No. 23-414

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

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QUESTIONS PRESENTED

1. 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.

2. Whether the court of appeals erred in declining to review a sentencing claim that petitioner raised for the first time at oral argument on appeal.

ADDITIONAL RELATED PROCEEDINGS

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

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

Supreme Court of the United States:

Archer v. *United States*, No. 20-1644 (Nov. 1, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the Federal Reporter but is available at 2023 WL 3860530. An earlier opinion of the court of appeals (Pet. App. 18a-53a) is reported at 977 F.3d 181. The opinion and order of the district court (Pet. App. 54a-133a) is reported at 366 F. Supp. 3d 477.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2023. A petition for rehearing was denied on July 18, 2023 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on October 16, 2023. 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 and 17 C.F.R. 240.10b-5. Judgment 1. The district court granted his motion for a new trial. Pet. App. 54a-133a. The court of appeals reversed and remanded for sentencing. *Id.* at 18a-53a. The district court then sentenced petitioner to one year and one day of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-15a.

1. This case arises out of a fraudulent scheme involving petitioner, his co-conspirator Jason Galanis, and several others. Pet. App. 19a-20a. In early 2014, the conspirators approached a tribal entity, the Wakpamni Lake Community Corporation of the Oglala 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 20a. 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 21a-22a. But instead of investing the proceeds in an annuity, the conspirators put the money in a bank account belonging to a shell company. *Ibid.* They then used the money for personal purposes, such as funding personal business ventures and buying jewelry, luxury cars, and a new home. *Id.* at 23a.

The conspirators also "foisted the Wakpamni bonds" on "unsuspecting" investors. Pet. App. 20a-21a. 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 21a-23a. When the scheme unraveled, the Wakpamni were left with approximately $60 million of debt and the investors with more than $40 million of losses. *Id.* at 24a.

2. A grand jury in the Southern District of New York 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, 18 U.S.C. 2, and 17 C.F.R. 240.10b-5. Superseding Indictment 1-17. A jury found petitioner guilty on both counts. Pet. App. 2a.

The district court, however, granted petitioner's motion for a new trial under Federal Rule of Criminal Procedure 33. See Pet. App. 54a-133a. 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 55a, 81a, 83a. 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 80a, 83a. 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 114a.

3. The court of appeals reversed and remanded. Pet. App. 18a-53a.

The court of appeals observed that, under Federal Rule of Criminal Procedure 33, "the court may grant a new trial to a defendant if the interests of justice so require." Pet. App. 28a (brackets and citation omitted). 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 29a (citation omitted). The court of appeals observed that such an approach "is in accord with the standard used by several of [its] sister circuits." *Id.* at 30a. It explained that, under that 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." *Id.* at 31a (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. 31a-50a. 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 33a (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 34a.

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. 34a. It explained that, although individual emails "could be subject to both legitimate and nefarious interpretations," 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 35a, 37a. 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 36a.

Second, the court of appeals found that the 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. 37a. 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 37a, 39a.

Third, the court of appeals highlighted evidence of petitioner's own deceptive conduct. Pet. App. 39a-40a. 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 addi-

tional 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 41a (citations 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 40a-41a.

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. 43a. 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. *Id.* at 43a-44a.

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. 47a. 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." *Ibid.* 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 48a.

Petitioner filed a petition for a writ of certiorari seeking review of the court of appeals' decision, which this Court denied. See 142 S. Ct. 425.

4. On remand, the probation office prepared a Presentence Investigation Report (PSR) that assigned petitioner an advisory Sentencing Guidelines range of 108 to 135 months, based on a total offense level of 31 and a criminal history category of I. See PSR ¶ 151. At sentencing, the district court agreed with the parties "that a two-level-minor-role reduction [was] warranted." Pet. App. 137a. That should have lowered petitioner's offense level from 31 to 29, yielding a guidelines range of 87-108 months of imprisonment. See United States Sentencing Guidelines Ch. 5 Pt. A (2016). The court, however, subsequently stated that petitioner's offense level was 31, yielding a guidelines range of 108-135 months of imprisonment. Pet. App. 139a.

Petitioner did not object to the district court's calculation of his offense level. Pet. App. 139a. The court ultimately varied from the Guidelines and sentenced petitioner to one year and one day of imprisonment, 75 months below even the correct guidelines range. *Id.* at 141a.

