No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

CARLTON P. CABOT,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A district court's factual determinations are generally reviewed for clear error. In rejecting petitioner's appeal in this case, the Second Circuit adopted a rule that the failure to object to a district court's factual finding necessarily results in a determination that no clear error occurred. Such a holding jettisons *Olano*'s plain error standard as applied to factual determinations an untenable result that is inconsistent with both logic, the plain language of Rule 52(b), Fed.R.Crim.P. and the prior holdings of this Court.

The Second Circuit likewise erred when it upheld the district court's substantial upward variance based on its determination that petitioner's conduct caused non-economic harms to alleged victims of petitioner's fraud offense even though there was no proof that these individuals suffered those harms as a result of petitioner's conduct rather than the 2008 Global Financial Crisis.

This petition raises two issues for this Court's consideration:

1. Does plain error review apply to unobjected to factual determinations?
2. Can an upward variance be based on non-economic losses to victims that were not established by a preponderance of the evidence?

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The decision of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as *United States v. Cabot,* 755 Fed.Appx. 75 (2d Cir. 2018) (Walker, Calabresi and Livingston, Circuit Judges), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated January 31, 2019, denying petitioner's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on November 15, 2018, and the order of that court denying petitioner's petition for rehearing was entered on January 31, 2019. Justice Ginsburg granted petitioner's application to extend his time to file a petition for a writ of certiorari until June 30, 2019, and by operation of Rule 30(1), Sup. Ct. Rules, petitioner's time to file was automatically extended until Monday, July 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner appealed a 10-year above-the-Guideline sentence of imprisonment imposed after he pled guilty to securities fraud based on his role in a scheme to misappropriate funds from real estate investments that his company had syndicated. The scheme began after those investments took a substantial hit from the 2008 Global Financial Crisis. The misappropriated funds were taken from more profitable investments and used to, *inter alia*, keep afloat other hurting investments, pay other business expenses and petitioner's and a co-schemer's personal expenses.

In arriving at a 10-year prison term, the district court upwardly varied from a USSG range of 78 to 97 months, on the basis of several assumptions that not only had no basis in the record but were either contradicted by it or conceded by the government to be "too speculative."

For example, although it refused to enhance petitioner's Guideline calculation based on the "vulnerable victim" enhancement, the district court indicated that it could properly consider enhancing petitioner's sentence under 3553:

> I do think that the vulnerability of the victims here is a factor. It may not warrant an enhancement, but I think it is certainly a powerful Section 3553 factor.

A104.[1] Critical to the district court's thinking however was the fact that petitioner was aware of his alleged victim's vulnerability:

> while there may not be anything in the record indicating that the defendant set out purposefully to defraud -- to take advantage of that vulnerability, *I certainly think he knew, given the nature of the investment here and the tax advantages of it, that the people who were investing were people like those that you see in the letters who would lose their nest eggs*, monies that they had earned through decades of hard work that they expected to retire on.

A104-A105 (emphasis added). No objection was made to the district court's finding that petitioner knew that his investors were risking their "nest egg" to invest with him, although as demonstrated by petitioner on appeal it was completely belied by the record.

Likewise, although adopting the parties' agreed upon loss amount of $17 million for purposes of calculating the Guidelines, and despite the government's concession that a loss of more than $17 million was completely speculative,[2] the district court nonetheless concluded that since petitioner's investors suffered a greater loss "I do think I can and I should factor that in under Section 3553." A105. Again no objection was made to the district court's decision to consider those excess losses as to which there was nothing more than speculation that they were caused

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[1] "A__" refers to the Appendix filed in the United States Court of Appeals for the Second Circuit; "Doc#__" refers to documents listed on the docket for case number 1:15 cr 680 (JMF) in the United States District Court for the Southern District of New York, a copy of which was reprinted at A1-A10.

[2] As the government wrote in its sentencing submission: "The question is whether the entire loss was the result of the defendant's fraud or the result of the drastic downturn in the market during the Great Recession. The degree to which either of these factors caused the demise of any particular TIC Investment *is inherently speculative*." Doc#71 at 9 (emphasis added).

by petitioner, as opposed to the general downturn in the market as a result of the Global Financial Crisis.

