No. 19-8900

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY CHLEO BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected, on plain-error review, petitioner's claim that Federal Rule of Criminal Procedure 32(i)(3)(B) obligated the district court to make an explicit ruling regarding petitioner's disagreement with an assertion in a victim-impact statement that neither the government nor the Probation Office relied on or endorsed, where petitioner did not specifically request such a ruling from the district court.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B3) is not published in the Federal Reporter but is reprinted at 786 Fed. Appx. 499.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2019. A petition for rehearing was denied on January 28, 2020. Pet. App. A1. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for

rehearing. The petition for a writ of certiorari was filed on June 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of wire fraud in violation of 18 U.S.C. 1343. Pet. App. C1. He was sentenced to 40 months of imprisonment, to be followed by three years of supervised release, and ordered to pay $255,736.50 in restitution. Id. at C1-C2, C4.

1. Petitioner was the general manager of CSI Calendaring (CSI), a manufacturing company in Texas. WCCO Belting, Inc., CSI's parent company, provided petitioner with two credit cards for business purchases. C.A. ROA 24-25. From 2013 to 2017, petitioner used the business cards for personal purchases, including hotel stays, sports tickets, cruise line payments, movie rentals, and gift cards. ROA 25. Petitioner disguised the payments to make the charges look legitimate, sending false credit card information and altered receipts to WCCO Belting. ROA 25-26. Over the course of the scheme, petitioner made personal charges totaling approximately $255,736. ROA 26. Petitioner pleaded guilty to one count of wire fraud, in violation of 18 U.S.C. 1343. ROA 23.

Tom Shorma, the president of WCCO Belting, submitted a victim-impact statement to the district court. ROA 147-149. The victim-

impact statement addressed the financial impact of the fraud. In particular, Shorma stated that petitioner's actions "had a dramatic impact on the business" and that, without the "personal financial support of the company shareholders," the business would have "collapsed" due to petitioner's actions. ROA 147. Shorma also addressed petitioner's management at the company, including petitioner's creation of a coercive atmosphere and failure to make promised investments in safety. Ibid. Shorma concluded that, in addition to inflicting a financial loss, petitioner's actions had tarnished the company's reputation with its workforce, vendors, and customers. ROA 149.

The Probation Office prepared a presentence report, which calculated petitioner's sentencing range under the Sentencing Guidelines as 21 to 27 months of imprisonment. ROA 163; Presentence Investigation Report (PSR) ¶ 71. The presentence report stated that the U.S. Attorney's Office had received a victim-impact statement from Shorma and that that statement would be provided to the court. ROA 155; PSR ¶ 19. The report did not, however, summarize or incorporate the contents of Shorma's statement. The presentence report stated that petitioner owed restitution of $55,736.50 to WCCO Belting. ROA 165; PSR ¶ 81.

The Probation Office subsequently prepared an addendum to the presentence report regarding restitution. The addendum stated that WCCO Belting had received a $205,000 settlement from the

insurance company, leaving only $54,736.50 uncompensated. ROA 167; Addendum to PSR ¶ 18. The addendum also reported that WCCO Belting paid the insurance company a $1000 deductible and incurred forensic accounting and legal representation fees. Ibid.

On January 15, 2019, the district court issued an order informing that parties that it had tentatively decided to sentence petitioner above his Guidelines range based on its review of the presentence report and the other sentencing items. ROA 36.

2. At the sentencing hearing, the district court observed that the parties did not object to the presentence report, and it adopted the facts set forth in the report, as modified by the addendum. ROA 107-108. The court then reiterated its view that an above-Guidelines sentence was appropriate. ROA 108.

During the hearing, the district court invited petitioner to comment on Shorma's victim-impact statement, which the court described as a "letter * * * concerning [petitioner's] activities while employed by th[e] company." ROA 118. Petitioner's counsel said that he had not seen Shorma's statement. Ibid. The court provided copies to petitioner and the government for review. ROA 118-119. After reviewing the document, petitioner's counsel stated that he "would like to respond, just briefly, to [Shorma's] letter." ROA 123. Petitioner's counsel stated that the letter "grossly exaggerates the financial situation [the company] was put in" because the company did not notice that its funds were being

misused until somebody alerted it that the ledger was being changed. Ibid. Counsel also stated that much of the company's loss was recouped through insurance. ROA 124-126. The government did not disagree with petitioner about the financial impact of the scheme, arguing that Shorma's statement focused on the impact that petitioner's management, personal traits, and use of the safety budget had on the "business and on the people that work [at the company]." ROA 126.

The government then called FBI Special Agent Frank Super "to clarify the factual underpinnings [of Shorma's] statement." ROA 127. As is relevant here, Agent Super testified that "[t]here did not seem to be a major financial impact on the company in total," but that there was an "overall dark cloud over the business because of [petitioner's] management," leaving many employees with "negative attitudes." ROA 129. On cross-examination, petitioner's counsel likewise elicited testimony that "there was no financial hardship on the company." ROA 132.

