, application of the one-book rule to grouped offenses is similar to application of the most recent version of the Guidelines to a continuing offense that is begun under one version of the Guidelines but not completed until a later version has taken effect. As the court of appeals explained, "the change in [petitioner's] offense level is properly viewed not as a consequence of an ex post facto violation, but as the direct result of his decision to engage in closely related offense conduct in 2008." Pet. App. A52.

Petitioner's reliance (Pet. 16-17) on Miller v. Florida, supra, is misplaced. In Miller, this Court held that the Ex Post Facto Clause barred application of an increased state statutory sentencing guideline range that took effect only after the

defendant's criminal conduct was complete. 482 U.S. at 424-425, 427. As petitioner points out (Pet. 16-17), the Court rejected the argument that the defendant had "'fair warning'" of an increased sentence simply "because Florida's sentencing statute 'on its face provide[d] for continuous review and recommendation of changes to'" the state statutory guidelines. 482 U.S. at 430-431 (citation omitted). But the Court in Miller had no occasion to address, and did not address, whether a defendant has "fair warning" when, as here, the defendant undertakes a further criminal act that is considered for sentencing purposes to be part of a related course of criminal conduct, at a time when increased Guidelines have already gone into effect and the sentencing consequences are apparent.

b. Petitioner identifies (Pet. 14) only a single circuit -- the Ninth Circuit, in United States v. Ortland, 109 F.3d 539, cert. denied, 522 U.S. 851 (1997) -- that has held that application of the one-book rule to grouped offenses violates the Ex Post Facto Clause. The decision in Ortland, however, pre-dates many other circuits' consideration of the issue. As discussed above, see p. 14 & n.3, supra, other circuits that have applied the Ex Post Facto Clause to situations like the one in Peugh have nevertheless held that application of the one-book rule in a situation like the one in this case does not violate that Clause. See, e.g., United States v. Hallahan, 744 F.3d 497, 514 (7th Cir. 2014) (reaffirming

prior circuit precedent on this issue after Peugh). The overwhelming weight of circuit authority on this issue may lead the Ninth Circuit to revisit its outlier rule in the future.

Furthermore, even assuming application of the Ex Post Facto Clause to the one-book rule otherwise warranted this Court's review, this case would be an unsuitable vehicle for addressing it. Because petitioner did not preserve any ex post facto objection in the district court, review in this case would be for plain error. Pet. App. A45; see Fed. R. Crim. P. 52(b). To prevail on plain-error review, petitioner would have to show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted). In light of the considerable number of circuits that have concluded that application of the one-book rule in a case like this does not violate the Ex Post Facto Clause, petitioner would not be able to show that any error here was plain. See United States v. Williams, 469 F.3d 963, 966 (11th Cir. 2006) (per curiam) (no plain error where there is no controlling case law and circuits are split); United States v. Teague, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006). Furthermore, the district court's decision to impose a "nonguideline sentence," C.A. App. 658 (sentencing transcript),

would make it difficult for him to show the necessary prejudice under the third and fourth plain-error elements.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

JOCELYN SAMUELS
Acting Assistant Attorney General

DENNIS J. DIMSEY
NATHANIEL S. POLLOCK
Attorneys

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