2. On appeal petitioner challenged the district court's consideration and reliance on both of these factors as a basis to substantially enhance his sentence when considering the §3553(a) factors. The district court was simply mistaken in concluding that based on the nature of the investments petitioner should have been aware that his victims were vulnerable. If anything the nature of the investments -- 1031 exchanges marketed to accredited investors -- led to precisely the opposite conclusion.

For example, because petitioner's investments were marketed as unregistered securities, they could only be purchased by "accredited investors." Doc#65 at 10. According to the SEC, one of the "principal purpose[s] of the accredited investor concept is to identify persons who can bear the economic risk of investing in these unregistered securities." *See* SEC, Investor Bulletin: "Accredited Investors," SEC Pub. No. 158 (9/13).[3] Because an accredited investor requires a minimum net worth (*see* Rule 501(a) of SEC Regulation D, 17 C.F.R. § 230.501(a)), and is designed for sophisticated investors it would be counter-intuitive and nonsensical for petitioner to have believed that the TIC investors were, as the district court erroneously concluded, staking their "nest egg" in the TIC Investment.

Moreover, it was undisputed that the principal attraction of the TIC investments marketed by petitioner was towards investors seeking to engage in a 1031 Exchange, a mechanism that only appealed to owners of investment and

[3] https://www.sec.gov/files/ib_accreditedinvestors.pdf

business properties. *See* 26 U.S.C. §1031 ("No gain or loss shall be recognized on the exchange of *property held for productive use in a trade or business or for investment*") (emphasis added). Because those engaging in a 1031 exchange were experienced and "accredited" real estate investors petitioner was entitled to have assumed that they were sophisticated and substantial investors. Petitioner would have had no reason to believe that his investors were someone like Mr. Stewart, a victim whose letter the government pointed to at sentencing (A87), who used the proceeds from his "single-family residence that [he] used to live in" to invest with Petitioner.

Similarly, whether any loss -- economic or non-economic -- in excess of $17 million was attributable to petitioner's fraud was simple speculation which even under a §3553 cannot support an enhancement.

3. The Court of Appeals rejected both of these challenges raised by petitioner. With respect to petitioner's argument that the record belied any claim that he was aware of the vulnerability of his victims the Court of Appeals rejected it out of hand. In the view of the Court of Appeals petitioner's failure to object doomed any claim that the finding was erroneous:

> Cabot did not attempt at sentencing to controvert the government's description of the "natural pool of investors that would be attracted to this investment" as older investors, who both are more likely to own property and have less time and ability to recover from catastrophic losses. A82. The district court reasonably concluded that Cabot, even if he did not target vulnerable victims, knew or should have known the nature of his clientele. *United States v. Abiodun*, 536 F.3d 162, 170 (2d Cir. 2008) ("Where there are two permissible views of the evidence,

> the factfinder's choice between them cannot be clearly erroneous.").

755 Fed.Appx. at 80. As a result, the Court of Appeals never reached the question of whether the record established that the district court's findings constituted plain error.

With respect to the district court's consideration of losses in excess of $17 million, the Court of Appeals reasoned that notwithstanding the district court's acknowledgment that "it isn't clear . . . how much of [the monetary loss] is attributable to the criminal conduct as opposed to financial circumstances," i.e. the 2008 Global Financial Crisis (A78), it "does not mean that considering a potentially higher amount of loss was clearly erroneous." 755 Fed.Appx. at 80 (*citing United States v. Mi Sun Cho*, 713 F.3d 716, 722 (2d Cir. 2013). The Second Circuit reasoned that in determining that the victims' losses weighed in favor of an above-the-Guidelines sentence "the district court did not focus on monetary losses alone, but on the 'time and energy that the victims have spent trying to recover their money, the anxiety and emotions that these events have had for them, [and] losses to third parties, such as . . . employees . . . who were fired or lost their jobs.' A105." 755 Fed.Appx. at 80. In other words, in the view of the Court of Appeals because the district court was focused on non-monetary harms it was not bound by the normal preponderance standard.

REASONS FOR GRANTING THE WRIT

I.

This case raises an issue as to which at least two justices of this Court have already expressed concern, i.e., whether factual errors by a district court are ever cognizable on plain-error review when challenged for the first time on appeal. *See Carlton v. United States*, 135 S.Ct. 2399 (2015) (Statement of Sotomayor, J. and Breyer, J.).

