No. 18-274

# In the Supreme Court of the United States

MICHAEL JAY STEWART, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the district court's instructions in this case correctly conveyed the materiality element of mail fraud under 18 U.S.C. 1341.

2. Whether, in calculating a defendant's sentencing range under the advisory Sentencing Guidelines, a district court may consider losses caused by relevant conduct that occurred outside the statute of limitations.

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### OPINION BELOW

The decision of the court of appeals (Pet. App. 1-8) is not published in the Federal Reporter but is reprinted at 728 Fed. Appx. 651.

### JURISDICTION

The judgment of the court of appeals was entered on March 27, 2018. A petition for rehearing was denied on June 5, 2018 (Pet. App. 9). The petition for a writ of certiorari was filed on August 29, 2018. 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 Central District of California, petitioner was convicted on 11 counts of mail fraud, in violation of 18 U.S.C. 1341. Judgment 1. The court sentenced petitioner to 168 months of imprisonment, to be followed by

three years of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. 1-8.

1. From 1999 through 2009, petitioner and his business partner, John Packard, jointly owned and operated Pacific Property Assets (PPA), which, through a variety of holding companies and limited liability corporations, purchased, renovated, rented, refinanced, and sold real estate. Presentence Investigation Report (PSR) ¶¶ 7-11. PPA secured funding for its real estate ventures from five primary sources: (1) mortgages on its properties, (2) proceeds from bank refinancings, (3) earnings from the sale of properties, (4) rent from apartment residents, and (5) income from individual investor loans. PSR ¶ 12. Petitioner was primarily responsible for raising funds from individual investors. PSR ¶ 13.

Because PPA's business model relied on consistent increases in the value of its properties, the company began to struggle as the real estate market faltered in 2007. PSR ¶ 18. By November 2007, petitioner and Packard were unable to raise money from further refinancings or to generate any significant profit on property sales. PSR ¶ 19. By the end of that year, PPA's net loss exceeded $13 million. PSR ¶ 20. The company's financial situation continued to deteriorate in the following months, as the burgeoning credit crisis precluded PPA from taking out substantial bank loans. *Ibid.* Thus, by early 2008, PPA relied almost entirely on new loans from individual investors to cover its expenses. PSR ¶¶ 20-21.

Petitioner engaged in a number of fraudulent activities to keep attracting new money from investors despite PPA's ailing condition. For example, in June 2008, petitioner and Packard temporarily put $2 million into PPA accounts to ensure that the month-end balance

sheet would reflect a strong cash balance. PSR ¶ 22. By late August, the partners pulled out the full amount they had contributed. PSR ¶ 23. But PPA continued to use the financial snapshot from June 30—in which the temporary $2 million infusion constituted half of the company's $4 million cash balance—in private placement memoranda sent to potential investors in October and December of 2008 and January of 2009. PSR ¶¶ 22, 29, 37.

In total, PPA conducted a series of ten offerings of promissory notes over the course of 2008 and the first four months of 2009, raising tens of millions of dollars from hundreds of investors. PSR ¶ 26. Despite the fact that PPA was paying more than $3 million in expenses every month against less than $1 million in income, PSR ¶ 24, petitioner continued to represent to current and prospective investors that the company's financial position was strong, PSR ¶ 27. Petitioner and Packard further represented that individual investor money would be used "to acquire, renovate and operate additional workforce level apartment properties," when in reality those funds were earmarked for, *inter alia*, making monthly payments to banks, covering PPA's operating expenses, and paying petitioner and Packard. PSR ¶¶ 29-30.

Petitioner continued to raise funds from investors through April 24, 2009. PSR ¶ 31. One week later, however, he and Packard informed investors that they would no longer be making monthly payments on individual investors' loans. PSR ¶ 28. By the end of June, PPA was bankrupt. PSR ¶ 33.

