No. 20-1644

In the Supreme Court of the United States

DEVON ARCHER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
FINNUALA K. TESSIER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in determining that the district court lacked an adequate factual basis for granting petitioner's motion for a new trial under Federal Rule of Criminal Procedure 33.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. *Galanis*, No. 16-cr-371 (Nov. 15, 2018)

United States Court of Appeals (2d Cir.):

United States v. *Galanis*, No. 18-3727 (Oct. 7, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 977 F.3d 181. The order of the district court (Pet. App. 20a-58a) is reported at 366 F. Supp. 3d 477.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2020. A petition for rehearing was denied on December 23, 2020 (Pet. App. 19a). The petition for a writ of certiorari was filed on May 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to commit securities fraud, in violation of 18 U.S.C. 371, and securities fraud, in

violation of 15 U.S.C. 78j(b) and 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. The district court granted his motion for a new trial. Pet. App. 20a-58a. The court of appeals reversed and remanded for sentencing. *Id.* at 1a-18a.

1. This case arises out of a fraudulent scheme involving petitioner, his co-conspirator Jason Galanis, and several others. Pet. App. 3a-4a. In early 2014, the conspirators approached a tribal entity, the Wakpamni Lake Community Corporation of the Ogala Sioux Tribe, with an investment plan under which the tribe would issue tax-free bonds and then invest the proceeds in an annuity. *Id.* at 4a. The income from the annuity would cover interest payments on the bonds, and any leftover income would fund tribal economic development projects. *Ibid.* The Wakpamni agreed to the plan and issued tens of millions of dollars in bonds in a series of three offerings in 2014 and 2015. *Id.* at 4a-5a. But instead of investing the proceeds in an annuity, the conspirators put the money in a bank account belonging to a shell company. *Id.* at 5a. They then used the money for personal purposes, such as funding personal business ventures and buying jewelry, luxury cars, and a new home. *Ibid.*

The conspirators also "foisted the Wakpamni bonds" on "unsuspecting" investors. Pet. App. 4a. The conspirators used two asset-management companies that they controlled to buy Wakpamni bonds on behalf of the companies' clients—without the clients' knowledge or permission, without informing the clients of the conflicts of interest that riddled the transactions, and in violation of the clients' investment agreements. *Id.* at 4a-5a. When the scheme unraveled, the Wakpmani were left with approximately $60 million of debt and the investors with more than $40 million of losses. *Id.* at 5a.

2. A grand jury indicted petitioner on one count of conspiring to commit securities fraud, in violation of 18 U.S.C. 371, and one count of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. A jury found petitioner guilty on both counts. Pet. App. 6a.

The district court, however, granted petitioner's motion for a new trial under Federal Rule of Criminal Procedure 33. See Pet. App. 20a-58a. The court stated that Galanis was the "mastermind of the conspiracy," that Galanis "viewed [petitioner] as a pawn to be used in furtherance of his various criminal schemes," and that it was "unconvinced that [petitioner] knew that * * * Galanis was perpetrating a massive fraud." *Id.* at 23a, 35a-36a. The court acknowledged that the government had presented a "substantial amount of circumstantial evidence" of petitioner's intent to defraud, that the government's case was "not without appeal," and that petitioner's conduct was "troubling." *Id.* at 35a-36a. But the court ordered a new trial because, after "viewing the entire body of evidence, particularly in light of the alternative inferences that may legitimately be drawn from each piece of circumstantial evidence," it "harbor[ed] a real concern that [petitioner] is innocent of the crimes charged." *Id.* at 50a.

3. The court of appeals reversed. Pet. App. 1a-19a.

The court of appeals observed that, under Federal Rule of Criminal Procedure 33, "the court may * * * grant a new trial to the defendant if the interests of justice so require." Pet. App. 7a (quoting Fed. R. Crim. P. 33(a)). It explained that a district court may grant a new trial "based on the weight of the evidence alone," but only if "the evidence preponderates heavily against the verdict to such an extent that it would be 'manifest

injustice' to let the verdict stand." *Id.* at 8a. The court of appeals observed that such an approach "is in accord with the standard used by several of [its] sister circuits." *Ibid.* It explained that, under this standard, a district court may not "reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Ibid.* (citation omitted). It stated that a district court should instead "'defer to the jury's resolution of conflicting evidence'" unless "the evidence was 'patently incredible or defied physical realities'" or "an evidentiary or instructional error compromised the reliability of the verdict." *Ibid.* (brackets and citations omitted).

