No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LOIS BROOKS, PETITIONER,

v.

UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Does the government have "substantial rights" such that actions taken in derogation of them may constitute "plain error" under Fed. R. Crim. Pro. 52(b)?

If so, did the imposition of a sentence of post-release supervision below a statutory mandatory minimum affect the government's "substantial rights" in this case?

If it did, did the imposition of such a sentence also "seriously affect the fairness, integrity or public reputation of judicial proceedings" as required by *United States v. Olano*, 507 U.S. 725, 732 (1993)?

This Court has not previously addressed the question of whether such an error in favor of a defendant falls within the scope of Fed. R. Crim. Pro. 52(b). The Courts of Appeals are divided on this issue. *See United States v. Steed,* 879 F.3d 440, 453 (1st Cir. 2018) (citing cases).

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner Lois Brooks respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit reversing her sentence, in part, and remanding for further proceedings.

Opinion Below and Jurisdiction

A Panel of the Second Circuit granted the government's cross-appeal, vacated Brooks' sentence in part, and remanded for further proceedings in a summary order. See United States v. Brooks, No. 16-4022, 2018 WL 6131308 (2d Cir. Nov. 21, 2018) (opinion); Appendix ("A.") A.1-A.7. This Court has jurisdiction over final orders of the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

Fed. R. Crim. P. 52(b) provides as follows: "Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

Statement of Facts

Brooks pled guilty to a two-count information charging her with conspiracy to commit sex trafficking, in violation of 18 U.S.C. § 1594(c) (Count One), and the use of interstate commerce to promote unlawful

activity, in violation of 18 U.S.C. § 1952(a)(3) (Count Two). She was subsequently sentenced to a term of 48 months imprisonment and, significantly for the purposes of this petition, a three-year term of post-release supervision. No party objected to the sentence.

Following sentence, Brooks filed a habeas corpus petition, which was subsequently denied, and filed a notice of appeal. The government filed a notice of cross-appeal.

The Appeal Before the Second Circuit

On appeal, Brooks sought to challenge her guilty plea as being other than knowing and voluntary. On its cross-appeal, the government sought review of the three-year term of post-release supervision. Although conceding that it had failed to object to the three-year term of supervised release the government sought "plain error" review, arguing that the minimum term of post-release supervision for a violation of 18 U.S.C. § 1594(c) is five years.

After briefing and argument, the Second Circuit found that Brooks' sentence was erroneous because the three-year term of supervised release fell below the legally required mandatory minimum of five years and that the error was plain for the same reason. (A.6-A.7). Furthermore, because the imposition of a sentence above the lawful maximum impaired defendants' "substantial rights", it found that the government was analogously affected

by the imposition of a sentence on Brooks below the mandatory minimum. (A.7). Finally, the Second Circuit concluded that the imposition of a term of post-release supervision below the mandatory minimum affected the "fairness of the proceedings" because other, presumably similarly situated defendants, received the legally required five-year mandatory minimum. (A.7).[1]

On this basis, the Second Circuit reversed Brooks' sentence in part and remanded for further proceedings to the district court.

Argument

I. The Government Does Not Stand in a Comparable Position To A Criminal Defendant When It Comes to "Substantial Rights"

The Second Circuit concluded that the government and a defendant stood in substantially similar position regarding sentence, and an error in sentence that was too low affected the government in the same way that an error in a sentence that was too high affected a defendant:

> We have previously found that errors in imposing mandatory minimums, when they affect a defendant's sentence, do affect that defendant's substantial rights. We conclude, too, that when there is an error in applying a mandatory minimum to a defendant such that they

[1] Contrary to the Second Circuit's suggestion, (A.7), Brooks did argue that the error in her sentence did not "seriously affect the fairness, integrity or public reputation of judicial proceedings" *Olano* at 732, arguing that the loss of two years of post-release supervision was *de minimis*, arguing specifically that this was "not so grave an error" as to satisfy this prong of the inquiry.

