No. 23-7404

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM MAXWELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's convictions should be vacated or reversed in light of this Court's decisions in Ciminelli v. United States, 598 U.S. 306 (2023); New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); Fischer v. United States, 144 S. Ct. 2176 (2024); and related cases.

2. Whether the district court committed structural error by neglecting to formally admit certain exhibits into evidence at trial.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.J.):

United States v. Maxwell, No. 11-cr-740 (July 30, 2015)

United States Court of Appeals (3d Cir.):

United States v. Maxwell, No. 15-2925 (July 17, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-61) is reported at 41 F.4th 136.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2023. A petition for rehearing was denied on September 15, 2023 (Pet. App. 1). On November 3, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. Citations of that appendix in this brief use the pagination of the PDF document available on this Court's electronic docket.

and including February 12, 2024. The petition for a writ of certiorari was filed on February 9, 2024. 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 District of New Jersey, petitioner was convicted on one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(d); one count of conspiring to commit securities fraud, in violation of 18 U.S.C. 371; one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349; 16 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); one count of conspiring to obstruct justice, in violation of 18 U.S.C. 1512(k); and one count of conspiring to sell or transfer a firearm to a prohibited person, in violation of 18 U.S.C. 371 and 18 U.S.C. 922(d)(1) (2006). Judgment 1. The district court sentenced petitioner to 240 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 3-61.

1. This case arises out of a scheme to take over FirstPlus Financial Group, Inc., a Texas-based mortgage-loan company, and to drain FirstPlus of its assets. Pet. App. 4-5.

Nicodemo Scarfo was a member of a New Jersey branch of La Cosa Nostra, the American wing of the Italian Mafia. Pet. App. 5.

In 2007, he and his associate Salvatore Pelullo "stumbled on 'the golden vein of deals'": they learned that FirstPlus, "whose main operating subsidiary had recently exited bankruptcy," was "doing no business" but was "receiving periodic, multi-million-dollar 'waterfall' payments from [a] bankruptcy trust." Ibid. (citation omitted). Scarfo and Pelullo were introduced to petitioner, an attorney in Texas, through a former FirstPlus employee. Id. at 6.

Pelullo worked with petitioner to send letters to FirstPlus's CEO and other members of its board of directors threatening to report the company to federal agencies for "financial misconduct including bribery, money laundering, and Sarbanes-Oxley [Act] violations." Pet. App. 6. The letters also "threatened to tell [the CEO's] wife -- who was then divorcing him -- that [he] had raped an assistant and used the company's moneys to pay off the victim when she got pregnant." Ibid. The "letters had their intended effect." Ibid. The CEO met with petitioner and Pelullo, "who indicated the allegations would be dropped if [the CEO] and the FirstPlus board handed the business over." Ibid. The entire board resigned and Pelullo assembled a new board, with petitioner's brother, John Maxwell, as CEO. Ibid. In practice, it was Pelullo and petitioner who "controlled the show." Ibid.

Petitioner and his confederates proceeded to loot FirstPlus of its assets. Pet. App. 6-8. Petitioner became the company's "'special counsel,'" with "his supposed labors" earning him $100,000 per month "plus expenses." Id. at 6 (citation omitted).

That role, which gave him substantial powers, allowed him to (among other things) facilitate arrangements under which money flowed out of FirstPlus to Scarfo and Pelullo in the guise of payments for consulting services. Id. at 6-7. "In the meantime, Scarfo, Pelullo, and [petitioner] began to take advantage of their ill-gotten gains." Id. at 7. Scarfo, for example, bought a yacht with Pelullo and "a house and expensive jewelry for his wife," and "[petitioner] and Pelullo had FirstPlus acquire a plane for their personal use." Ibid.

At the time, Scarfo was serving a three-year term of supervised release resulting from a prior conviction "for running an illegal gambling business." Gov't C.A. Br. 26. He submitted false supervision reports to his probation officer to conceal his contacts with Pelullo (another convicted felon) and his financial gains from FirstPlus. Id. at 26-27. And as part of a bid for early termination of Scarfo's supervised release, petitioner sent the probation officer "a false letter describing [a] supposed job" in Texas which he had offered to Scarfo. Id. at 27.

All told, between June 2007 and May 2008, petitioner and his co-conspirators "bled FirstPlus dry," draining the company of more than $14 million and leaving it with "less than $2,000" in its accounts. Pet. App. 8, 10. The Federal Bureau of Investigation began to investigate after it "became aware of the mob ties and suspicious circumstances surrounding the resignation and replacement of FirstPlus's former board." Id. at 8. The FBI

"obtained court permission to track the defendants' locations through their cellphones and wiretap their calls," "executed search warrants," and seized the plane and the yacht. Ibid. The FBI also seized numerous guns and ammunition, including a gun that petitioner's brother John Maxwell had delivered to Scarfo after speaking with petitioner. Id. at 8, 27-29.