Applying that approach, the court of appeals found that the evidence in this case did not preponderate heavily against the jury's guilty verdict. Pet. App. 9a-16a. The court noted that the "only seriously disputed element" was petitioner's intent, namely, his intent to defraud (for the securities-fraud count) and his intent to further the conspiracy's purposes (for the conspiracy count). *Id.* at 9a-10a (citation omitted). It then identified five categories of evidence that left it with "the unmistakable conclusion that the jury's verdict must be upheld." *Id.* at 10a.

First, the court of appeals observed that the jury reviewed "a wealth of emails" in which petitioner "discussed the progression of the Wakpamni scheme" with the conspirators. Pet. App. 10a. It explained that, although individual emails "could be subject to both legitimate and nefarious interpretation," the emails, "taken as a whole," "strong[ly]" indicated that petitioner knew that Galanis was using the proceeds of the bond sales for personal purposes. *Id.* at 10a-11a. It identified one "string of emails," for example, that revealed that

petitioner was aware of Galanis's intent to spend the proceeds of the Wakpamni bonds "on a condo in Manhattan's Tribeca neighborhood." *Id.* at 11a.

Second, the court of appeals found that "[t]he evidence strongly supported an inference that [petitioner] intended to help the conspirators defraud [the asset-management companies'] clients by purchasing the bonds without informing them of the conflicts of interest that riddled the transactions." Pet. App. 11a. The court observed, for instance, that "ample evidence" showed that petitioner helped to acquire certain companies for the specific purpose of "plac[ing] the Wakpamni bonds with their clients," even though the "very nature of the transactions was surely suspect" and even though petitioner's email exchanges indicated his "awareness that Galanis * * * w[as] investing in ways that would be objectionable to the directors" of the companies. *Id.* at 11a-12a.

Third, the court of appeals highlighted evidence of petitioner's own deceptive conduct. Pet. App. 12a-13a. The court observed that the Wakpamni issued the bonds in three offerings; that, after the first offering, the conspirators had sought to persuade them to issue the second offering by "falsely assuring them that additional investors wanted to invest 'right away'"; and that, in an effort to prop up that assurance, petitioner sent the Wakpamni a letter in which he expressed interest in buying the bonds and in which he portrayed his company "as a legitimate investor . . . using its own funds to invest." *Id.* at 13a (citation omitted). The court explained that, in reality, "the funds used to purchase the bonds were not [petitioner's] at all"; instead, "in Ponzi-like fashion," the conspirators "knowingly purchas[ed]

the bonds from the second issuance with proceeds from the first." *Id.* at 12a-13a.

Fourth, the court of appeals found "[p]erhaps the strongest evidence of [petitioner's] guilty knowledge" in "his lies" in furtherance of the scheme. Pet. App. 14a. The court pointed out, for example, that petitioner had told two banks that his company used its own funds to acquire the Wakpamni bonds from the second offering, even though the bonds were in fact purchased with the proceeds of the first offering. *Ibid.*

Finally, the court of appeals found "persuasive evidence that [petitioner] knowingly performed two key actions in furtherance of a cover-up designed to delay discovery of the scheme." Pet. App. 15a. It observed that, when the first set of interest payments on the bonds had come due, petitioner had transferred money to a "purported annuity provider," and that "[t]hese funds were then used to help pay the interest on the bonds, thereby delaying disclosure of the fraud." *Id.* at 15a-16a. And it further observed that petitioner had made "false statements concerning * * * [a] fraudulent entity created to cover the conspiracy's tracks and delay discovery of the scheme." *Id.* at 16a.

ARGUMENT

Petitioner contends (Pet. 18-35) that the district court was entitled to set aside the jury's verdict and grant him a new trial under Federal Rule of Criminal Procedure 33 based on its different view of the evidence in this case. The petition for a writ of certiorari arises in an interlocutory posture, which itself provides a sufficient reason to deny it. In any event, the court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or

another court of appeals. The court of appeals' fact-bound decision does not warrant further review.

