No. 18-6092

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DION ABLES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether factual error is categorically immune from plain error review?

II. Whether sentences arising under Guideline 2G2.2 tend to produce substantively unreasonable sentences in the ordinary case? Whether a court of appeals may evaluate the empirical foundation of a Sentencing Guideline, or policy critiques of the Guideline, in order to determine whether the sentences it produces are reasonable in the ordinary case?

PARTIES

Robert Dion Ables is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

I. The decision below conflicts with the decisions of most other circuits, the precedent of this Court, and the plain text of Federal Rule of Criminal Procedure 52 on the important, recurring, question of whether factual error can ever be plain.

1. The record in this case tells us next to nothing about the image referenced in count one of the information. We know what is depicted; we know that Petitioner received it July 5, 2014; we know that he stored the image on his cell-phone.[1] That is the sum of record evidence about the indicted image. Yet the Presentence Report and the district court concluded that it comprised part of a common scheme or course of conduct with respect to at least 600 other images obtained by the defendant, with respect to images that depicted intercourse between toddlers and adult males, and with respect to images that Petitioner used in an extortion scheme.[2] There is not a shred of evidence supporting this conclusion, and it is plain error – legal, factual, or mixed – to reach that conclusion in the absence of plausible evidentiary support.

The court below rejected this claim on the sole basis that it involved a claim of factual error, which under its precedent can never be plain.[3] That view of the plain error doctrine conflicts with the majority of other circuits.[4] This Court should grant certiorari to resolve that conflict.

2. The government chiefly opposes certiorari because it does not think the relevant conduct determinations were plain error.[5] Of course, this is not what the court of appeals said, and it is not a question this Court need reach.[6] The issue that divides the courts of appeals pertains to the bare

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[1] *See* (ROA.36-37).

[2] *See* (ROA.137-138).

[3] *See United States v. Ables*, 728 Fed. Appx. 394, 394-395 (5th Cir. 2018)(unpublished).

[4] *See Carlton v. United States*, 135 S.Ct. 2399, 2400 & n* (June 22, 2015)(Sotomayor, J., opinion respecting denial of certiorari)(collecting cases); *United States v. Claiborne*, 676 F.3d 434, 442 (5th Cir. 2012)(Prado, J., concurring)(same).

[5] *See* (Brief in Opposition, at pp.8-13).

[6] *See* 28 U.S.C. §2106.

possibility of plain factual error. This Court can, if it chooses, resolve that issue and remand for application of ordinary plain error review.[7]

But if the Court wished to apply the plain error doctrine, it (or the court of appeals on remand) would have little difficulty in finding a plain error. There simply isn't enough information about the count one image to justify a finding that it shared a common scheme or course of conduct with any of the images that produced the enhancements. The government seeks to tie the relevant conduct finding to various statements in the record about Petitioner's conduct, but, respectfully, none of what it says makes any sense.[8]

The government points first to the PSR's statement that Petitioner's extortion schemes involved the acquisition of child pornography between 2014 and 2016.[9] Petitioner acquired the count one image July 5, 2014.[10] This mere temporal coincidence does not show that the count one image was a part of the scheme in question. Certainly, it cannot show as much where the record reflects neither when Petitioner's collection of child pornography passed any particular numerical threshold, nor when he acquired the particular images depicting toddlers that gave rise to an enhancement under USSG §2G2.2(b)(4).[11]

The government next endeavors to show that a sufficient number of images (more than the 600 needed for the maximum offense level enhancement) were tied to Petitioner's extortion

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[7] ***Compare*** *United States v. Dominguez-Benitez*, 542 U.S. 74, 86 (2004)(finding that the court of appeals had applied an incorrect standard of prejudice in plain error case involving a plea of guilty, and remanding to apply the correct standard), ***with*** *United States v. Olano*, 507 U.S. 725, 737-741 (1993)(fully applying the standard it enunciated to the case before it).

[8] *See* (Brief in Opposition, at pp.11-13).

[9] *See* (Brief in Opposition, at p.11).

[10] *See* (ROA.36-37).