After Agent Super's testimony, the district court asked petitioner's counsel whether he had any further comments. Counsel replied that he was "done," and counsel did not identify any remaining factual dispute that the court was obligated to resolve. ROA 132. The court then stated that it was "still of the belief" that a sentence above petitioner's Guidelines range was warranted. Ibid. Citing the "large number of [crimes]" petitioner committed

"with this employer over a long period of time," the court imposed an above-Guidelines sentence of 40 months of imprisonment. ROA 133.

3. On appeal, petitioner for the first time argued that the district court violated Federal Rule of Criminal Procedure 32(i)(3)(B) by failing to resolve petitioner's disagreement with the way Shorma characterized the economic impact that petitioner's conduct had on the business. Pet. C.A. Br. 8, 14.

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. B1-B3. It reviewed petitioner's claim for plain error because petitioner "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." Id. at B2.

The court of appeals determined that the district court did not "clear[ly] or obvious[ly]" err because Fifth Circuit had "not previously addressed whether Rule 32(i)(3)(B) requires resolution of disputed issues that arise from a victim-impact statement." Pet. App. B2. It noted that other courts had rejected the argument that Rule 32(i)(3)(B) extends beyond objections to the presentence report. Ibid. (citing United States v. Petri, 731 F.3d 833, 838-842 (9th Cir.), cert. denied, 571 U.S. 1074 (2013)). And the court of appeals additionally found that petitioner "ha[d] not shown a

reasonable probability that he would have received a lower sentence but for the district court's alleged error." Id. at B2-B3.

ARGUMENT

Petitioner contends (Pet. 5-9) that the court of appeals erred in applying plain-error review to his procedural claim that Federal Rule of Criminal Procedure 32(i) required the district court to explicitly resolve his disagreement with an assertion in Shorma's victim impact statement. The nonprecedential decision is correct and does not conflict with the decision of any other court of appeals. In any event, this case is a poor vehicle for further review because petitioner's factual position was undisputed by the government and because petitioner took issue with materials outside the presentence report.

1. The court of appeals correctly applied plain-error review to petitioner's claim under Federal Rule of Criminal Procedure 32(i)(3), which he raised for the first time on appeal.

When a defendant fails to object to an alleged error in the district court, he may not obtain relief from that error on appeal unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (brackets in original) (quoting United

States v. Olano, 507 U.S. 725, 732 (1993)). If those prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Ibid. (brackets in original; internal quotation marks omitted) (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

Here, petitioner's claim under Federal Rule of Criminal Procedure 32(i)(3) was forfeited and thus subject to plain-error review. Rule 32(i)(3) provides that, at sentencing, the district court:

> (A) may accept any undisputed portion of the presentence report as a finding of fact;
>
> (B) 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; and
>
> (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

Fed. R. Crim. P. 32(i)(3).

In the district court, petitioner disagreed with a victim-impact statement's characterization of the financial impact of his offense. But petitioner never invoked Rule 32(i)(3), suggested that his position about financial impact required an explicit ruling from the court, or requested that the court take any action

as to the factual assertion. Because petitioner did not "inform[] the [district] court" of "the action [he] wishe[d] the court to take" or object to any "action" taken by the district court, Fed. R. Crim. P. 51(b), he did not preserve a claim of error to the district court's failure to issue an affirmative ruling. Put otherwise, petitioner did not preserve his objection because he did not "inform[] the [district] court of the legal error at issue in [his] appellate challenge." Holguin-Hernandez v. United States, 140 S. Ct. 762, 766 (2020).

The court of appeals' application of plain-error review in these circumstances is consistent with the approach of several other courts of appeals, which have likewise declined to treat a factual objection in district court as the assertion of a Rule 32(i) claim. United States v. Wijegoonaratna, 922 F.3d 983, 989 (9th Cir. 2019) ("[W]here a defendant does not object at sentencing to a district court's compliance with [Rule 32], we review for plain error."); United States v. Warren, 737 F.3d 1278, 1284 (10th Cir. 2013) (applying plain-error review because a defendant who made a factual objection "made no separate objection to the district court's alleged failure to resolve his factual objection to the PSR"), cert. denied, 572 U.S. 1078 (2014); United States v. Wagner-Dano, 679 F.3d 83, 90 (2d Cir. 2012) (explaining that it "review[s] only for plain error where, as here, * * * appellant failed to alert the district court of [the Rule 32(i)(3)(B)]

procedural issue"). As the Second Circuit explained, "[i]f the defendant or the Government believes that a particular factual issue is material and the district court neglects to address the issue at sentencing, it is not difficult -- indeed, it should be intuitive -- to bring this procedural error to the district court's attention." Wagner-Dano, 679 F.3d at 92.