> receive a sentence shorter than mandated, the Government's substantial rights are similarly affected. (A.7) (citation omitted)

But this equivalence finds no support in logic or in law. The government, as an abstract entity, can no more serve a day in prison (or under post-release supervision) than a corporation. *See New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481, 493 (1909) ("A corporation cannot be arrested and imprisoned in either civil or criminal proceedings[.]") A defendant subject to a sentence that is overly long has his or her rights compromised by the incarceration, an injury that is both concrete and substantial. Indeed, the right to be free from unlawful incarceration is fundamental to the system of well-ordered liberty: and the machinery of the criminal justice system is bent primarily, if not exclusively, towards that end. *Olano* itself recognized that plain error review originated in those cases in which "the liberty . . . of the defendant is at stake[.]" *Olano*, 507 U.S. at 735 (quoting *Sykes v. United States*, 204 F. 909, 913–914 (8th Cir. 1913)).

As a party who suffers no intrusion on constitutionally protected liberty as a result of an unlawful sentence, the government simply cannot be said to stand in an identical position to a defendant and the assertion that the two parties do so stand is both unsupported and unsupportable. Accordingly, while there may be a theory under which the government's substantial rights are affected by an error in sentencing in favor of a defendant, the Second

Circuit has not identified one, nor for that matter, did the government on appeal, citing in support a single case, with an entirely conclusory holding. *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 741 (9th Cir. 2009) ("The government's substantial rights may be affected when a defendant receives an inappropriate sentence.") Notwithstanding the lack of logical support for such an equivalence, this does appear to be the view of the majority of the Circuits. *See United States v. Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004), as amended (Aug. 28, 2006) ("[S]ix other courts of appeals have firmly rejected Dickerson's argument and applied the plain error standard in the context of criminal appeals brought by the Government.")

Other circuits to have found the government unable to satisfy the plain error standard of review have done so either on the failure of the government to adequately address the fourth prong of the plain error inquiry, *see Steed* at 453-54, for prudential reasons, *see United States v. Garcia–Pillado,* 898 F.2d 36, 39–40 (5th Cir. 1990) (declining to find plain error out of concern government would fail to object to such errors in future cases), or both, *see United States v. Posters 'N' Things Ltd.,* 969 F.2d 652, 663 (8th Cir. 1992), *aff'd* 511 U.S. 513 (1994).

But the question of impairment of "substantial rights" deserves to be addressed. To begin with, the Court's seminal decision in *Olano* does not answer the question, focusing exclusively, as it does, on the defendant's

substantial rights. *See id.* at 735 ("the *defendant* must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)").

"Substantial rights" are as *Olano* points out, are a creature of Fed. R. Crim. P. 52 itself. Even properly preserved errors under Fed. R. Crim. P. 52(a) may not be remedied, unless they affect "substantial rights," whereas even unpreserved errors may be remedied if they do affect "substantial rights" so long as they are plain under Fed. R. Crim. P. 52(b). *See generally Olano* at 734. The inquiry as to the "substantiality" of the right at issue is the same for both "harmless error" under Rule 52(a) and "plain error" under Rule 52(b), with only the burden of persuasion changing: "Rule 52(b) normally requires the same kind of inquiry [as Rule 52(a)], with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice [under Rule 52(b)]." *Id.* This exclusive discussion of the rights of the defendant carries through in subsequent decisions by the Court on plain error. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) ("the error must have affected the *defendant's* substantial rights") (emphasis added) *United States v. Dominguez-Benitez*, 542 U.S. 74, 81-83 (2004) (addressing "a *defendant* who seeks reversal of his conviction after a guilty plea") (emphasis added).

This history and this language from *Olano* (and subsequent decisions of this Court) both support the proposition that the government should never be the beneficiary of "plain error" review under Rule 52(b). As noted previously, the government's "liberty" is never at stake. Further, whenever it makes an application under Rule 52(b), government always seeks some deeper incursion on the liberty of the defendant, notwithstanding its own failure to raise that issue below. Accordingly, the text and history of Rule 52(b) require the statute to be read strictly against the interests of the government and only in favor of the accused. Such an argument is supported by the role of the courts in protecting constitutional rights, rights that generally benefit only the accused. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (constitutional error may not be found harmless if error deprives defendant of the "'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair'").