2. In 2011, a federal grand jury in the District of New Jersey returned a 25-count indictment against petitioner and 12 other defendants. Pet. App. 8. Petitioner was charged with conspiring to violate RICO; conspiring to make false statements in connection with a loan application; conspiring to commit securities fraud, wire fraud, money laundering, and bank fraud; wire fraud; conspiring to obstruct justice; and conspiring to transfer a firearm to a prohibited person (arising from John Maxwell's delivery of the gun to Scarfo). Indictment 2-78, 82-87. A jury found petitioner guilty on all counts except conspiring to commit bank fraud and to make false statements. Pet. App. 10 & n.13. It also found Scarfo, Pelullo, and John Maxwell guilty on most of their charges. Id. at 10. The district court sentenced petitioner to 240 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

Years later, while the defendants' appeals were pending, Scarfo filed a motion in the district court seeking to "correct and amend the record" under Federal Rule of Appellate Procedure 10. D. Ct. Doc. 1545, at 4 (Feb. 14, 2019). In requesting the

court's exhibit list, Scarfo noted that the defense had identified several audio recordings that "were played to the jury during [witness] testimony and went back to the jury during deliberations," but which were "seemingly never entered into evidence at trial." Id. at 15. After a hearing on the matter, the court noted in a letter to counsel for all parties that "[t]here were times during trial when counsel" for both sides "failed to form[al]ly move an exhibit into evidence," but explained that all counsel had repeatedly been able to review all of the exhibits shown to the jury. D. Ct. Doc. 1566, at 1 (Apr. 29, 2019); see id. at 1-2; C.A. App. E3893-3894.

3. The court of appeals affirmed. Pet. App. 3-61.

The court of appeals rejected almost all of the claims of error raised by petitioner, Scarfo, Pelullo, and John Maxwell in their consolidated appeals. Pet. App. 5. As to petitioner, the court of appeals found, among other things, that the district court did not err by admitting evidence related to La Cosa Nostra or by denying his motion to sever his trial from Scarfo and Pelullo's. Id. at 17-20. The court also turned away petitioner's challenge to his RICO-conspiracy conviction, id. at 26-27, as well as his claims that there was insufficient evidence to support his firearm-transfer and wire-fraud convictions, id. at 28-30. And applying plain-error review to the sufficiency of the evidence for petitioner's wire-fraud convictions, id. at 29 n.59, the court found "plenty of evidence to support the jury's finding that

[petitioner] participated in the scheme to defraud FirstPlus by causing the company to funnel money to Pelullo and Scarfo," id. at 29; see id. at 30 ("His convictions on the wire-fraud related counts are amply supported by the trial record.").

ARGUMENT

Petitioner contends (Pet. 5-25) that most of his convictions must be vacated or reversed in light of this Court's recent decisions in Ciminelli v. United States, 598 U.S. 306 (2023); New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); Fischer v. United States, 144 S. Ct. 2176 (2024); and related cases. None of those decisions affects this case, however, so they provide no basis for relief -- particularly on plain-error review -- nor any support for petitioner's alternative request (Pet. 30-35) that the Court grant his petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings (GVR). And petitioner's unpreserved claim (Pet. 25-32) that the district court committed structural error by failing to formally admit certain exhibits into evidence likewise lacks merit and implicates no disagreement in the courts of appeals. Further review is unwarranted.

1. Petitioner contends (Pet. 5-25) that most of his convictions are invalid on various legal grounds recognized in Ciminelli, Bruen, Fischer, and related cases. Because he did not raise those claims below, they would be subject to plain-error

review. See Fed. R. Crim. P. 52(b).[2] Plain-error relief requires the defendant to show (1) an "error"; (2) that is "plain"; and (3) that affected his "substantial rights," meaning there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Greer v. United States, 593 U.S. 503, 507-508 (2021) (citation omitted). Petitioner shows neither plain error nor any basis for a GVR.

a. Petitioner first argues (Pet. 7-15) that his wire-fraud convictions -- as well as other convictions for which wire fraud provides a predicate -- should be reversed because he was prosecuted using a "right to control" theory of fraud. In Ciminelli, this Court held that "the wire fraud statute reaches only traditional property interests," and the "right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest." 598 U.S. at 316. Petitioner, however, was not prosecuted on a right-to-control theory.