5. The court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals declined to revisit its previous reversal of the district court's order granting a new trial. Pet. App. 2a-4a. The court explained that the law-of-the-case doctrine ordinarily required it to adhere to decisions reached at earlier stages of the litigation, and that it had no basis for departing from that doctrine in this case. *Ibid.* In doing so, the court rejected petitioner's contention that its intervening decision in *United States* v. *Landesman*, 17 F.4th 298 (2d Cir. 2021), cert. denied, 143 S. Ct. 86 (2022)—which applied

a new-trial standard of whether "the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand," *id.* at 330 (citation omitted)—was inconsistent with its earlier decision in this case. Pet. App. 3a-4a. And it clarified that cases "where the evidence was 'patently incredible or defied physical realities," or "where an evidentiary or instructional error compromised the reliability of the verdict," were "examples," and not an "exhaustive list," of situations in which that standard might be satisfied. *Ibid.* (citation and internal quotation marks omitted).

The court of appeals also declined to entertain petitioner's claim that the district court had miscalculated his offense level. See Pet. App. 14a n.2. Petitioner had not only failed to object to the calculation in the district court, but also failed to raise the issue in his opening brief and reply brief on appeal. See *ibid.* Petitioner had instead raised the issue "for the first time" "[a]t oral argument" in the court of appeals. *Ibid.* The court determined that, "[b]ecause [petitioner] failed to raise this argument in his opening brief or his reply brief, he ha[d] forfeited it." *Ibid.* As precedent for declining to address a claim advanced only at an appellate oral argument, the court cited *United States* v. *Cedeño*, 644 F.3d 79, 83 n.3 (2d Cir.), cert. denied, 565 U.S. 909, 565 U.S. 912, and 565 U.S. 922 (2011), which in turn had relied on precedent under which "issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal," *Warren* v. *Garvin*, 219 F.3d 111, 113 n.2 (2d Cir.) (brackets and citation omitted), cert. denied, 532 U.S. 968 (2000).

ARGUMENT

Petitioner contends (Pet. 15-27) 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 view of the evidence in this case. He also contends (Pet. 29-34) that the court of appeals was required to entertain a claim that he raised for the first time at oral argument on appeal. The court correctly rejected both contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Petitioner first argues (Pet. 15-27) that the court of appeals erred in reversing the district court's order granting a new trial. Petitioner raised the same contention in his interlocutory petition for a writ of certiorari, which this Court denied. See 142 S. Ct. 425. The Court should likewise decline to review the contention now.

a. 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 courts of appeals "have interpreted Rule 33 * * * to permit the trial judge to set aside a conviction that is 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.[1] And although this Court has not di-

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[1] See *United States* v. *Indelicato*, 611 F.2d 376, 387 (1st Cir. 1979) ("evidence preponderates heavily against the verdict") (citation omitted); *United States* v. *Rafiekian*, 68 F.4th 177, 189 (4th Cir. 2023) ("preponderates sufficiently heavily against the verdict") (citation omitted); *United States* v. *Robertson*, 110 F.3d 1113, 1118 (5th

rectly 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. 29a. (citation omitted). And it observed that the "'preponderates heavily' standard" "is in accord with the standard used

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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, 581 U.S. 1024 (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. *David*, 222 Fed. Appx. 210, 215 (3d Cir. 2007) ("weighed * * * heavily against the verdict").

by several of [its] sister circuits." *Id.* at 30a (citation omitted).

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. 33a. 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 33a-51a. 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 34a.

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 and discuss specific facts.").

b. Petitioner reads the decision below as having restricted weight-of-the-evidence challenges under Rule 33 to "situation[s] in which the evidence was patently incredible or defied physical realities," Pet. 4 (citation omitted), 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.

In reading the decision to adopt a more restrictive approach, petitioner incorrectly attaches (Pet. 16-17) 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 defied 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. 31a (brackets and 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 29a ("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.") (citation omitted); *id.* at 33a ("The evidence introduced at trial did not preponderate heavily against the jury's verdict."); see also *id.* at 28a (using the "preponderates heavily" standard) (capitalization and emphasis omitted); *id.* at 29a (same); *id.* at 30a (same); *id.* at 31a (same); *id.* at 32a (same); *id.* at 33a (same); *id.* at 34a (same); *id.* at 37a (same); *id.* at 40a (same); *id.* at 46a (same); *id.* at 49a (same); *id.* at 52a (same).

Indeed, on petitioner's second appeal, the court of appeals expressly disavowed petitioner's reading of the opinion it had issued in the first appeal. See Pet. App. 3a-4a. The court explained that, "[t]o *illustrate* when it would be appropriate to grant a motion for a new trial," its earlier opinion had "provided two *examples* of when a district court need not 'defer to the jury's resolution of conflicting evidence'—namely, (1) where the evidence was 'patently incredible or defied physical realities,' or (2) where an 'evidentiary or instructional error compromised the reliability of the verdict.'" *Id.* at 3a (emphasis added; citation omitted). The court rejected petitioner's suggestion that its earlier opinion had treated those two examples as the "*only* two situations where a district court may disregard a jury's resolution of conflicting evidence." *Id.* at 3a-4a (emphasis added; citation omitted). The court noted that its earlier opinion had "never said that the two examples it provided formed an exhaustive list." *Id.* at 4a.

