

No. _____

In the Supreme Court of the United States

Jeffrey Chleo Brown,
Petitioner,

v.

United States of America,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Is a factual objection at sentencing sufficient to preserve for appeal the district court's failure to resolve the ensuing dispute?

PARTIES TO THE PROCEEDING

Petitioner, Jeffrey Brown, was the Defendant-Appellant before the Court of Appeals. Respondent, the United States of America, was Plaintiff-Appellee.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
INDEX TO APPENDICES	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
RELEVANT PROVISIONS	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THIS PETITION	5
I. Granting Mr. Brown's petition will allow this Court to resolve a standard-of-review split involving nine Courts of Appeals	5
a. The Federal Rules of Criminal Procedure require district courts to resolve factual disputes at sentencing, and in the First, Third, Fourth, Sixth, and D.C. Circuit Courts of Appeals, the initial factual objection preserves for appeal a district court's subsequent failure to rule	6
b. In the Second, Fifth, Ninth, and Tenth Circuits, the defendant must object twice	7
c. This deep and persistent split involves a pair of commonly applied rules	8
CONCLUSION	9

INDEX TO APPENDICES

Appendix A Order Denying Petition for Rehearing

Appendix B Judgment and Opinion of Fifth Circuit

Appendix C Judgment and Sentence of the United States District Court for the
Northern District of Texas

TABLE OF AUTHORITIES

Federal Rules

FED. R. CRIM. P. 32.....	2, 6-8
FED. R. CRIM. P. 51.....	1, 5, 8

Federal Cases

<i>United States v. Acevado</i> , 824 F.3d 179 (1st Cir. 2016)	7
<i>United States v. Banks</i> , 494 F.3d 681 (8th Cir. 2007)	6
<i>United States v. Blanco</i> , 884 F.2d 1577 (3d Cir. 1989).....	7
<i>United States v. Brown</i> , 786 F. App'x 499 (5th Cir. 2019)	1, 4, 8
<i>United States v. Esparza-Gonzales</i> , 268 F.3d 272 (5th Cir. 2001).....	8
<i>United States v. Flores-Alvarado</i> , 779 F.3d 250 (4th Cir. 2015).....	6-7
<i>United States v. Furst</i> , 918 F.2d 400 (3d Cir. 1990)	7, 9
<i>United States v. Gomez</i> , 831 F.2d 453 (3d Cir. 1987)	7
<i>United States v. Gonzalez-Velez</i> , 587 F.3d 494 (1st Cir. 2009)	7
<i>United States v. McCants</i> , 434 F.3d 557 (D.C. Cir. 2006)	6-7
<i>United States v. Reyna</i> , 358 F.3d 344 (5th Cir. 2004)	8
<i>United States v. Scott</i> , 91 F.3d 1058 (8th Cir. 1996)	6
<i>United States v. Tackett</i> , 113 F.3d 603 (6th Cir. 1997)	7
<i>United States v. Wagner-Dano</i> , 679 F.3d 83 (2d Cir. 2012)	8
<i>United States v. Warren</i> , 737 F.3d 1278 (10th Cir. 2013)	8
<i>United States v. Wijegoonaratna</i> , 922 F.3d 983 (9th Cir. 2019)	8
<i>United States v. Williams</i> , 612 F.3d 500 (6th Cir. 2010).....	7
<i>United States v. Williamson</i> , 53 F.3d 1500 (10th Cir. 1995).....	9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Brown seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's unpublished opinion can be found in the Federal Appendix at 786 F. App'x 499 (5th Cir. 2019). The opinion is attached to this petition as Appendix B. The Fifth Circuit's order denying Mr. Brown's timely petition for rehearing is attached as Appendix A. The district court's judgment is attached as Appendix C.

JURISDICTION

The Court of Appeals issued its panel opinion on December 5, 2019, and denied Mr. Brown's timely petition for rehearing on January 28, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves two standards set in the Federal Rules of Criminal Procedure. One addresses the preservation of errors at the district-court level:

A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.

FED. R. CRIM. P. 51(b). The other addresses the district court's duty to resolve factual disputes at sentencing:

At sentencing, the court . . . must—for any disputed portion of the presentence report or other controverted

matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.

FED. R. CRIM. P. 32(i)(3)(B).

LIST OF PROCEEDINGS BELOW

1. *United States v. Jeffrey Brown*, Case No. 4:18-CR-00242-A, United States District Court for the Northern District of Texas. Judgment and sentence entered on January 25, 2019. (Appendix C).
2. *United States v. Jeffrey Brown*, 786 F. App'x 499 (5th Cir. 2019), Case No. 19-10103, Court of Appeals for the Fifth Circuit. Judgment affirmed on December 5, 2019. (Appendix B).
3. *United States v. Jeffrey Brown*, Case No. 19-10103, Court of Appeals for the Fifth Circuit. Order denying Mr. Brown's timely petition for rehearing entered on January 28, 2020. (Appendix A).