1. As a threshold matter, the decision below is interlocutory; the court of appeals reversed the district court's judgment and remanded the case for sentencing. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari). The Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., *Supreme Court Practice* 4-55 n.72 (11th ed. 2019).

That practice promotes judicial efficiency, because the proceedings on remand may affect the consideration of the issues presented in a petition. It also enables issues raised at different stages of a lower-court proceeding to be consolidated in a single petition. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case presents no occasion for this Court to depart from its usual practice.

2. In any event, the decision below was correct. Rule 33 provides that a district court may "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The lower federal courts "have interpreted Rule 33 * * * to permit the trial judge to set aside a conviction against the weight of the evidence." *Tibbs* v. *Florida*, 457 U.S. 31, 39 n.12 (1982).

The courts of appeals have uniformly recognized, however, that a district court should grant a new trial based on the weight of the evidence only in exceptional cases where the evidence preponderates heavily against the guilty verdict. See *United States* v. *Indelicato*, 611 F.2d 376, 387 (1st Cir. 1979) ("evidence preponderates heavily against the verdict") (citation omitted); *United States* v. *Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997) ("evidence must preponderate heavily against the verdict"); *United States* v. *LaVictor*, 848 F.3d 428, 455-456 (6th Cir.) ("extraordinary circumstances where the evidence preponderates heavily against the verdict") (citation omitted), cert. denied, 137 S. Ct. 2231 (2017); *United States* v. *Reed*, 875 F.2d 107, 114 (7th Cir. 1989) ("evidence preponderates * * * heavily against the [verdict]"); *United States* v. *Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980) ("preponderates sufficiently heavily against the verdict"); *United States* v. *Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981) ("exceptional cases in which the evidence preponderates heavily against the verdict") (citation omitted); *United States* v. *Evans*, 42 F.3d 586, 593-594 (10th Cir. 1994) ("exceptional cases in which the evidence preponderates heavily against the verdict") (citation omitted); *United States* v. *Brown*, 934 F.3d 1278, 1297 (11th Cir. 2019) ("evidence must preponderate heavily against the verdict") (citation omitted), cert. denied, 140 S. Ct. 2826 (2020); *United States* v. *Rogers*, 918 F.2d 207, 213 (D.C. Cir. 1990) (Thomas, J.) ("extraordinary circumstances where the evidence preponderates heavily against the verdict") (citation omitted); see also *United States* v. *Pritt*, 238 F.3d 417, 2000 WL 1699833, at *5 (4th Cir. Nov. 14, 2000) (per curiam) (unpublished).

Although this Court has not directly addressed the issue, it has quoted a court of appeals decision stating that a district court may grant a new trial if "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." *Tibbs*, 457 U.S. at 38 n.11 (citation omitted). The court of appeals in this case applied that standard. It "h[eld] that a district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be 'manifest injustice' to let the verdict stand." Pet. App. 7a-8a (citation omitted). And it observed that this "'preponderates heavily' standard" "is in accord with the standard used by several of [its] sister circuits." *Id.* at 9a.

Applying that standard, the court of appeals properly determined that, in this case, "[t]he evidence introduced at trial did not preponderate heavily against the jury's verdict." Pet. App. 9a. The court identified numerous categories of evidence that supported the jury's verdict: (1) emails indicating petitioner's awareness that Galanis was using the proceeds of the bonds for personal purposes, (2) evidence showing that petitioner helped the conspirators acquire asset-management companies for the specific purpose of offloading the Wakpamni bonds to those companies' clients, (3) petitioner's deceptive representations to the Wakpamni about the source of the funds used to buy bonds in the second offering, (4) petitioner's lies to banks during the conspiracy, and (5) petitioner's actions in furtherance of covering up the conspiracy. *Id.* at 10a-16a. Evaluating that evidence "under the preponderates heavily standard," the court was "left with the unmistakable conclusion that the jury's verdict must be upheld." *Id.* at 10a.

That fact-bound decision does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence or discuss specific facts.").