In the alternative, even if the government is deemed to have "rights" that can trigger plain error review under Rule 52(b), the question remains what rights it has that are "substantial". The Court held in *Fulminante* many instances of even constitutional error do not rise to the level of violating the defendant's "substantial rights" and accordingly, are subject to "harmless

error" review under Rule 52(a). *See id.* at 306-307. Following up and expanding on the reasoning in *Fulminante*, the Court found in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006), found that the distinction between "rights" and "substantial rights" for considerations of constitutional error under Rule 52 turned on whether the question of whether the error was "trial error" (such as the admission of a coerced confession, as in *Fulminante*) or "structural error" (such as the deprivation of counsel of choice, as in *Gonzalez-Lopez*). Given this distinction, and the fact that only the most fundamental types of error will be found to affect "substantial rights," even if the government were able to benefit from plain error review, only those errors that undermine its ability to effectively prosecute the law should be considered "plain error". The imposition of a sentence of two years less of post-release supervision than the mandatory minimum is not that type of error.

II. The Error Here Did Not Undermine the Fairness, Integrity, or Public Reputation of the Judicial Proceedings

Rule 52(b) is permissive, and even if a court were to find that the three factors enumerated therein (error, plainness of the error, and effect on substantial rights), are satisfied, the court retains discretion as to whether or not to grant relief. In describing what has become known as the fourth *Olano* factor, courts are directed to grant relief when the error "seriously

affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). This Court noted that this required something less than the "miscarriage of justice" standard, which required proof of actual innocence, but found that the *Atkinson* standard required meaningfully more than mere error that affected even "substantial rights" of a defendant in a criminal case.

Those Courts of Appeals that have ruled against the government's assertion of plain error have done so primarily on the basis that the government had failed to satisfy the requirements of this factor. In *Steed*, the First Circuit found that the government had argued merely that the defendant had received an illegal sentence, without identifying either the substantial right that had been impaired or the manner in which that error had undermined the fairness, integrity or public reputation of judicial proceedings. *Id.* at 453-54. In *United States v. Posters N Things Ltd*, 969 F.2d 652, 663 (8th Cir. 1992), *aff'd sub nom. Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994), a case decided in the Court of Appeals before *Olano*, the Eighth Circuit found that a sentence below a 10-year mandatory minimum was plainly erroneous, and the first three factors of Rule 52(b) satisfied, but concluded that it did not amount to "miscarriage of justice" and declined to reverse.

So too in this case, the imposition of a sentence of post-release supervision two years less than the mandatory minimum, while plainly contrary to the statute, did not "seriously affect the fairness, justice or public reputation" of the judicial proceedings. The Second Circuit found only that "the fairness of the proceeding" was affected by the error, appearing to adopt the government's argument that because Congress had intended a uniform mandatory minimum to apply to all defendants, the imposition of something less than the mandatory minimum on one such defendant resulted in an "unfair" sentence. (A.7). This argument does not withstand scrutiny. As is obvious from the term itself, a mandatory *minimum* does not contemplate, much less require, that every defendant be sentenced to five years of supervised release. To the contrary, the applicable statute, 18 U.S.C. § 3583(k), expressly provides for terms of post-release supervision of anywhere from five years to life. With such a variation contemplated by the statute itself, there is simply no reasonable expectation of uniformity expressed by the legislature for the courts to enforce. Against such a dramatic variation in the possible terms of post-release supervision, the two-year difference between what Brooks received and what other, arguably similarly situated defendants, received, is hardly a noteworthy exception, much less a gross violation that undermines the fairness of the proceedings.

It should be noted that the federal courts, including the Second Circuit, have consistently held that the failure to consider disparities among similarly situated defendants, even though statutorily required by 18 U.S.C. 3553(a)(6*)*, does not amount to plain error. *See United States v. Johnson*, 680 F. App'x 451, 457 (6th Cir. 2017); *Brown v. People*, No. S.CT.CRIM. 2011-0022, 2012 WL 1886443, at *6 (S.Ct.V.I. May 24, 2012); *United States v. Williams*, 506 F. App'x 140, 143 (3d Cir. 2012); *United States v. Canada*, 465 F. App'x 890, 891 (11th Cir. 2012); *United States v. Pereira*, 465 F.3d 515, 522 (2d Cir. 2006). The Second Circuit's conclusion that this much more trivial error somehow undermined the "fairness of the proceedings" is incorrect and should be reversed.

Conclusion

For these reasons, the Court should grant the petition for certiorari.

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