

No. _____

In the Supreme Court of the United States

October Term 2017

PATRICK LANIER, Petitioner

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In *Puckett v. United States*, 556 US 129, 135 (2009) this Court held that under the fourth prong of plain error review, “[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error ‘seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.’” 507 U.S. 725, 736 (1993). to meet that standard, is it necessary as the Fifth Circuit Court of appeals required in this case that the error be one that “...be reviewed only for a manifest miscarriage of justice” and necessitates reversal under Rule 52(b). [This issue has recently been argued before this Court in No. 16-9493, *Rosales-Mireles v. United States*].
2. Whether the written judgment—which conflicts with the oral pronouncement at sentencing and is obviously incorrect on the face—violates petitioner’s rights under the Eight Amendment and necessitates reversal under rule 52(b). In this case, the Criminal Monetary Penalties provision of the judgment orders restitution in the amount of \$37, 544, 944.16, but reflects losses of \$0.00.

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Petitioner Patrick Lanier respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on January 2, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES	1
FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	5
CERTIFICATE OF SERVICE	6
APPENDIX.....	7
<ul style="list-style-type: none">• <i>United States v. Lanier</i>, 879F.3d 141, (5th Cir. 2018)• Judgment of the Court of Appeals• Order on Petition for Rehearing• Judgment in a Criminal Case (District Court)• Transcript of Sentencing Hearing• Statement of Reasons	

TABLE OF AUTHORITIES

Cases

<i>Clark v. Memolo</i> , 174 F.2d 978, 980-981 (1949)	3
<i>Hicks v. United States</i> , 582 U.S. ____ (2017)	4
<i>Hill v. United States ex rel. Wampler</i> , 298 US 460, 464, 56 S.Ct. 760, 80 L.Ed. 1283 (1936)	3
<i>Paroline v. United States</i> , 572 U.S. ___, 134 S.Ct. 1710 (2014)	4
<i>Puckett v. United States</i> , 556 US 129, 135 (2009)	i
<i>Rosales-Mireles v. United States</i> , 850 F.3d 246 (5th Cir. 2017), cert. granted, No. 16-9493	i, 5
<i>Rupinski v. United States</i> , 4F.2d 17, 18 (6th Cir. 1925)	3
<i>United States v. Davis</i> , 690 F.3d 330, 336–37 (5th Cir. 2012) cert. denied 133 S.Ct. 1283, 185 L.Ed. 2d 216 (2013)	4
<i>United States v. Giaimis</i> , 574 Fed. Appx. 439 (5th Cir. 2014)	4
<i>United States v. Huor</i> , 852 F.3d 392, 404 (5th Cir. 2017)	3
<i>United States v. Lanier</i> , 879 F.3d 141, (5th Cir. 2018)	1
<i>United States v. Mudékunye</i> , 646 F.3d 281, 293 (5th Cir. 2011)	4
<i>United States v. Rollnick</i> , D.C. MD. Pa, 33 F.Supp. 863, 866 (M.D. Penn. 1940)	3
<i>United States v. Stevens</i> , 224 F.2d 866. (3rd Cir.)	3

Statutes

28 U.S.C. § 1254(1)	1
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Rules

FED. R. CRIM. P. 36	3
FED. R. CRIM. P. 52(b)	1
SUP. CT. R. 13.1	1

OPINION BELOW

On January 2, 2018, a panel of the Fifth Circuit Court of appeals entered its opinion affirming in part and reversing and remanding in part the judgment of the United States District Court for the Southern District of Texas. The opinion is reported as *United States v. Lanier*, 879 F.3d 141, (5th Cir. 2018). The motion for rehearing was denied February 8, 2018. A copy of the opinion and order denying the motion for rehearing are attached to this petition as an appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth circuit were entered January 2, 2019; the order denying the Motion for Rehearing was entered February 8, 2018. This Petition is filed with 90 days of the denial of the Motion for Rehearing. *See*, SUP. CT. R. 13.1 This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Federal Rule of Criminal Procedure 52(b) which provides “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” FED. R. CRIM. P. 52(b).

STATEMENT

Patrick Lanier was indicted and charged with conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349 (Count 1); wire fraud, in violation of 18 U.S.C. § 1343 (Counts 2–15); harboring and concealing a person from arrest, in violation of 18 U.S.C. § 1071 (Count 16); and assisting a federal offender, in violation of 18 U.S.C. § 3 (Count 17). A jury convicted him on each count save Count 14. Lanier received a sentence of 204 months in prison based on the fraud-related convictions and a concurrent 22-month sentence based on the Counts 16 and 17 convictions. The district court also sentenced him to three years of supervised release and ordered a \$1,600 special assessment and restitution in the amount of \$37,544,944.16. The court of appeals reversed the conviction for harboring and concealing (Count 16) and assisting a federal offender (Count 17), but otherwise affirmed the verdict.