3. Petitioner reads (Pet. 17) the decision below as having "restrict[ed] weight-of-the-evidence challenges under Rule 33 to circumstances where evidence was patently incredible or physically impossible" and, on that basis, argues that the decision was incorrect, conflicts with this Court's precedents, and creates a circuit conflict. Petitioner's reading of the decision, and thus the premise of his entire argument, is incorrect. The court of appeals did not restrict Rule 33 motions in the manner that petitioner asserts. Instead, as just shown, the court of appeals repeatedly made clear that a district court may grant a motion for a new trial when the evidence preponderates heavily against the verdict—the same test that other circuits apply. See p. 9, *supra*.

a. In reading the decision to adopt a more restrictive test, petitioner incorrectly attaches (Pet. 3-4) dispositive significance to a single sentence in which the court of appeals stated that, "absent a situation in which the evidence was 'patently incredible or defie[d] physical realities,' or where an evidentiary or instructional error compromised the reliability of the verdict, a district court must 'defer to the jury's resolution of conflicting evidence.'" Pet. App. 8a (citations omitted). The court of appeals, however, explicitly and repeatedly framed its holding in terms of the "preponderates heavily" test. See, *e.g.*, *id.* at 7a-8a ("We now clarify that rule and hold that a district court may not grant a Rule 33 motion

based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict."); *id.* at 9a ("The evidence introduced at trial did not preponderate heavily against the jury's verdict."); see also *id.* at 7a (using the "preponderates heavily" standard) (capitalization and emphasis omitted); *id.* at 8a (same); *id.* at 9a (same); *id.* at 10a (same); *id.* at 11a; *id.* at 12a (same); *id.* at 15a (same); *id.* at 16a (same); *id.* at 17a (same); *id.* at 18a (same).

The court of appeals' lengthy discussion of how that standard applies to this case belies any suggestion that its single reference to "patently incredible or defie[d] physical realities," Pet. App. 8a (citation omitted), supplied any kind of threshold or controlling limitation on the grant of a new trial motion. The case from which the court was quoting states that "'[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury's function of credibility assessment,'" with "testimony [that] is 'patently incredible or defies physical realities'" constituting "[a]n *example* of exceptional circumstances." *United States* v. *Ferguson*, 246 F.3d 129, 134, 139 (2d Cir. 2001) (emphasis added); see Pet. App. 8a (quoting *Ferguson*, *supra*). The court thus did not "restrict" Rule 33 motions solely to cases where the evidence is patently incredible or defies physical realities. Pet. 3.

Petitioner misconstrues the decision below in other respects as well. For example, petitioner incorrectly asserts (Pet. 16, 19, 20, 24, 28, 29, 33) that the court of appeals required the district court to view all the evidence in the light most favorable to the government. In support of that claim, petitioner cites (Pet. 20) a footnote in the fact section of the opinion, which stated that the facts recited were "drawn from the trial evidence and

described in the light most favorable to the Government." Pet. App. 3a n.1. The court went on to explain, however, that the fact section focused "primarily on the undisputed facts" and that the court would discuss the permissible inferences on the disputed issue of intent in a later section of its opinion. *Ibid.* And when the court analyzed and applied Rule 33, it did not draw every inference in favor of the jury's verdict, but rather discussed and weighed all the competing inferences available from the evidence. *Id.* at 9a-16a.

Petitioner also errs in suggesting (Pet. 23-24) that the court of appeals denied the district court the authority to weigh the credibility of witnesses. The court of appeals instead explained that the application of the "preponderates heavily standard specifically requires that the district court make a comprehensive assessment of the evidence." Pet. App. 16a-17a. And it has acknowledged elsewhere that, "[i]n the exercise of its discretion [under Rule 33], the court may weigh the evidence and credibility of witnesses." *United States* v. *Coté*, 544 F.3d 88, 101 (2d Cir. 2008). In any event, petitioner acknowledges (Pet. 5 n.2) that this case "d[oes] not turn on any credibility issues."

b. Contrary to petitioner's contention (Pet. 29-33), the decision below does not conflict with this Court's precedents. Petitioner principally relies (Pet. 30) on this Court's decisions in *Crumpton* v. *United States*, 138 U.S. 361 (1891), and *Metropolitan Railroad Co.* v. *Moore*, 121 U.S. 558 (1887), which note that, at common law, a defendant could move for a new trial if the verdict were "manifestly against the weight of evidence." *Crumpton*, 138 U.S. at 363; see *Moore*, 121 U.S. at 568. The "preponderates heavily" standard applied by the court of appeals is consistent with that understanding.