Petitioner misconstrues the decision below in other respects as well. For example, petitioner incorrectly asserts (Pet. 15, 24) 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. 12) 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. 19a n.1 (citation omitted). 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 the opinion. *Ibid.* And when the court analyzed and applied Rule 33, it did not draw every in-

ference in favor of the jury's verdict, but instead discussed and weighed all the competing inferences available from the evidence. *Id.* at 33a-49a.

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. 49a. 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 acknowledged in his interlocutory petition for a writ of certiorari that this case "d[oes] not turn on any credibility issues." 20-1644 Pet. 5 n.2.

c. Contrary to petitioner's contention (Pet. 24-27), the decision below does not conflict with this Court's precedents. Petitioner principally relies (Pet. 25) on this Court's decisions in *Crumpton* v. *United States*, 138 U.S. 361 (1891), and *Metropolitan Railroad* 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. 25-26) 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. *Id.* at 471.

Petitioner also errs in arguing (Pet. 16-24) 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. 8-9, *supra*. Thus, contrary to petitioner's contention (Pet. 18-22), the decision below does not conflict with the decisions of the Fourth, 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.*, *United States* v. *Rafiekian*, 68 F.4th 177, 189 (4th Cir. 2023); *United States* v. *Reed*, 875 F.2d 107, 114 (7th Cir. 1989); *United States* v. *Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980). Petitioner asserts (Pet. 17-22) that the Fourth, 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 petitioner misreads the decision below in asserting that the Second Circuit restricted Rule 33 motions to that ground. See pp. 10-12, *supra*.[2]

Petitioner's assertion of conflict (Pet. 22) 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 (*ibid.*), 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

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[2] To the extent that the Fourth Circuit's decision in *United States* v. *Rafiekian*, *supra*, viewed itself as parting ways with the Second Circuit, see 68 F.4th at 188, it did not consider this case in particular, and it predated the clarification in the decision below.

the phrase "thirteenth juror" may suggest, a district court may not grant a new trial simply because it disagrees with the verdict. See *Rafiekian*, 68 F.4th at 189 (4th Cir.); *United States* v. *Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997); *United States* v. *LaVictor*, 848 F.3d 428, 455-456 (6th Cir.), cert. denied, 581 U.S. 1024 (2017); *United States* v. *Evans*, 42 F.3d 586, 593-594 (10th Cir. 1994); *United States* v. *Rogers*, 918 F.2d 207, 213 (D.C. Cir. 1990).

Petitioner also argues (Pet. 23) that the First, Third, Ninth, and Eleventh Circuits all agree that a district court deciding a Rule 33 motion need not draw all inferences in favor of the government. But as noted above, 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. 12-13, *supra*.

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, petitioner has not shown that the outcome of the case would change under any of his preferred formulations. 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. 49a. Petitioner provides no sound reason to conclude that any other court of appeals would have upheld that "piecemeal assessment." *Ibid.*

2. Petitioner separately contends (Pet. 29-34) that the court of appeals erred by declining to consider a sentencing claim that petitioner raised for the first time at oral argument on appeal. That contention likewise does not warrant this Court's review.

Federal Rule of Criminal Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In order to obtain relief under Rule 52(b), a party must first establish that the district court committed an error, that the error was plain, and that the error affected the party's substantial rights. See *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Even when a party makes that showing, "Rule 52(b) is permissive, not mandatory"; "the court of appeals has authority to order correction" when a party fails to preserve a claim of error, but it "is not required to do so." *Id.* at 735; see Fed. R. Crim. P. 52(b) ("plain error * * * *may* be considered") (emphasis added).