[11] *See* (ROA.134)(PSR, ¶38); (ROA.137)(PSR, ¶55).

scheme.[12] But the record does not show that the count one image was involved in that scheme. As such, it does not justify a numerosity enhancement (USSG §2G2.2(b)(7)) on count one.

Most feebly, the government points to the record evidence showing that Petitioner possessed a video depicting the sexual abuse of a toddler.[13] It does not even try to explain the relationship between this video and the extortion scheme, let alone the count one image.

Finally, the government does not even try to defend the pecuniary gain enhancement, neither the district court's bizarre conclusion that amounts taken from pedophiles in extortion represent the "retail value" of the images used therein, (USSG §2G2.2(3)(A)), nor that the count one image was in any way involved in that scheme.[14]

The government's total failure to defend the relevant conduct finding in terms of the record demonstrates that this case is an excellent vehicle to resolve the conflict. Every case presenting this issue will require the Petitioner to show (here, or on remand to the court of appeals) a plain error. In every such case, the government can argue against review by contesting the clarity of the error. But here there is simply no record evidence that could defend the district court's sentencing determination. The artificial barrier to review imposed by the prohibition on plain factual error is likely outcome determinative.

3. The government also maintains that the error would not warrant relief here because it would not survive analysis under the third and fourth prongs of plain error review.[15] This contention is in the teeth of this Court's recent precedent.

In *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), this Court held that a seven month error in the minimum of the defendant's Guideline range presumptively affected the

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[12] *See* (Brief in Opposition, at p.12).

[13] *See* (Brief in Opposition, at p.12).

[14] *See* (Brief in Opposition, at pp.11-12).

[15] *See* (Brief in Opposition, at pp.12-13).

sentence imposed.[16] Here, the difference is ***50 years***. As the government correctly notes, the court discussed the aggravating features of the offense before imposing sentence.[17] The same remarks, however, would not have seemed out of place before imposing a sentence of 30 years, 40 years, or 50 years. Any of those sentences, opened up by the new Guideline range, would restore some hope to Mr. Ables of seeing the outside of a prison one day.

In *Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897 (2017), this Court similarly held that an 8 month Guideline error affected the fairness of the proceedings, and warranted discretionary remand.[18] The government points out that Petitioner engaged in egregious conduct, for which a severe sentence might be appropriate.[19] But the unfairness occasioned by a Guideline error does not arise from the substantive unreasonableness of the sentence in relation to the conduct. It arises from the unwillingness of the judiciary to correct a simple oversight, and the unnecessary deprivation of liberty.[20] And here, again, there are as many as 50 years of unnecessary imprisonment at stake.

4. The division in the courts of appeals on the question of whether factual error can ever be plain is indisputable. It has been acknowledged by no less an authority than a Justice of this Court.[21] It has likewise been acknowledged by a concurring opinion of the court below.[22] In an effort to

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[16] *See Molina-Martinez*, 136 S.Ct. at 1343-1344, 1349.

[17] *See* (Brief in Opposition, at p.13).

[18] *See Rosales-Mireles v. United States*, 138 S.Ct. at 1905-1906, 1911.

[19] *See* (Brief in Opposition, at p.13).

[20] *See Rosales-Mireles v. United States*, 138 S.Ct. at 1908 ("The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error.").

[21] *See Carlton*, 135 S.Ct. at 2400 & n* (Sotomayor, J., opinion respecting denial of certiorari)(collecting cases)

[22] *Claiborne*, 676 F.3d at 442 (Prado, J., concurring)(collecting cases).

mitigate this widely acknowledged circuit split, the government argues that factual errors will be plain less often than legal errors.[23] Even taking the claim at face value, it does not provide a reason to tolerate the circuit split. The prohibition on plain factual error is applied in a large volume of cases, as the government declared emphatically below:

> [The Fifth Circuit] has applied this rule over a hundred times —most recently, in *United States v. Maxey*, 699 F. App'x 435 (5th Cir. Nov. 1, 2017), when the defendant attempted to attack the drug-quantity amount in the PSR. *Id*. at 435.
>
> [FN 2]
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> In the interest of brevity, the government will not cite all of the cases that have applied this rule. Rather, it warrants to the Court that its Westlaw search turned up well over 100 cases in which the Court has resolved factual issues by applying the rule. In fact, the Court has applied the rule at least twelve times in the last two years. *See Maxey*, 699 F. App'x at 435; *United States v. Glaze*, 699 F. App'x 311, 311 (5th Cir. Oct. 16, 2017); *United States v. Oti*, 872 F.3d 678, 694 (5th Cir. Oct. 3, 2017); *United States v. Reynolds*, __ F. App'x __, 2017 WL 3328154, at *3 n.6 (5th Cir. Aug. 3, 2017); *United States v. Sphabmisai*, __ F. App'x __, 2017 WL 3271060, at *1 (5th Cir. Aug. 1, 2017); *United States v. Bookout*, 693 F. App'x 332, 333 (5th Cir. July 13, 2017); *United States v. McCain-Sims*, 695 F. App'x 762, 766 (5th Cir. Jun. 12, 2017); *United States v. Ramirez-Castro*, 687 F. App'x 400, 400 (5th Cir. Apr. 25, 2017); *United States v. Cooper*, 669 F. App'x 243, 244 (5th Cir. Oct. 4, 2016); *United States v. Rios*, 669 F. App'x 193, 194 (5th Cir. Sept. 20, 2016); *United States v. Ayala*, 667 F. App'x 840, 840 (5th Cir. Aug. 1, 2016); *United States v. Chavira*, 647 F. App'x 503, 503 (5th Cir. May 10, 2016).[24]

As such, the difference between a standard that seldom authorizes relief from unpreserved factual error and an absolute prohibition will implicate a significant number of cases.

In any case, the government's point has little force when one considers the wide range of errors that may be plausibly – and, from the perspective of a busy court of appeals, conveniently – characterized as "factual," rather than "legal." Indeed, the court below has held that all relevant conduct error is categorically factual and immune from plain error review,[25] a view rejected by the

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[23]*See* (Brief in Opposition, at pp.12-13).

[24]*See* Appellee's Brief, in *United States v. Ables*, No. 17-10796, 2017 WL 6554679, at *8 & n.2 (5th Cir. Filed December 22, 2017).

[25]*See United States v. Rogers*, 599 Fed. Appx. 223, 225 (5th Cir. April 14, 2015)(unpublished).

D.C. Circuit, which holds relevant conduct determinations to be mixed questions of fact and law.[26] The court below has also held that other mixed Guideline application questions – such as the required nexus between a firearm and another offense,[27] or the proper determination of a "minor role"[28] – are factual and immune from plain error.

The instant case relies on a particularly expansive definition of "factual error," that would seem to forbid correction of virtually any error with a factual predicate of any kind. Here, the court of appeals characterized the asserted errors as factual because they "pertain[] to the type and number of images involved and whether the money he received from extorting other pedophiles accurately reflected his pecuniary gains."[29] But the fact that the asserted errors "pertained to" the type and number of images involved hardly demonstrates that they were exclusively, or even predominately, legal. The errors also "pertained to" the application of the relevant conduct Guideline to undisputed facts,[30] and to the meaning of the term "pecuniary gain" (i.e., whether amounts taken in extortion represent an ullegal picture's "retail value.")[31]. It is not as though Petitioner were trying to reverse the district court's findings that he possessed more than 600 images, that he possessed images depicting the abuse of a toddler, nor how much money obtained from extortion victims. Rather, he was simply pointing to a dearth of record evidence, and asking whether the count one image could be incorporated into the "scheme" or "course of conduct" – legal entities created by USSG §1B1.3 – outlined in the PSR.

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[26] *See United States v. Mellen*, 393 F.3d 175, 183 (D.C. Cir. 2004).

[27] *see United States v. Glaze*, 2017 U.S. App. LEXIS 20173, at *2 (5th Cir. October 16, 2017)(unpublished)

[28] *see United States v. McCain-Sims*, 695 Fed. Appx. 762, 767 (June 12, 2017)(unpublished)

[29] *United States v. Ables*, 728 Fed. Appx. 394, 298 (5th Cir. 2018)(unpublished).