Petitioner's reliance (Pet. 31-32) on *United States* v. *Smith*, 331 U.S. 469 (1947), is likewise misplaced. In *Smith*, this Court held that a district court had improperly granted a motion for new trial out of time; it did not purport to define the standard for granting a new trial based on the weight of the evidence.

Petitioner also errs in arguing (Pet. 20-24) that the decision below conflicts with the decisions of other courts of appeals. As explained above, the court of appeals applied the same "preponderates heavily" standard used in other circuits. See pp. 9-11, *supra*. Thus, contrary to petitioner's contention (Pet. 20-23), the decision below does not conflict with the decisions of the Seventh and Eighth Circuits. Those courts, like the Second Circuit, allow a district court to grant a new trial based on the weight of the evidence only when the evidence preponderates heavily against the verdict. See, *e.g.*, *Reed*, 875 F.2d at 114 (7th Cir.); *Lincoln*, 630 F.2d at 1319 (8th Cir.). Petitioner asserts (Pet. 20-23) that the Seventh and Eighth Circuits allow a district court to grant a new trial even when the evidence is not patently incredible or contrary to physical reality, but as noted above, petitioner misreads the decision below in asserting that the Second Circuit restricted Rule 33 motions to that ground. See pp. 10-11, *supra*.

Petitioner likewise errs in suggesting (Pet. 23-24) that the decision below conflicts with the decisions of the First and Sixth Circuits. Those courts, too, have employed the same "preponderates heavily" test that the court of appeals applied in this case. See, *e.g.*, *Indelicato*, 611 F.3d at 387 (1st Cir.) (citation omitted); *LaVictor*, 848 F.3d at 455-456 (6th Cir.). Petitioner argues (Pet. 23) that the First and Sixth Circuits improperly "restrict [the district court's] discretion when it

comes to witness credibility." But regardless of what the First and Sixth Circuits may do, the Second Circuit did not impose any such restrictions here. See p. 11, *supra*. As already noted, petitioner has acknowledged that this case does not turn on credibility issues. See *ibid.*

Petitioner's assertion of conflict (Pet. 24-29) with decisions from the Fourth, Fifth, Sixth, Tenth, and D.C. Circuits describing a court deciding a Rule 33 motion as a "thirteenth juror" is equally mistaken. As petitioner appears to acknowledge (Pet. 25), those courts have used the term "thirteenth juror" only as an "analogy," not as a governing legal standard. Those courts agree that the ultimate legal standard is whether the evidence preponderates heavily against the verdict, and that, whatever the phrase "thirteenth juror" may suggest, a district court may not grant a new trial simply because it disagrees with the verdict. See *Pritt*, 2000 WL 1699833, at *5 (4th Cir.); *Robertson*, 110 F.3d at 1118 (5th Cir. 1997); *LaVictor*, 848 F.3d at 455-456 (6th Cir.); *Evans*, 42 F.3d at 594 (10th Cir.); *Rogers*, 918 F.2d at 213 (D.C. Cir.).

Petitioner also contends (Pet. 28) that the First, Third, Ninth, and Eleventh Circuits all agree that a district court need not draw all inferences in favor of the government. As noted earlier, however, the decision below does not say otherwise; petitioner's assertion that it does rests on a misreading of a footnote in the opinion's fact section. See pp. 11-12, *supra*. Finally, petitioner asserts (Pet. 5-6, 24) that the decision below is inconsistent with earlier decisions of the same court. But any intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901,

902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

In all events, even if the court of appeals' formulation of the "preponderates heavily" differs in some ways from the formulation used by other circuits or in previous decisions of the Second Circuit, petitioner has not shown that the outcome of the case would change under any of those standards. The court of appeals explained that the district court exceeded the bounds of its authority to set aside the jury's verdict, where the analysis "veered into a piecemeal assessment of the evidence that understated the weight of the proof in its totality." Pet. App. 17a. Petitioner provides no sound reason to think that any other court of appeals would have upheld that "piecemeal assessment."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
FINNUALA K. TESSIER
Attorney

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