The judgment entered by the district court was in obvious conflict with the Statement of Reasons. For example, the restitution order is in an amount inconsistent with the Presentence Investigation Report, which was never amended to reflect the amount ordered by the court. This created an apparent conflict between the Presentence Investigation Report and the Restitution Order, which lists no payees and zero losses. The judgment also reflects that Lanier was found guilty on January 27, 2014, instead of the correct date, February 27, 2014.

REASONS FOR GRANTING THE WRIT

A court speaks through its judgment which imports verity when collaterally attacked. If the entry is inaccurate there is only a remedy by motion in a direct proceeding in the same action to correct it to the end that it may speak the truth. FED. R. CRIM. P. 36; *Rupinski v. United States*, 4 F.2d 17, 18 (6th Cir. 1925). Until corrected in a direct proceeding the Court will close its ears to a claim that the written judgment is actually not the judgment of the Court. *Hill v. United States ex rel. Wampler*, 298 US 460, 464, 56 S.Ct. 760, 80 L.Ed. 1283 (1936); *Clark v. Memolo*, 174 F.2d 978, 980-981 (1949). Incorrect judgments are not per se void judgments subject to collateral attack. *United States v. Rollnick*, D.C. MD. Pa, 33 F.Supp. 863, 866 (M.D. Penn. 1940); *United States v. Stevens*, 224 F.2d 866. (3rd Cir.).

A careful reading of the Statement of Reasons and the Judgment compared to the oral pronouncement of the sentence in the full transcript of the sentencing hearing (attached as appendix) reveals that the trial court's oral pronouncement is in total conflict with the Statement of Reasons and the written judgment. The oral sentence is to be followed if not ambiguous, otherwise the entire record is to be reviewed and should be remanded for further proceedings by the district court. See, e.g. *United States v. Huor*, 852 F.3d 392, 404 (5th Cir. 2017), since the sentencing errors are apparent on the face of the judgment they should be corrected or returned to the trial court for resentencing and full consideration of the victims alleged actual losses which can be done at any time under Rule 36

and necessitates reversal under Rule 52(b) for plain error and not the “far more strict” standard “manifest miscarriage of justice.” See, *United States v. Giaimis*, 574 Fed. Appx. 439 (5th Cir. 2014) as to “manifest miscarriage of justice” being a “far more strict” standard of review than plain error relying on *United States v. Mudekunya*, 646 F.3d 281, 293 (5th Cir. 2011). “A manifest miscarriage of justice exists only if the record is devoid of evidence pointing to guilt, or because the evidence on a key element of the offense is so tenuous that a conviction would be shocking.” *United States v. Davis*, 690 F.3d 330, 336–37 (5th Cir. 2012), *cert. denied* 133 S.Ct. 1283, 185 L.Ed. 2d 216 (2013). In this case there is an obvious conflict between the amount of restitution ordered and the damages found by the district court, effectively raises excessiveness issues under the Eighth Amendment since the primary goal of 18 U.S.C. § 3663 is remedial or compensatory and not punitive. *Paroline v. United States*, 572 U.S. ___, 134 S.Ct. 1710 (2014).

Because the judgment is incorrect on its face and by comparison with the district court’s oral pronouncements, Lanier’s rights under the Eighth Amendment have been violated. “[To] undo and revise a sentence under the plain error standard, a court must not only (1) discern an error, that error must (2) be plain, (3) affect the defendant’s substantial rights, and (4) implicate the fairness, integrity, or public reputation of judicial proceedings.” *Hicks v. United States*, 582 U.S. ____ (2017). When the Court perceives that there is a reasonable probability that curing the error will yield a different outcome, remand is

appropriate.

This Court should also grant the writ because the Court of Appeals erred in applying the harsher manifest miscarriage of justice standard to review the sufficiency of the evidence to support Lanier's conviction for wire fraud and conspiracy to commit wire fraud. This Court recently heard argument in *Rosales-Mireles v. United States*, 850 F.3d 246 (5th Cir. 2017), cert. granted, No. 16-9493, to determine if the "shock the conscience" test or "manifest miscarriage of justice" standard used by the Fifth Circuit is the correct standard or whether a more lenient standard for correcting plain error should apply. Petitioner respectfully requests that should this Court determine that a lesser standard applies, that it remand this case to the Court of Appeals for rebriefing and rehearing on the sufficiency of the evidence issues.

CONCLUSION

For these reasons, Petitioner Patrick Lanier respectfully requests that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

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Dated: May 9, 2018