[30] *see* USSG §1B1.3

[31] *see* USSG §2G2.2(b)(3)(A)

5. The government reprises Justice Sotomayor's hope that the Fifth Circuit will spontaneously abandon the *Lopez* rule.[32] Even if that were to occur, it would not resolve the circuit split, since the Sixth and Tenth Circuits have applied a similar rule.[33] But it is in any case past time to hope for this eventuality. That is best stated by the government below, which noted that the rule has been applied with "regularity and consistency ...for the past 26 years."[34] As the government also noted, more than 100 cases applied the rule in that time, including 12 applications in the two years immediately prior to the filing of its brief.[35]

6. The government cites a handful of denied petitions addressing the prohibition plain factual error, but only one of them, *Wright v. United States*, No.15-5090 (Petition Denied October 2, 2017), postdates *Carlton*.[36] *Wright* involved a pure factual question: whether a particular restitution calculation subtracted amounts recovered by a victim bank at foreclosure.[37] The case did not, therefore, show the expansive conception of "factual errors" used by the court below to avoid review.

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[32] *See* (Brief in Opposition, at p.14); *Carlton*, 135 S.Ct. at 2400 & n* (Sotomayor, J., opinion respecting denial of certiorari).

[33] *See United States v. Alford*, 1994 U.S. App. LEXIS 14582 (4th Cir. June 14, 1994)(unpublished)("Questions of fact capable of resolution by the district court during sentencing, such as the defendant's role in the offense, cannot constitute plain error.")(citing *United States v. Lopez*, 923 F.2d 47 (5th Cir. 1991)); *accord United States v. Kent*, 1998 U.S. App. LEXIS 3750, 7-8 (6th Cir. Mar. 2, 1998)(unpublished)(citing *United States v. Saucedo*, 950 F.2d 1508, 1518 (10th Cir. 1991), *disapproved on other grounds by Stinson v. United States*, 508 U.S. 36, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993)); *see also United States v. Smith*, 531 F.3d 1261, 1271 (10th Cir. 2008)("'While we have reviewed sentencing errors that were not raised in the district court under a plain error standard, plain error review is not appropriate when the alleged error involves the resolution of factual disputes.'") (quoting *United States v. Easter*, 981 F.2d 1549, 1555-1556 (10th Cir. 1992)).

[34] Appellee's Brief in *United States v. Ables*, 2017 WL 6554679, at *8.

[35] Appellee's Brief in *United States v. Ables*, 2017 WL 6554679, at *8, n.2

[36] *See* (Brief in Opposition, at p.8).

[37] *See United States v. Wright*, 848 F.3d at 1285.

The court of appeals in *Wright* below found the issue waived, and not merely unpreserved,[38] and the Petitioner never filed a reply in support of certiorari. It is not comparable.

7. Notably, the government does not even try to defend the absolute prohibition on finding plain factual error. Nor would any such defense be persuasive. The absolute prohibition is utterly inconsistent with the text of Rule 52, which makes no reference to legal or factual error, but only to "plain" error.[39] It is plainly inconsistent with the history of the Rule and its Commentary, the latter of which cites cases of insufficient evidence as an appropriate use of plain error.[40] It flies in the face of this Court's precedent, insofar as that precedent discourages "per se" rules in the plain error context.[41] And it virtually invites gross miscarriages of justice.[42]

II. The courts of appeals are divided as to whether Guideline 2G2.2 tends to produce unreasonable sentences in the ordinary case, and on the broader question of whether courts of appeals may evaluate a Guideline's empirical foundation, and policy critiques of the Guideline, in a reasonableness inquiry. The Fifth Circuit's view likely conflicts with this Court's Guidance in *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Pepper v. United States*, __ U.S. __, 131 S.Ct. 1229 (2011).

1. Petitioner pleaded guilty to two crimes that involved the production of child pornography from victims he contacted over the internet. If those were his only counts of conviction, the Guidelines would have recommended a sentence between 360 months imprisonment and the

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[38] *see id.* at 1284,

[39] *See* Fed. R. Crim. P. 52(b).