2. A federal grand jury charged petitioner and Packard with 11 counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of bank fraud, in violation

of 18 U.S.C. 1344; one count of fraudulent concealment of bankruptcy assets, in violation of 18 U.S.C. 152(7); and one count of fraudulent transfer of bankruptcy assets, in violation of 18 U.S.C. 152(1). Indictment 1-18. Packard pleaded guilty to a single count of mail fraud. D. Ct. Doc. 60 (Nov. 6, 2014). Petitioner went to trial on the mail fraud charges, and the government voluntarily dismissed the remaining counts of the indictment. D. Ct. Doc. 156 (Aug. 7, 2015).

Consistent with the Ninth Circuit's Model Jury Instructions, the district court instructed jurors that, to qualify as mail fraud, "statements made or facts omitted as part of the scheme [must be] material," defined to mean that "they had a natural tendency to influence, or were capable of influencing, a person to part with money or property." Jury Instruction No. 14. The court also instructed the jury that, "[i]n determining whether the defendant knowingly participated in or devised a scheme or plan to defraud, * * * it is immaterial whether only the most gullible or negligent would have been deceived by the defendant's scheme," because "[t]he mail fraud statute is designed to protect the naive and careless as well as the experienced and careful." Jury Instruction No. 15. Petitioner objected to Instruction No. 15 on the ground that an investor's "failure to even look at [the private placement memorandum] would seem to me to be directly relevant to whether or not there is a scheme at all." Gov't C.A. Br. 39 (citation omitted). The court overruled that objection, explaining that the purpose of the instruction was to make clear that, in contrast to the civil context, reasonable reliance was not required for conviction under the mail fraud statute. *Id.* at 39-40.

Petitioner was convicted on all 11 counts of mail fraud. Verdict Form 1-5. At sentencing, the district court rejected petitioner's assertion that the Probation Office had incorrectly included, in its calculation of the amount of loss attributable to petitioner's misconduct under Sentencing Guidelines § 2B1.1(b)(1) (2015), losses incurred beyond the statute of limitations. The court sentenced petitioner to 168 months of imprisonment. Judgment 2.

3. The court of appeals affirmed. Pet. App. 1-8. As relevant here, the court determined that the district court had not erred in giving Instruction No. 15 because "[t]he Government is not required to prove that a 'scheme to defraud was reasonably calculated to deceive persons of ordinary prudence and comprehension.'" Pet. App. 2 (quoting *United States* v. *Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000)).

The court of appeals also rejected petitioner's argument that, in calculating the loss amount under Sentencing Guidelines § 2B1.1(b)(1) (2015), a court may not take account of losses attributable to "relevant conduct" that occurred outside the statute of limitations. Pet. App. 6. The court of appeals explained that petitioner's argument was inconsistent with its prior holding in *United States* v. *Williams*, 217 F.3d 751 (9th Cir.), cert. denied, 531 U.S. 1001 (2000), which held that a "district court may consider as relevant conduct for sentencing purposes actions which may be barred from prosecution by the applicable statute of limitations," *id.* at 754. See Pet. App. 6.

**ARGUMENT**

Petitioner contends (Pet. 11) that the district court's jury instructions erred by failing to convey that false or fraudulent statements are punishable as mail fraud only

if they would have deceived a "reasonably prudent victim." No court of appeals requires such instructions. Instead, the courts of appeals, including the court below, properly adhere to the definition of materiality articulated by this Court in *Neder* v. *United States*, 527 U.S. 1 (1999).

Petitioner further contends (Pet. 23-27) that the district court, by taking into account at sentencing losses resulting from relevant conduct outside the statute of limitations, violated his rights under the Fifth and Sixth Amendments and contravened 18 U.S.C. 3282. No court of appeals has accepted petitioner's argument, which is foreclosed both by statute and by longstanding precedent of this Court. Further review is unwarranted.