In *Carlton,* as here, the district court enhanced the defendant's sentence based on an un objected to factual inaccuracy proffered by the government at sentencing. On appeal, the Fifth Circuit, however, refused to consider Carlton's challenge to the enhancement based on its prior holding in *United States v. Lopez,* 923 F.2d 47 (5th Cir. 1991) that plain error review is never available to a defendant challenging factual errors for the first time on appeal. In the Fifth Circuit's view the failure to object in the district court to a factual determination acts as a waiver of the defendant's right to challenge that factual finding no matter how erroneous it may be.

Carlton petitioned for certiorari noting that the Fifth Circuit's rule was at odds with virtually every other circuit to consider the issue.[4] This Court denied

[4] In support of the majority view, *Carlton* cited the following decisions as holding that plain-error review was appropriate even to an unobjected to factual determination. *United States v. Thomas,* 518 Fed. Appx. 610, 612-613 (11th Cir. 2013) (applying plain-error review to asserted factual error); *United States v. Griffiths,* 504 Fed.Appx. 122, 126-127 (3rd Cir. 2012) (same); *United States v. Durham,* 645 F.3d 883, 899-900 (7th Cir. 2011) (same); *United States v. Sahakian,* 446 Fed.Appx. 861, 863 (9th Cir. 2011) (same); *United States v. Romeo,* 385 Fed.

certiorari. Justices Sotomayor and Breyer although joining in the denial of certiorari issued a statement disagreeing with the position of the Fifth Circuit but explaining its reason for denying certiorari. In the view of Justices Sotomayor and Breyer the Fifth Circuit's rule was "misguided." 135 S.Ct. at 2399. Both the plain language of the plain error rule codified in Federal Rule of Criminal Procedure 52(b) and the Court's prior precedent undermine a claim that plain error review is only available to unobjected to legal error.

For example, this Court "has long held that '[i]n exceptional circumstances, especially in criminal cases, appellate courts . . . may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Carlton*, 135 S.Ct. at 2399 (*quoting United States v. Atkinson*, 297 U. S. 157, 160 (1936)). Moreover, Rule 52(b), Fed. R. Crim. P., provides that: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." *Carlton* noted that the Rule does not state that "a plain *legal* error," or "a plain error *other than a factual error*" are subject to the rule.

Appx. 45, 50 (2d Cir. 2010) (same); *United States v. Gonzalez-Castillo,* 562 F.3d 80, 83-84 (1st Cir. 2009) (same); *United States v. Sargent,* 19 Fed.Appx. 268 (6th Cir. 2001) (same); *United States v. Wells,* 163 F.3d 889, 900 (4th Cir. 1998) (same); *United States v. Saro,* 24 F.3d 283, 291 (D.C. Cir. 1994) (same). It appears that some of these courts have not always applied this rule consistently. *See, e.g., United States v. Elion,* 15 Fed. Appx. 14, 16 (1st Cir. 2001) ("Questions of fact capable of resolution by the district court during sentencing . . . cannot constitute plain error"); *United States v. Alford,* 1994 WL 258412, at *2 (4th Cir. June 14, 1994) ("Since these factual questions could have been resolved by the district court had Elion presented this argument, we cannot find plain error").

135 S.Ct. at 2400 (original emphasis). Instead, the clear and plain import of the rule is that "all plain errors fall within the Rule's ambit." *Id.*

Nevertheless, Justice Sotomayor "reluctantly agree[d]" with the Court's decision to deny certiorari but only based on representations from the Solicitor General that the Fifth Circuit itself was inconsistent with its application of the rule. 135 S.Ct. at 2401. As a result, this Court felt it important to give "the court of appeals the first opportunity to resolve the disagreement." *Id.*

The passage of time has not helped resolve this conflict. If anything, as demonstrated by this case the conflict has become more pronounced. Subsequent to this Court's Statement in *Carlton,* the Fifth Circuit in *United States v. Flores,* 730 Fed.Appx. 216 (5th Cir. 2018), demonstrated that it has no intention of withdrawing from its prior holding in *Lopez*, and that it will continue to refuse to consider a claim of plain error where the defendant failed to object to a factual finding made by the district court.