STATEMENT OF THE CASE

Jeffrey Brown recently pleaded guilty to committing wire fraud. The United States charged him in a one-count information with a scheme to defraud his former employer. (ROA.7-10). The information, filed in the Northern District of Texas, alleged that Mr. Brown committed the fraud by making personal purchases with a company-issued credit card. (ROA.7-8). Mr. Brown pleaded guilty, *see* (ROA.23-26), and his case was set for sentencing, *see* (ROA.29).

At Mr. Brown's sentencing hearing, the district court introduced a previously undisclosed victim-impact statement. (ROA.118-19). The statement was written by the CEO of Mr. Brown's former employer and claimed that his crime "had a dramatic impact on the business." (ROA.147). The statement went on to specify that this impact was economic: "Had it not been for the resolve and *personal financial support* of the company shareholders," the statement claimed, "the small business would have collapsed due to [Mr. Brown's] misappropriation of funds." (ROA.147).

Mr. Brown objected. He argued that the statement "grossly exaggerate[d]" the effect of the offense, (ROA.123), and supported his argument with reference to two facts. First, insurance covered a large portion of the loss. (ROA.125). Second, Mr. Brown's scheme went undetected for years. (ROA.123). These facts were drawn directly from undisputed portions of the presentence report. *See* (ROA.154-55).

The district court never actually resolved the dispute. In response to Mr. Brown's objection, the government called its case agent, and on direct, he testified that that Mr. Brown's offense "did not seem to [have] a major financial impact on the company." (ROA.129). The district court then imposed sentence without addressing the objection. (ROA.132-33).

On appeal, the parties contested the applicable standard of review. Mr. Brown challenged the district court's failure to resolve a factual dispute at sentencing and argued that his objection to the victim-impact statement preserved for appeal the district court's failure to resolve the matter. *United States v. Brown*, 786 F. App'x 499, 499-500 (5th Cir. 2019). The Fifth Circuit disagreed. *Id.* In an unpublished opinion, it faulted Mr. Brown for failing to raise the failure-to-resolve claim at sentencing. *Id.* It then affirmed the judgment after finding that "any error by the district court in not resolving the alleged dispute . . . was not clear or obvious." *Id.* The Fifth Circuit issued the opinion on December 5, 2019, and two weeks later, Mr. Brown filed a timely petition for panel rehearing. The petition asked the Fifth Circuit to reconsider its standard-of-review analysis, *see* Petition for Panel Rehearing at 1, *United States v. Jeffrey Brown*, No. 19-10103 (5th Cir. Dec. 19, 2020), but the Fifth Circuit denied the petition on January 28, 2020, *see* Order on Petition for Rehearing at 1, *United States v. Jeffrey Brown*, No. 19-10103 (5th Cir. Jan. 28, 2020).

REASONS FOR GRANTING THIS PETITION

I. Granting Mr. Brown’s petition will allow this Court to resolve a standard-of-review split involving nine Courts of Appeals.

“A party may preserve a claim of error by informing the court—when the court ruling or order is made or ought—of the action the party wishes the court to take.” FED. R. CRIM. P. 51(b). Mr. Brown objected at sentencing to a factual claim advanced in a victim-impact statement. (ROA.123). The objection informed the district court “of the action” he “wishe[d] the court to take,” FED. R. CRIM. P. 51(b), namely a ruling in his favor on the ensuing dispute. On appeal, Mr. Brown challenged the district court’s apparent failure to resolve the dispute one way or the other, but despite his objection, the Fifth Circuit applied the plain-error standard of review. It faulted Mr. Brown for not making a second objection concerning the district court’s duty to resolve the matter. The Second, Ninth, and Tenth Circuits have adopted the same approach, but the First, Third, Fourth, Sixth, and D.C. Circuits have all come out the other way. In the latter jurisdictions, a specific factual objection triggers the district court’s duty to resolve the ensuing dispute and is sufficient to preserve for appeal an argument concerning the failure to do so. This deep and persistent split involves an important matter—the factual integrity of the federal sentencing process—and warrants this Court’s review.

a. *The Federal Rules of Criminal Procedure require district courts to resolve factual disputes at sentencing, and in the First, Third, Fourth, Sixth, and D.C. Circuit Courts of Appeals, the initial factual objection preserves for appeal a district court’s subsequent failure to rule.*

The Federal Rules of Criminal Procedure require sentencing courts to resolve factual disputes at sentencing. “[F]or any disputed portion of the presentence report or other controverted matter,” the district court “must . . . rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.” FED. R. CRIM. P. 32(i)(3)(B). Such findings, in turn, “help ensure ‘meaningful appellate review and the fairness of the sentencing process.’” *United States v. Banks*, 494 F.3d 681, 687 (8th Cir. 2007) (quoting *United States v. Scott*, 91 F.3d 1058, 1062 (8th Cir. 1996)).