1. a. Under the federal mail fraud statute, it is unlawful to use the mails to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. In *Neder*, the Court concluded that Congress intended to incorporate into the mail and wire fraud statutes the common law requirement of materiality. 527 U.S. at 20-25. The Court further determined that "a false statement is material if it has 'a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Id.* at 16 (quoting *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995)) (brackets omitted); cf. *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016) (same under False Claims Act); *Kungys* v. *United States*, 485 U.S. 759, 770-772 (1988) (same for naturalization fraud under 8 U.S.C. 1451(a)).

*Neder* incorporated into this formulation the two-part, disjunctive common law definition, as articulated

in the Restatement of Torts, which provides that a matter is material if:

> "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; *or*
>
> "(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it."

527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts (Restatement) § 538(2) (1977)) (emphasis added). Thus, a misrepresentation has "a natural tendency to influence, or is capable of influencing" the decisionmaker if it would influence a reasonable person in the decisionmaker's shoes, or if the defendant had reason to believe that it would influence the particular decisionmaker to whom it was addressed. *Id.* at 16 (brackets and citation omitted).

Consistent with that understanding, the Ninth Circuit's Model Jury Instructions adopt nearly verbatim the *Neder* formulation of materiality: "[S]tatements made or facts omitted were material" if "they had a natural tendency to influence, or were capable of influencing, a person to part with money or property." Ninth Circuit Manual of Model Jury Instructions (Criminal) § 8.121 (2010 ed.) (Ninth Circuit Manual). That instruction was given in petitioner's case; petitioner did not object to it; and he does not challenge it in this Court. He also acknowledges (Pet. 20) that the *Neder* formulation incorporates the "two potential definitions of materiality" contained in the Restatement—namely, whether "a reasonable man would attach importance" to the stated

or omitted facts (the "reasonable-person inquiry"), and whether the recipient "is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it" (the "recipient inquiry"). *Neder*, 527 U.S. at 22 n.5 (citation omitted); see *Gaudin*, 515 U.S. at 512.

Petitioner nevertheless asserts (Pet. 21) that the recipient inquiry "does not apply to an omissions theory of fraud because it requires a representation." In petitioner's view (Pet. 22), the district court should have instructed the jury to evaluate his alleged omissions under the reasonable-person inquiry only.

As a threshold matter, to the extent petitioner faults "[t]he materiality instruction given in this case" for not "includ[ing] a reasonable person standard," Pet. 22, he never raised such an objection in the district court and overlooks that the *Neder* formulation replicated in the instructions here inherently incorporates that standard, see *Neder*, 527 U.S. at 22 & n.5. And to the extent petitioner objects to the use of the *Neder* formulation because it also inherently incorporates the disjunctive recipient inquiry, see *ibid.*, he is effectively reasserting an argument he made below about the instructions on liability for omissions, which was rejected on plain-error grounds. See Pet. App. 4.

As petitioner himself acknowledges (Pet. 21 n.1), the recipient inquiry may "apply to an omissions theory of fraud if the defendant maintained a fiduciary relationship with the victim." The same chapter of the Restatement that furnishes the two-pronged definition of materiality quoted in *Neder* provides that "[n]ondisclosure" is actionable when relations between the contracting parties—or the known expectations of the recipient party—give rise to a duty to disclose. See Restatement

§ 551. The Ninth Circuit's Model Jury Instructions impose a substantially similar predicate requirement:

> To convict defendant[s] of mail fraud based on omission[s] of material fact[s], you must find that defendant[s] had a duty to disclose the omitted fact[s] arising out of a relationship of trust. That duty can arise either out of a formal fiduciary relationship, or an informal, trusting relationship in which one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise.

Ninth Circuit Manual § 8.121.