Moreover, while *Carlton* cited the Second Circuit's decision in *United States v. Romeo*, 385 Fed.Appx. 45, 50 (2nd Cir. 2010) for the proposition that the Second Circuit adhered to the view that plain error applied to unobjected to factual errors, petitioner's case demonstrates that it does not uniformly follow that rule.[5]

[5] This Court cannot expect the Second Circuit to resolve the conflict internally. The Second Circuit has made its position clear that it eschews rehearing. *See, e.g., United States v. Taylor*, 752 F.3d 254, 255 n.1 (2nd Cir. 2015) (Cabranes, J, dissenting) ("Our Court hears the fewest cases en banc of any circuit by a substantial margin, both in absolute terms and when considering the relative size of our docket.").

This Court should resolve the issue and the conflict now. As this Court recently recognized in an analogous context, "district courts sometimes make mistakes" and "there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed" the plain error rule is designed so that these "defendants are not entirely without recourse." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1904 (2018).

The fairness and integrity of the judicial system is enhanced when a litigant, particularly a criminal defendant, is permitted to raise and have a court correct factual inaccuracies that mistakenly crept into the record. Permitting a court to sweep under the rug errors that are plain simply because they are unpreserved may appear to create greater efficiency in the judicial system, but it can only do so at the expense of undermining the public perception of fairness and integrity in the judicial system. "It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners 'as people.'" 138 S. Ct. at 1907. Here, where petitioner's sentence was enhanced above the applicable sentencing guideline range based on such an error, upholding such a sentence not only impugns the fairness, integrity and public reputation of judicial proceedings it also "serve[s] as a powerful indictment against our system of justice," a heightened standard rejected by this Court. 138 S. Ct. at 1906.

Petitioner's petition for a writ of certiorari should be granted.

II.

The determination by the Court of Appeals that no plain error existed in the district court's reliance for purposes of §3553(a) on a loss amount of greater than $17 million was similarly flawed. In response to petitioner's argument that holding him responsible for losses in excess of $17 million was error because everyone agreed that such losses were speculative, the Second Circuit held that "the district court did not focus on monetary losses alone, but on the 'time and energy that the victims have spent trying to recover their money, the anxiety and emotions that these events have had for them, [and] losses to third parties, such as . . . employees . . . who were fired or lost their jobs.' A105."

The Second Circuit's reasoning is based on a fundamentally flawed principle. If petitioner could not be held responsible for any loss greater than $17 million because it was simply too speculative whether losses greater than $17 million were caused by his fraud as opposed to the Global Financial Crisis then the same principle demanded that petitioner could not be held responsible for any non-monetary harms associated with such losses. In other words, whether a district court relies on monetary losses or non-monetary losses, the minimum proof of a preponderance is always the same.

Every circuit to have considered the issue has determined that the minimum proof on which sentencing determinations may be based is a preponderance of the evidence. *See, e.g., United States v. Rondón-García*, 886 F.3d 14, 25 (1st Cir. 2018) ("sentencing court may consider both charged and uncharged conduct of the

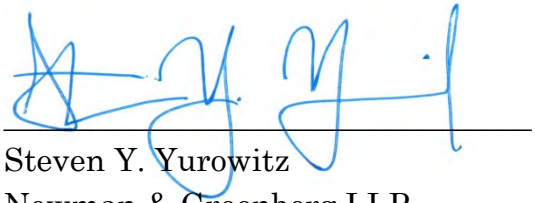
defendant, but only if proven by a preponderance of the evidence."); *United States v. Khan,* 771 F.3d 367, 379-80 (7th Cir.2014) ("[t]he government must show the loss amount caused by the conduct of conviction and other relevant unlawful conduct by a preponderance of the evidence"); *United States v. Grubbs,* 585 F.3d 793, 798-803 (4th Cir. 2009) (consistent with the Fifth and Sixth Amendments, a district court may consider uncharged conduct in determining a sentence, so long as that conduct is proven by a preponderance of the evidence); *United States v. Fenderson*, 354 Fed.Appx. 236, 238 (6th Cir. 2009) (permitting an estimate of drug quantity, "but ... a preponderance of the evidence must support the estimate."); *United States v. Kinard,* 472 F.3d 1294, 1298 (11th Cir.2006) ("The government bears the burden of establishing by a preponderance of the evidence the facts necessary to support a sentencing enhancement").

The Second Circuit's determination upholding a non-economic loss determination on less than a preponderance was error, conflicts with this Court's prior precedent, and those of the other Courts of Appeal and violates fundamental due process.

CONCLUSION

For the foregoing reasons, petitioner Carlton Cabot respectfully requests that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



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