No. 18-274

In The
Supreme Court of the United States

MICHAEL JAY STEWART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner respectfully submits this reply to the Brief for the United States in Opposition ("Gov. Br."). With respect to the first question presented, the government's brief and citations manifest the confusion that has resulted after *Neder v. United States*, 527 U.S. 1 (1999). The lower courts (and the government here) have confused *Neder*'s discussion of materiality as to the false statements tax offense in the case with its separate discussion of materiality for mail and wire fraud. Gov. Br. 6, 12. Although the government's brief perpetuates this confusion, it ultimately agrees that the standard for materiality under the federal fraud statutes is set forth in footnote five of *Neder*. *Id.* at 6-7. The challenged "gullible or negligent" jury instruction given in this case was flatly inconsistent with the first prong of the *Neder* definition, and nothing in the jury instructions explained the second prong of the *Neder* definition or otherwise cabined the disputed instruction to the second prong. Although the government attempts to deflect with contentions that petitioner did not object to *other* instructions given by the district court, petitioner objected to the "gullible or negligent" instruction, and the court of appeals reviewed his claim *de novo*. App. 2. The government does not contend that this instructional error was harmless beyond a reasonable doubt, making this case an excellent vehicle for review.

As for the second question presented regarding the use of time-barred conduct to enhance a defendant's Sentencing Guidelines, the government primarily

relies on 18 U.S.C. § 3661 and cases like *United States v. Watts*, 519 U.S. 148 (1997). Gov. Br. 18-19. However, § 3661 does not answer the question presented, and *Watts* focused on the Double Jeopardy Clause and had nothing to do with time-barred conduct and the meaning of 18 U.S.C. § 3282. The government implicitly acknowledges that this petition cleanly presents this important federal sentencing question for review.

ARGUMENT

I. Petitioner objected to the challenged instruction, the instruction was flawed under *Neder*, and the government does not argue that the error was harmless beyond a reasonable doubt, making this case an excellent vehicle for review.

The government claims that there is no confusion after *Neder*, but the government's analysis and citations demonstrate otherwise. *Neder* involved *two* questions presented in the context of *two* different sets of statutes that were analyzed separately. *See Neder*, 527 U.S. at 6-7. The defendant in *Neder* was convicted of: (1) false statements on his tax return in violation of 26 U.S.C. § 7206(1); and (2) mail, wire, and bank fraud. *Id.* at 6. This Court analyzed the false statement tax charges separately, *id.* at 8-19, from the fraud charges. *Id.* at 20-25.

In discussing the tax charges, this Court recited the established definition of materiality for false

statements offenses: "a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* at 16. However, this Court recited a different standard for materiality in its separate discussion of the fraud statutes. As mentioned, this Court quoted the definition of materiality from the Restatement (Second) of Torts. *Id.* at 22 n.5 ("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").

In claiming that there is no confusion, the government provides a long string cite to cases that have generally articulated the false statements standard for materiality in the fraud context. Gov. Br. 12. Some of these cases have erroneously relied on the materiality discussion in the false statements section of *Neder*, 527 U.S. at 16, to articulate the materiality standard for fraud. *See, e.g.*, *United States v. Prieto*, 812 F.3d 6, 13 (1st Cir. 2016); *United States v. Corsey*, 723 F.3d 366, 373 (2d Cir. 2013). The government itself does so in its brief. Gov. Br. 6. And, as the government notes, model jury instructions continue to make this mistake, *id.* at 7, further demonstrating the confusion. There are significant differences between the footnote five standard for materiality and the false statements standard, including that both prongs of the footnote five standard

require the misrepresentation to be *important* to the recipient, not merely capable of influencing a decision.

Ultimately, the government appears to concede that the footnote five definition of materiality applies in the fraud context. Gov. Br. 7. Under that standard, the "gullible or negligent" instruction given in this case was erroneous because it was inconsistent with the first prong of the footnote five definition, which requires a reasonable person standard. The instruction was also inconsistent with the "bespeaks caution doctrine," *In re Donald J. Trump Casino Securities Litigation – Taj Mahal Litigation*, 7 F.3d 357, 371-72 (3d Cir. 1993), which the government does not dispute was applicable, and requires a reasonable investor standard. *See, e.g.*, *Rombach v. Chang*, 355 F.3d 164, 173-74 (2d Cir. 2004); *United States v. Morris*, 80 F.3d 1151, 1167 (7th Cir. 1996). Even if, despite the "bespeaks caution doctrine," the second prong of the footnote five definition were applicable, the jury instructions failed to clarify that petitioner had to know that an unreasonable or "negligent" victim considered the matter important, which is required to establish materiality under the second prong.