In the First, Third, Fourth, Sixth, and D.C. Circuit Courts of Appeals, a sufficiently specific factual objection triggers the district court’s duty to rule. The Fourth Circuit, for example, has stated that a district court becomes “obligated to resolve the dispute” upon a “specific and factually grounded” objection. *United States v. Flores-Alvarado*, 779 F.3d 250, 255 (4th Cir. 2015). The District of Columbia Circuit Court of Appeals has used similar language:

McCants argues that, since the PIR contained factual assertions that were hotly contested by the defendant and the prosecutor, Rule 32 obligated the trial court to confront the factual disputes and resolve them on the record. We agree.

United States v. McCants, 434 F.3d 557, 561 (D.C. Cir. 2006). This approach is faithful to text, which states that the district court “must” take one of three actions

when faced with “any disputed portion of the presentence report or other controverted matter.” FED. R. CRIM. P. 32(i)(3)(B).

A sufficiently specific objection in the First, Third, Fourth, Sixth, and D.C. Circuits is sufficient *by itself* to preserve for appeal the district court’s failure to resolve the ensuing dispute. The First Circuit has specifically identified the *de novo* standard as applicable in those cases. *See United States v. Acevado*, 824 F.3d 179, 183-84 (1st Cir. 2016) (Souter, J.) (quoting *United States v. Gonzalez-Velez*, 587 F.3d 494, 508 (1st Cir. 2009)). The Third Circuit refers to its review as “plenary,” but the standard applied is the same. *United States v. Furst*, 918 F.2d 400, 406 (3d Cir. 1990) (citing *United States v. Blanco*, 884 F.2d 1577, 1580 (3d Cir. 1989); *United States v. Gomez*, 831 F.2d 453, 455 (3d Cir. 1987)). The Fourth, Sixth, and D.C. Circuit Courts of Appeals have not identified the precise standard of review but have instead looked to enforce “literal compliance” with the duty-to-resolve rule whenever the defendant triggers the district court’s obligation to act. *See United States v. Williams*, 612 F.3d 500, 515 (6th Cir. 2010) (quoting *United States v. Tackett*, 113 F.3d 603, 613-14 (6th Cir. 1997)); *see also Flores-Alvarado*, 779 F.3d at 255; *McCants*, 434 F.3d at 561.

- b. In the Second, Fifth, Ninth, and Tenth Circuits, the defendant must object twice.*

In four other circuits, the defendant must make two objections. The Fifth Circuit applied the plain-error standard in this case after noting that Mr. Brown never made a second objection concerning the district court’s duty to resolve the ongoing dispute:

The record reflects that Brown failed to raise the issue of Rule 32(i)(3)(B) at sentencing and did not otherwise argue that the district court did not resolve a disputed issue or make relevant findings or rulings. Thus, our review is for plain error.

United States v. Brown, 786 F. App'x 499, 500 (5th Cir. 2019) (citing *United States v. Reyna*, 358 F.3d 344, 349-50 (5th Cir. 2004) (en banc); *United States v. Esparza-Gonzales*, 268 F.3d 272, 274 (5th Cir. 2001)). The Second, Ninth, and Tenth Circuits have all adopted the same approach. See *United States v. Wijegoonaratna*, 922 F.3d 983, 989 (9th Cir. 2019); *United States v. Warren*, 737 F.3d 1278, 1284 (10th Cir. 2013); *United States v. Wagner-Dano*, 679 F.3d 83, 90 (2d Cir. 2012).

- c. *This deep and persistent split involves a pair of commonly applied rules.*

This case allows the Court to resolve a deep and persistent circuit split concerning an important question of federal law. At the outset, it implicates two commonly applied standards set by the Federal Rules of Criminal Procedure. One applies at the district-court level whenever a criminal defendant lodges a factual objection at sentencing. See FED. R. CRIM. P. 32(i)(3)(B). The other applies at the appellate level and sets the standard of review. FED. R. CRIM. P. 51(b). The latter standard requires only that the defendant “inform” the district court “of the action the party wishes the court to take,” FED. R. CRIM. P. 51(b), and the First, Third, Fourth, Sixth, and D.C. Circuit Courts of Appeals all recognize that a factual objection does just that: it requests a ruling in the defendant’s favor. Four other Courts of Appeals come out the other way, but their approach is not faithful to the text. In any event, there is authority on either side going back decades, *see, e.g.*,

United States v. Williamson, 53 F.3d 1500, 1527 (10th Cir. 1995); *Furst*, 918 F.2d at 406, and the Courts of Appeals are unlikely to resolve the split on their own. As it stands, the relevant rules are inconsistently applied based on geography, but both are tremendously important to an orderly and reasoned federal sentencing process. This Court should step in and resolve the split.

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted June 26, 2020.

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