Petitioner's basic objection, therefore, is not to the use of the recipient inquiry in omission cases generally, but to its use in *his* case—where, as he correctly notes (Pet. 21 n.1), the district court "did not require the jury to find such a fiduciary relationship." He raised the absence of such an instruction as a separate claim below, and the court of appeals recognized that it was error. Pet. App. 4 ("[T]he trial court clearly and obviously erred in not instructing the jury on the requirement of a duty to disclose."). But because petitioner concededly "did not request such an instruction in the district court," appellate "review [wa]s for plain error" only. Gov't C.A. Br. 33; see Pet. App. 4. And on plain-error review, the court of appeals determined that the district court's instructional error "did not affect [petitioner's] substantial rights" because, *inter alia*, the government's case had relied on "numerous false statements to investors"; the record reflected "an informal, trusting relationship between [petitioner] and investors"; and many of the representations could "be categorized as 'half-truths' * * * rather than pure omissions." Pet. App. 4. Petitioner's omission-focused argument about

the materiality instruction is thus inextricably intertwined with a claim that he failed to raise in the district court and that the court of appeals rejected. The court of appeals also rejected his claim that "the cumulative effect of the alleged errors * * * requires reversal of his conviction," finding "overwhelming evidence of [his] guilt." Pet. App. 4-5. Petitioner does not explicitly reraise either claim here, and review of his materiality argument on a stylized version of the facts is not warranted. Even if the court of appeals miscalculated the degree to which omissions were part of the prosecution's theory, that factbound determination would not merit this Court's review.

Petitioner also errs in suggesting (*e.g.*, Pet. 22) that the district court misstated the materiality standard by instructing the jury that the level of sophistication of petitioners' investors—namely, whether they were so gullible or negligent as to be "deceived" by schemes that more prudent investors might have ferreted out—was "immaterial" to "whether the defendant knowingly participated in or devised a scheme or plan to defraud." Jury Instruction No. 15. Petitioner's argument misapprehends the relationship between Instruction No. 14 (setting out the elements of mail fraud and defining materiality) and Instruction No. 15 (including "gullible or negligent" investors within the protective ambit of the mail fraud statute). The district court stated that the purpose of Instruction No. 15 was to make clear that *reasonable reliance* was not required here if petitioner in fact made false representations. See Gov't C.A. Br. 40. That instruction followed petitioner's attempts, in the proceedings below, to disclaim any "scheme to defraud" (*ibid.*) on the theory that no investor had meaningfully reviewed the various disclaimers recited in

PPA's private placement memoranda. See *id.* at 39 (petitioner argued that "a victim's failure to even look at [the memorandum] would seem to me to be directly relevant to whether or not there is a scheme at all") (brackets and citation omitted); *id.* at 40 n.11 ("[Petitioner] cross-examined several victims regarding their failure to appreciate the supposed risks of investing in PPA.").

Contrary to petitioner's objections below, however, reliance is not an element of mail fraud. See, *e.g.*, *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 648 (2008) ("Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud * * * even if no one relied on any misrepresentation."). Nor can a fraudster escape liability merely because a reasonable or prudent investor *might have* discovered that his representations were false, and thus his fraudulent scheme might not have succeeded, or because the victims of his crime were gullible or negligent investors who failed to identify his falsehoods. See *Neder*, 527 U.S. at 24-25 ("The common-law requirements of 'justifiable reliance' and 'damages' * * * plainly have no place in the federal fraud statutes."); cf. *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.) (finding "no intention on the part of Congress to differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity"), cert. denied, 446 U.S. 919 (1980). Petitioner thus acknowledged prior to trial that investors' "negligen[ce] or gullib[ility] in giving their money to [him] * * * would not be a defense." Gov't C.A. Br. 40 n.11. And the district court did not err in instructing the jury that such lack of sophistication would not provide a basis for acquittal.