[40] *See* Fed. R. Crim. P. 52(b), advisory committee's notes (1944)(citing *Wiborg v. United States*, 163 U.S. 632 (1896), and *Hemphill v. United States*, 112 F.2d 505 (9th Cir. 1940), *reversed by* 312 U.S. 657 (1941)).

[41] *See Puckett v. United States*, 556 U.S. 129, 142 (2009)("We have emphasized that a '*per se* approach to plain-error review is flawed.'")(quoting *United States v. Young*, 470 U.S. 1, 17, n. 14 (1985)).

[42] *See United States v. Carlton*, 593 Fed. Appx. 346 (5th Cir. 2014)(unpublished)(affirming sentence enhancement based on testimony falsely recounted by the prosecution, in spite of a government concession, because of the prohibition on plain factual error), *cert. denied*, 135 S.Ct. 2399 (2015).

combined statutory maximum.[43] But he was also convicted of another crime, one that most people would regard as less serious than producing child pornography: receiving child pornography. Because of a series of enhancements present in virtually every case (the use of a computer, numerosity, distribution, the possession of sado-masochistic images), the offense level for this count went well off the charts, and the recommended sentence became 80 years.[44] In other words, because Petitioner produced child pornography from live victims, the Guidelines recommended at least thirty years imprisonment. Because he received pornography on a computer (rather than through the mail), and possessed more than 600 images (as nearly all offenders do), they recommended no fewer than 80. These aspects of the offense are not worth 50 years imprisonment.

In the Second Circuit this irrational feature of the receipt Guideline – its tendency to recommend sentences at the statutory maximum as a consequence of facts present in nearly every case – would at least be available to Petitioner to challenge his sentence.[45] In the Fifth Circuit, it was categorically off-limits.[46] This case presents a circuit split worth addressing

2. Disputing this claim, the government points to two cases in which the Second Circuit affirmed within Guideline child pornography sentences.[47] Neither sentence approached even the

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[43] The highest offense level produced by either of those counts was 38 (on count two). *See* (ROA.138-139). After a two level multi-count adjustment under USSG §3D1.4 (because count three produced an offense level between 1-4 levels less serious than 38, *see* ROA.139), a five level adjustment for a pattern of abuse under USSG §4B1.5, *see* (ROA.140), and a three level reduction for accepting responsibility under USSG §3E1.1, *see* (ROA.140), the result would have been a final offense level of 42. Coupled with a criminal history category of I, *see* (ROA.142), the result would have been a range of 360 months to life, whose maximum would be reduced to the statutory maximum. As the court below and the government have conceded, count one should have been grouped with at least one of the other counts, and would not have contributed to the offense level if it had not produced the highest number.

[44] *See* (ROA.136-140).

[45] *See United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010).

[46] See *United States v. Miller*, 665 F.3d 114, 120–21 (5th Cir. 2011); *United States v. Duarte*, 569 F.3d 528, 529 (5th Cir. 2009)).

[47] *See* (Brief in Opposition, at pp.20-21)(citing *United States v. Swackhammer*, 400 Fed. Appx. 615, 616 (2010)(unpublished), and *United States v. Cossey*, 476 Fed. Appx. 931, 934 (2d Cir. 2012)(unpublished)).

statutory maximum, much less 80 years.[48] Most importantly, neither questioned the basic premise of *Dorvee*, with which the Fifth Circuit disagreed: that the accumulation of enhancements for conduct present in nearly every child pornography case may be considered in evaluating the reasonableness of the sentence.[49] That consideration is forbidden in the court below, and it would have provided Petitioner a powerful tool to attack the addition of 50 years to his Guideline minimum.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*.

Respectfully submitted this 5th day of February, 2019.

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[48] *See Swackhammer*, 400 Fed. Appx. at 616; *Cossey*, 476 Fed. Appx. at 934.

[49] *See Swackhammer*, 400 Fed. Appx. at 616; *Cossey*, 476 Fed. Appx. at 934.