The government contends that the instruction was intended "to make clear that reasonable reliance was not required." Gov. Br. 10-11. Nothing in the instruction mentioned "reliance," and the instruction went much further, telling the jurors that "it is immaterial whether only the most gullible or negligent would have been deceived by the defendant's scheme." Negligence was not "immaterial," as it was relevant to the first

prong of the footnote five definition. Even if the district court's intent was only to explain that reliance is not required, the relevant standard for instructional error is how the jury would have interpreted the instruction, not what a court may have intended to convey with the instruction. *See Sandstrom v. Montana*, 442 U.S. 510, 514-17 (1979). Whatever the district court's intent, the disputed instruction corrupted the requisite materiality standard.

Faced with instructional error, the government contends that this Court should deny review because petitioner did not adequately object in the district court, focusing on the fact that petitioner did not object to the instructions' defective explanation of an omissions theory of fraud. Gov. Br. 8-10, 15-16. Petitioner, however, explicitly objected to the instruction that is the focus of this petition, emphasizing the error with the "negligent" language, which was sufficient to preserve the issue. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 707 n.10 (2005) (argument on appeal did "not mirror" argument in district court but was "sufficient to comply with Rule 30(d)"). Indeed, although the government urged plain error review as to this particular instruction, the court of appeals reviewed this instruction *de novo*. App. 2.

In sum, this case is not a "poor vehicle" to resolve the confusion regarding the materiality standard under the federal fraud statutes. Gov. Br. 15. To the contrary, this case comes to this Court after a specific objection to the disputed instruction in the district court and *de novo* review by the court of appeals.

Furthermore, the government did not argue harmless error below as to this particular instructional error and does not contend that the error was harmless in its opposition to this petition, making this case an excellent vehicle for review.

II. On the second question presented, the government erroneously relies on 18 U.S.C. § 3661, and this Court has not resolved the question presented.

The government contends that "even if 18 U.S.C. § 3282 were ambiguous" about using time-barred conduct to increase a defendant's Sentencing Guidelines range, any ambiguity is clarified by 18 U.S.C. § 3661, which places no limits on the conduct that a court may consider in imposing a sentence. Gov. Br. 18. Section 3661 states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person *convicted* of an offense which a court of the United States may receive and consider for the purpose of imposing an *appropriate* sentence." 18 U.S.C. § 3661 (emphases added).

Thus, the statute specifically mentions "a person *convicted* of an offense[,]" and that language should be given some meaning and not rendered mere surplusage. In other words, there is a textual basis for concluding that § 3661 does not give a court carte blanche to consider time-barred conduct. Furthermore, the statute assumes the purpose of imposing an "appropriate" sentence, and the question presented is whether and

to what extent time-barred conduct can be used appropriately. There are limitations on the information that a sentencing court can consider. For example, a sentencing court cannot consider a defendant's race, sex, or national origin in determining a sentence. *See* 28 U.S.C. § 994(d). Section 3661 should be considered in conjunction with other parts of the statutory scheme, and this Court can interpret the scheme as limiting the consideration of time-barred conduct so as to render it consistent with § 3282.

Furthermore, even if a sentencing court can *consider* time-barred conduct under § 3661, that does not mean that such conduct can be relied upon to *determine* a defendant's Sentencing Guidelines range. The government ignores U.S.S.G. § 1B1.4, which states that § 3661 is meant to govern the information that a court can consider when determining a sentence *within* a guidelines range, not the information that a court can consider in calculating the range. *See* U.S.S.G. § 1B1.4 comment. and Background.

Despite the government contention, Gov. Br. 18-19, this Court's precedent has not resolved the issue and does not suggest that review is inappropriate. Time-barred conduct was not at issue in *Witte v. United States*, 515 U.S. 389, 403-04 (1995) and *United States v. Watts*, 519 U.S. 148 (1997), which only focused on the Double Jeopardy Clause. *See United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). Nor does *Braxton v. United States*, 500 U.S. 344, 348-49 (1991) suggest that review is not warranted. *Braxton* declined to consider a Sentencing Guidelines issue because the Sentencing

Commission was considering amendments to the provision. Here, the question presented implicates a federal statute, 18 U.S.C. § 3282, not just the Sentencing Guidelines, and the Commission is not currently considering the issue.

Finally, while this Court has not yet held that the Fifth and Sixth Amendments prohibit consideration of acquitted conduct (time-barred conduct would require a defendant to be acquitted) to increase a defendant's Sentencing Guidelines, Gov. Br. 17-18, several jurists have urged it do so. *See, e.g.*, *United States v. Bell*, 808 F.3d 926, 927-32 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing *en banc*); *United States v. White*, 551 F.3d 381, 386-97 (6th Cir. 2008) (*en banc*) (Merritt, J., dissenting); *United States v. Mercado*, 474 F.3d 654, 658-65 (9th Cir. 2007) (Fletcher, J., dissenting). Time-barred conduct is particularly problematic because just as delay can often frustrate a defendant's ability to defend himself at trial, it can have the same effect at sentencing. Ultimately, the constitutional question can be avoided by interpreting § 3282 and the entire statutory scheme to prohibit use of time-barred conduct to increase a defendant's offense level under the guidelines. *Cf. United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Dated: December 14, 2018

Respectfully submitted,

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