b. Petitioner asserts (Pet. 15-18) that "confusion" exists among the courts of appeals on the definition of

materiality, but that is incorrect. Every court of appeals with criminal jurisdiction has determined, consistent with *Neder*, that false statements are "material" under the fraud statutes if they are capable of influencing the decision or outcome at issue. See, *e.g.*, *United States* v. *Prieto*, 812 F.3d 6, 13 (1st Cir.), cert. denied, 137 S. Ct. 127 (2016); *United States* v. *Corsey*, 723 F.3d 366, 373 (2d Cir. 2013) (per curiam); *United States* v. *Riley*, 621 F.3d 312, 332 (3d Cir. 2010); *United States* v. *Wynn*, 684 F.3d 473, 479-480 (4th Cir. 2012); *United States* v. *Lucas*, 516 F.3d 316, 342 & n.104 (5th Cir.), cert. denied, 555 U.S. 822 (2008); *United States* v. *McAuliffe*, 490 F.3d 526, 531 (6th Cir.), cert. denied, 552 F.3d 976 (2007); *United States* v. *Seidling*, 737 F.3d 1155, 1160 (7th Cir. 2013); *Preston* v. *United States*, 312 F.3d 959, 961 & n.3 (8th Cir. 2002) (per curiam); *United States* v. *Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004); *United States* v. *Lawrence*, 405 F.3d 888, 901 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Clay*, 832 F.3d 1259, 1309 (11th Cir. 2016), cert. denied, 137 S. Ct. 1814 (2017); *United States* v. *Stadd*, 636 F.3d 630, 638 (D.C. Cir. 2011) (noting that "*Neder*'s definition is of course the accepted definition of materiality," and citing cases from ten other circuits).

The only post-*Neder* cases cited by petitioner (Pet. 15) are not to the contrary. None of those decisions turned on the difference between the fraud's effect on a gullible or vulnerable victim, as opposed to its effect on a reasonably prudent decisionmaker. The cases cited by petitioner involved convictions based on evidence that the defendant had made misstatements to which a reasonable person would have attached importance. In addressing that ground for conviction, they did not reject liability based on the alternative ground identified

in *Neder*—a misstatement that was known to be significant to the intended victim, although not to a reasonable decisionmaker. Nor did they reject the use of an instruction, like Jury Instruction No. 15, that permits conviction where a "gullible or negligent" victim has been deceived.

In *United States* v. *Raza*, 876 F.3d 604 (2017), cert. denied, 138 S. Ct. 2679 (2018), for instance, the Fourth Circuit affirmed a conviction for wire fraud that was based on evidence that satisfied a reasonable-person inquiry. *Id.* at 621. But the court also noted that it had held, following *Neder*, that a victim's "fail[ure] to perform an adequate due diligence investigation" was not a valid defense because "'the susceptibility of the victim of the fraud * * * is irrelevant to the analysis,'" *id.* at 618 (quoting *United States* v. *Colton*, 231 F.3d 890, 903 (4th Cir. 2000)), illustrating that the court saw no contradiction between those principles.

Nor did the other decisions relied upon by petitioner adopt a reasonable-prudence requirement for all fraud prosecutions. In *United States* v. *Litvak*, 889 F.3d 56, (2018), the Second Circuit approved the district court's decision to allow "counterparty traders [to] testify to 'their own point of view'" regarding whether "they considered appellant's misstatements to be an important factor, among others, in their investment decisions," explaining that such testimony could help show "a nexus between a particular trader's viewpoint and that of the mainstream thinking of investors in that market." *Id.* at 65 (citation omitted). But the Second Circuit did not hold that the defendant's misstatements would not have been material if the counterparties he deceived had been gullible. Nor did the court otherwise discuss that issue. See *United States* v. *Williams*, 865 F.3d 1302,

1314 (10th Cir.), cert. denied, 138 S. Ct. 567 (2017) (affirming conviction for bank fraud based on a finding that "[t]he bank would have denied [the defendant] a loan had it known his true identity and financial state," but not discussing the victim's vulnerability); *United States* v. *Betts-Gaston*, 860 F.3d 525, 532 (7th Cir. 2017), cert. denied, 138 S. Ct. 689 (2018) (upholding the district court's decision to preclude the defendant from introducing evidence "that the lenders involved * * * routinely behaved unreasonably").