Every court of appeals has recognized that it has the discretion to decline to consider an issue raised for the first time at oral argument.[3] That rule "makes excellent sense: It ensures that opposing parties will have notice of every issue in an appeal, and that neither they nor reviewing courts will incur needless costs from eleventh-hour changes of course." *Joseph* v. *United States*, 574

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[3] See *United States* v. *Merritt*, 945 F.3d 578, 585 n.3 (1st Cir. 2019), cert. denied, 140 S. Ct. 2697, and 140 S. Ct. 2783 (2020); *United States* v. *Ramos*, 677 F.3d 124, 129 n.4 (2d Cir. 2012) (per curiam); *United States* v. *Lennon*, 372 F.3d 535, 541-542 n.10 (3d Cir. 2004); *United States* v. *Legins*, 34 F.4th 304, 319 n.18 (4th Cir.), cert. denied, 143 S. Ct. 266 (2022); *United States* v. *Bigelow*, 462 F.3d 378, 383 (5th Cir. 2006); *United States* v. *Bender*, 265 F.3d 464, 475 (6th Cir. 2001); *United States* v. *Kezerle*, 99 F.3d 867, 869 n.2 (7th Cir. 1996); *United States* v. *Larison*, 432 F.3d 921, 923 n.3 (8th Cir. 2006); *United States* v. *King*, 244 F.3d 736, 740 n.2 (9th Cir. 2001); *United States* v. *Eddington*, 65 F.4th 1231, 1240 n.5 (10th Cir. 2023); *United States* v. *Dekle*, 768 F.2d 1257, 1263 (11th Cir. 1985); *United States* v. *Southerland*, 486 F.3d 1355, 1360 (D.C. Cir.), cert. denied, 552 U.S. 965 (2007).

U.S. 1038, 1038 (2014) (statement of Kagan, J., respecting the denial of certiorari). The court of appeals properly applied that rule here when it declined to consider a sentencing claim that petitioner had "not developed at all * * * in his opening brief or his reply brief." Pet. App. 14a n.2.

Contrary to petitioner's suggestion (Pet. 30-31), this Court's decisions in *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897 (2018), *Molina-Martinez* v. *United States*, 578 U.S. 189 (2016), and *United States* v. *Olano*, *supra*, do not mandate that a court of appeals consider a claim raised for the first time at oral argument. In each of those cases, this Court considered the application of the plain-error rule to a criminal defendant who failed to raise a claim in district court, but who then raised the claim in his opening brief on appeal. See *Rosales-Mireles*, 138 S. Ct. at 1905 ("On appeal, Rosales-Mireles argued for the first time that his criminal history score and the resulting Guidelines range were incorrect."); *Molina-Martinez*, 578 U.S. at 196 ("Molina-Martinez * * * filed a merits brief arguing that the Probation Office and the District Court erred in calculating his criminal history points."); *Olano*, 507 U.S. at 731 (discussing "errors that were forfeited because not timely raised in district court"). Petitioner, by contrast, did not simply fail to raise his sentencing claim in the district court; he also failed to raise it in his briefs on appeal, and instead raised it for the first time at oral argument. The precedents that petitioner cites do not preclude a court of appeals from declining to review a claim in such circumstances.

Petitioner errs in asserting (Pet. 29) that the decision below conflicts with Fourth Circuit's decision in *United States* v. *Jackson*, 327 F.3d 273, cert. denied, 540

1019 (2003), reh'g denied, 540 U.S. 1144 (2004), and the Tenth Circuit's decision in *United States* v. *Courtney*, 816 F.3d 681, cert. denied, 580 U.S. 901 (2016). In *Jackson*, the Fourth Circuit considered a claim that a defendant raised for the first time in the reply brief because the claim rested on an intervening decision that had been issued "[a]fter [he] submitted his opening brief." 327 F.3d at 282. And in *Courtney*, the Tenth Circuit considered a claim that a defendant had raised in his opening brief, even though the defendant did not discuss the appropriate standard of review for that claim "until his reply brief." 816 F.3d at 683. This case, in contrast, involves neither an intervening change in the law nor a mere failure to address the proper standard of review. And whereas the defendants in *Jackson* and *Courtney* made the relevant arguments in their reply briefs, petitioner did not raise his sentencing claim until oral argument.

In any event, petitioner's contention does not warrant this Court's review. "The courts of appeals have wide discretion to adopt and apply 'procedural rules governing the management of litigation,'" and this Court "do[es] not often review the circuit courts' procedural rules." *Joseph*, 574 U.S. at 1038, 1040 (statement of Kagan, J., respecting the denial of certiorari) (citation omitted). This case would also be a poor vehicle for addressing petitioner's contention because it is far from clear that the error affected "'substantial rights'"—which requires, in general, "that the error must have been prejudicial." *Olano*, 507 U.S. at 734 (citation omitted). The district court's substantial variance from the guidelines range indicates that it was not anchored to that range, and a sentence lower than the year-and-a-day sentence that he received would have disqualified

him from receiving good-time credits. See 18 U.S.C. 3624(b)(1) (restricting such credits to "term[s] of imprisonment of more than 1 year"); *Molina-Martinez*, 578 U.S. at 203-204 (observing that a defendant cannot establish prejudice where the district court would have imposed the same sentence regardless of an alleged guidelines error).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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