2. Petitioner errs in suggesting that several circuits have reached the opposite conclusion. Petitioner cites (Pet. 6-7) several decisions that did not apply plain-error review to a Rule 32(i) claim. But none of those decisions identifies any dispute between the parties about the correct standard, let alone reasons or holds that plain-error review is inappropriate. See United States v. Acevedo, 824 F.3d 179, 183-184 (1st Cir.), cert. denied 137 S. Ct. 317 (2016); United States v. Flores-Alvarado, 779 F.3d 250, 254-255 (4th Cir. 2015); United States v. Williams, 612 F.3d 500, 515-516 (6th Cir. 2010), cert. denied, 562 U.S. 944 (2010); United States v. McCants, 434 F.3d 557, 561 (D.C. Cir. 2006); United States v. Furst, 918 F.2d 400, 406 (3d Cir. 1990). And, although one unpublished Third Circuit decision appears to have consciously chosen to follow petitioner's preferred approach, United States v. Gonzalez, 176 Fed. Appx. 230, 233-234 (2006), that decision is not precedential and the Second Circuit has subsequently observed that "[e]mploying a plain error standard" where a defendant fails to request a ruling from the district court

is "consistent with the practice in those sister circuits that appear to have considered the issue," Wagner-Dano, 679 F.3d at 92.

In any event, this case does not implicate the purported conflict. Below, petitioner disagreed with the victim-impact statement's assertion that the financial impact of the crime was significant. ROA 122-126. Neither the Probation Office's presentence report, nor the government's submission at sentencing relied on that assertion -- indeed, the government itself rebutted it. The government provided a witness who clarified that that "[t]here did not seem to be a major financial impact on the company in total." ROA 126-129 (emphasis added). Petitioner's counsel confirmed that fact on cross-examination. ROA 132. After that testimony, petitioner's counsel stated that he was "done." Ibid. Because the factual dispute was apparently resolved to petitioner's satisfaction, even if a factual objection could itself preserve a Rule 32(i) argument, no such objection remained before the district court. And petitioner identifies no court of appeals that would grant relief in such a circumstance.

3. This case would also be a poor vehicle for further review because petitioner would not prevail even if plain-error review did not apply. Petitioner's objection to material outside the presentence report does not implicate Rule 32(i) at all, and any error was harmless.

a. Petitioner claims a Rule 32(i)(3) violation based on the absence of an explicit ruling regarding his disagreement with an assertion in a victim-impact statement that was not incorporated into the presentence report. Rule 32(i)(3) does not require such a ruling. The rule allows the district court to "accept any undisputed portion of the presentence report as a finding of fact," and requires the district court "for any disputed portion of the presentence report or other controverted matter" either to "rule on the dispute" or "determine that a ruling is unnecessary" and "append a copy of the court's determinations" to "any copy of the presentence report made available to the Bureau of Prisons." Fed. R. Crim. P. 32(i)(3)(A)-(C). In United States v. Petri, 731 F.3d 833, cert. denied, 571 U.S. 1074 (2013), the Ninth Circuit explained that Section 32(i)(3)(B) applies only to unresolved factual objections to the presentence report, rather than "all matters controverted, no matter how they are presented, throughout the entire sentencing phase." Id. at 836. The court relied on the Rule's structure, purpose, drafting history, the Advisory Committee's notes, and rulings of other courts on similar questions in reaching that conclusion. Id. at 837-841.

The government is not aware of any court of appeals that has reached a contrary conclusion, and, indeed, every Rule 32(i)(3) case petitioner cites addresses an objection to the presentence report. See Pet. 5-9. This case involved disagreement with an

assertion that appeared only in a victim-impact statement, which was in any event not a "controverted matter" between the parties. Because, at the very least, this case falls outside the Rule 32(i)(3) heartland, it is a poor vehicle for addressing the standard of appellate review for Rule 32(i)(3) claims.

b. Finally, even if plain-error review did not apply, any Rule 32(i)(3) error was harmless. See Fed. R. Crim. P. 52(a); United States v. Moton, 951 F.3d 639, 644-646 (5th Cir. 2020) (rejecting a defendant's sentencing argument under de novo review because errors in the presentence report were harmless); United States v. Becerra-Sandoval, 790 Fed. Appx. 2, 3 n.2 (5th Cir. 2020) (per curiam) (explaining that, even assuming it were preserved, any Rule 32(i) error was harmless). An error is harmless if it does not have a "substantial and injurious effect" on the proceeding. See Kotteakos v. United States, 328 U.S. 750, 776 (1946). Here, the assertion with which petitioner disagreed had no effect on his sentence. The district court viewed Shorma's allegations about petitioner's management, rather than his assertion about the financial impact of the crime, as the focus of the victim-impact statement. See ROA 118. The court made no reference to the former assertion, or to the financial impact of petitioner's fraud, in explaining the reasons for the sentence imposed. ROA 132-134; see ROA 179. Nor does the record reflect a realistic possibility that the court believed that the financial

impact was grave. The parties agreed that it was not; the court adopted the presentence report's findings that insurance compensated the business for all but approximately $55,000 of the losses from the fraud; and Agent Super testified without contradiction that the fraud did not cause a financial hardship to the company. ROA 128-129, 132. On this record, it is clear that no prejudice resulted from the lack of an express ruling by the court adopting Agent Super's testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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