Finally, in *United States* v. *Jamieson*, 427 F.3d 394 (2005), cert. denied, 547 U.S. 1218 (2006), the Sixth Circuit upheld a materiality instruction, similar to the Ninth Circuit's, instructing the jury that a misrepresentation would be material if it "'had the potential or capability' to influence the action of or be relied upon by the investors." *Id.* at 416. In the context of discussing whether a misstatement would deceive a hypothetical victim, the court stated that it would do so if it was "reasonably calculated to deceive persons of ordinary prudence and comprehension." *Id.* at 415 (citation omitted). Again, the court did not consider whether a misstatement might be material if it was aimed at a nonprudent victim whom the defendant had reason to know would have been affected by it.

Petitioner's assertion (Pet. 15) that those decisions demonstrate "confusion" concerning the standard for establishing materiality in cases involving omissions thus rests on a false dichotomy. A rule that a statement or omission *is* material if it is capable of influencing the intended victim is entirely consistent with a rule that a statement or omission *may also be* material if it is capable of influencing a reasonable decisionmaker. The Restatement is explicit on that point: *Either* finding is

enough to prove materiality. See Restatement § 538; see also *Neder*, 527 U.S. at 22 n.5. As courts of appeals have explained, "[p]roof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty." *United States* v. *Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009) (en banc) (emphasis added), cert. denied, 559 U.S. 1009 (2010); see *United States* v. *Davis*, 226 F.3d 346, 358-359 (5th Cir. 2000) (a misstatement is material "if a reasonable person would rely on it" or "if the maker knew or had reason to know his victim was likely so to rely"), cert. denied, 531 U.S. 1181 (2001); *Brien*, 617 F.2d at 311 (finding "no intention on the part of Congress to differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity"); see also Restatement § 538 cmt. f ("One who practices upon another's known idiosyncrasies cannot complain if he is held liable when he is successful in what he is endeavoring to accomplish.").

c. In any event, this case would be a poor vehicle in which to determine what instructions a jury should be given about materiality. Petitioner argued for the first time on appeal that the jury instructions were faulty because they permitted conviction for misstatements that would have deceived only the gullible. See Gov't C.A. Br. 40 (explaining forfeiture); see also Pet. App. 2 ("Assuming without deciding that [petitioner] preserved error with respect to his challenge to Instruction No. 15"). And petitioner also waived any challenge to the application of that standard to omissions in particular. Compare Pet. App. 3 (applying "plain error" to petitioner's

argument that the district court erred "in failing to instruct the jury that it must find [he] had a fiduciary duty or other similar duty to disclose in order to convict him on an omissions theory of fraud"), with Pet. 21 (arguing that the recipient inquiry "does not apply to an omissions theory of fraud"). If petitioner were correct (Pet. 13) that a genuine circuit conflict does exist regarding the materiality element in several of "the most frequently prosecuted federal offenses," then the Court will have the opportunity to address it in a case in which the defendant took a consistent position about what the jury should be instructed.

2. Petitioner separately argues that this Court should also grant review to consider "whether conduct beyond the statute of limitations can be used to increase a defendant's Sentencing Guidelines range." Pet. 23 (emphasis omitted). He acknowledges (*ibid.*) that "[a]ll of the circuits to address the issue agree with the Ninth Circuit that time-barred conduct can be used to increase a defendant's guidelines calculations."[*] But, relying on this Court's recent decision in *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017), he argues (Pet. 23, 25) that "[t]he approach taken by the lower courts is inconsistent with this Court's precedent," with "the Fifth and Sixth

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[*] See, *e.g.*, *United States* v. *Williams*, 217 F.3d 751, 754 (9th Cir.), cert. denied, 531 U.S. 1001 (2000); *United States* v. *Stephens*, 198 F.3d 389, 390-391 (3d Cir. 1999) (Alito, J.); *United States* v. *Matthews*, 116 F.3d 305, 307-308 (7th Cir. 1997); *United States* v. *Behr*, 93 F.3d 764, 765-766 (11th Cir. 1996) (per curiam); *United States* v. *Silkowski*, 32 F.3d 682, 687-688 (2d Cir. 1994); *United States* v. *Neighbors*, 23 F.3d 306, 311 (10th Cir. 1994); *United States* v. *Pierce*, 17 F.3d 146, 150 (6th Cir. 1994); *United States* v. *Wishnefsky*, 7 F.3d 254, 257 (D.C. Cir. 1993); *United States* v. *Lokey*, 945 F.2d 825, 840 (5th Cir. 1991).

Amendments," and with "the plain language in [18 U.S.C.] 3282." Petitioner's argument lacks merit.

a. A district court may, consistent with the Fifth and Sixth Amendments, "consider the widest possible breadth of information about a defendant" when selecting an appropriate sentence. *Pepper* v. *United States*, 562 U.S. 476, 488 (2011). That principle applies with special force to the consideration of facts used to determine the recommended range of imprisonment under the advisory Sentencing Guidelines. Although the Sixth Amendment requires that, other than the fact of a prior conviction, "any fact that increase[s] the prescribed statutory maximum sentence" or the statutory "minimum sentence" for an offense "must be submitted to the jury and found beyond a reasonable doubt," *Alleyne* v. *United States*, 570 U.S. 99, 106, 108 (2013), judges have broad discretion to engage in factfinding to determine an appropriate sentence *within* a statutorily authorized range, see *id.* at 116 ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."). Petitioner cites no authority to support his assertion that, contrary to this Court's uniform understanding, the district court's consideration of losses incurred outside the applicable statute of limitations was unconstitutional.

b. Petitioner contends (Pet. 25) that considering conduct outside the limitations period conflicts with "the plain language in [18 U.S.C.] 3282," but that argument is likewise unfounded. Section 3282(a) provides that "no person shall be prosecuted, tried, or punished

for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." Petitioner's argument thus depends on the premise that he is being "punished" for "offense[s]" that are time-barred under Section 3282.

As this Court has explained on multiple occasions, however, "where the legislature has authorized * * * a particular [statutory] punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction." *Witte* v. *United States*, 515 U.S. 389, 403-404 (1995); see *United States* v. *Watts*, 519 U.S. 148, 154-155 (1997) (per curiam). Here, petitioner's statutory penalty range was fixed according to his offenses of conviction, which undisputedly took place within the limitations period set by 18 U.S.C. 3282. Variation within that range—based on factors as diverse as petitioner's criminal history, his prospective dangerousness, his culpability and contrition, and the full scope of harm he has caused—does not alter the fact that any punishment petitioner receives is for his offenses of conviction, all of which occurred within the limitations period.

Indeed, even if 18 U.S.C. 3282 were ambiguous on that point, Congress has expressly provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a district court "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Petitioner's argument that Congress has sought to limit the consideration of his conduct at sentencing is inconsistent with that instruction as well. Nor, contrary to petitioner's suggestion (Pet. 25), could or do the Guidelines themselves limit the

scope of Section 3661. And to the extent petitioner would suggest that the Guidelines do not permit consideration of loss amounts outside the limitations period, that Guidelines-interpretation claim would not warrant this Court's review. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991).

c. This Court's decision in *Kokesh*, *supra*, does not support petitioner's argument here. In that case, the Court construed the statute of limitations for certain SEC civil enforcement actions, 28 U.S.C. 2462, which provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." The Court held that a disgorgement order incident to an SEC enforcement action "constitutes a penalty within the meaning of § 2462." *Kokesh*, 137 S. Ct. at 1643. The Court did not address any constitutional question, did not purport to interpret 18 U.S.C. 3661, and did not suggest that its decision would affect or unsettle longstanding criminal sentencing law.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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