The fraud scheme for which petitioner and the other defendants were indicted was not a scheme to deprive some counterparty of economic information necessary to make an economic decision, but instead a straightforward scheme to "make money for themselves * * * through the takeover and looting of [FirstPlus]." Indictment 61; see id. at 62 (alleging that the wire-fraud

[2] Ciminelli and Fischer were decided after petitioner's appeal was decided, and Bruen was decided the month before. See Pet. App. 3.

conspiracy "stole money from [FirstPlus]"); id. at 60 (alleging that the object of the conspiracy was "to obtain money and property"); id. at 68, 73 (similar for substantive wire-fraud counts); pp. 2-5, supra. The district court instructed the jury accordingly. See, e.g., C.A. App. C12,421 ("The government alleges that the purpose of the conspiracy was for the defendants * * * to make money for themselves and their co-conspirators by taking over and looting [FirstPlus].").

Petitioner claims (Pet. 8-10) that several of the jury instructions at his trial relied on a right-to-control theory, but that is incorrect. Most of the instructions he cites do not involve the meaning of "property" under the fraud statutes at all. See Pet. 8-9, 35-36 (citing instructions explaining materiality and defining "proceeds" and "specified unlawful activity" for purposes of money laundering). Another defines "property" for purposes of extortion (one of the predicate offenses for the RICO conspiracy count), not for purposes of fraud, as "consist[ing] of the seats on the board of directors of [FirstPlus], including the compensation due to those members, and thus control of [FirstPlus]." Pet. 9 (quoting C.A. App. C12,379) (emphasis omitted). Even assuming that instruction were germane to the fraud-related charges, direct control of a company -- as well as its directors' compensation -- are traditional property interests, not the kind of informational interest found insufficient in Ciminelli. See, e.g., Duplex Printing Press Co. v. Deering, 254

U.S. 443, 465 (1921) (a business "is a property right, entitled to protection against unlawful injury or interference").

Petitioner's other objections to his fraud convictions similarly lack merit. He invokes (Pet. 24, 36) Texas law recognizing immunity for attorneys from certain civil suits, but he does not explain how such immunity could apply to his wrongful conduct here, see Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 484 (Tex. 2015) (immunity "does not extend to fraudulent conduct that is outside the scope of an attorney's legal representation of his client, just as it does not extend to other wrongful conduct outside the scope of representation"), let alone how a state-law immunity from civil suit could override the federal criminal laws he was convicted of violating. And while petitioner emphasizes (Pet. 11) that his contract with FirstPlus received the "unanimous consent" of the company's board and "all proper procedures were followed," he omits the salient fact that the board was handpicked by Pelullo after he and petitioner extorted the previous board into resigning. See p. 3, supra.[3]

[3] Petitioner's second supplemental brief supporting his petition for a writ of certiorari also invokes Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257 (2024), in connection with his conviction for conspiring to commit securities fraud. He does not explain how Macquarie, which held that "[p]ure omissions are not actionable under [SEC] Rule 10b-5," id. at 260, is pertinent to this case. The securities-fraud conspiracy here involved numerous affirmative statements that were false or misleading. Indictment 52-59; see, e.g., Gov't C.A. Br. 24 (discussing SEC filings that disclosed FirstPlus's acquisition of companies without mentioning Pelullo controlled them).

b. Petitioner next argues (Pet. 16-17) that under Bruen, his conviction for conspiring to sell or transfer a firearm to a prohibited person, in violation of 18 U.S.C. 371 and 18 U.S.C. 922(d)(1) (2006), violates the Second Amendment. There was no error, let alone a plain error, on that basis either. See United States v. Sanches, 86 F.4th 680, 686-687 (5th Cir. 2023) (per curiam) (rejecting a Bruen challenge to Section 922(d)(1) on plain-error review). Neither Bruen nor this Court's more recent decision in United States v. Rahimi, 144 S. Ct. 1889 (2024), addresses the constitutionality of restrictions on sales or transfers (as opposed to carrying or possession) of firearms to prohibited persons. See Bruen, 597 U.S. at 10 (holding "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home"); Rahimi, 144 S. Ct. at 1896 (holding that persons subject to certain restraining orders "may -- consistent with the Second Amendment -- be banned from possessing firearms while the order is in effect").

There is also no basis for petitioner's suggestion (Pet. 16) that his conviction for "inchoate conspiracy" to commit the firearm offense, rather than the substantive offense itself, raises a constitutional problem. Bruen and Rahimi do not touch on that issue, either, and there is no shortage of support in "historical tradition[]" (ibid.) for the criminalization of conspiracy. See Dennis v. United States, 341 U.S. 494, 574 (1951) (Jackson, J.,

concurring) (noting Congress's adoption of "the ancient common law that makes conspiracy itself a crime").

c. Petitioner also argues (Pet. 17-22) that Fischer undermines his conviction for conspiring to obstruct justice, in violation of 18 U.S.C. 1512(k). But he again fails to show error, much less plain error.

Fischer construed 18 U.S.C. 1512(c), which imposes criminal penalties on anyone who corruptly (1) "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding," or (2) "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." 18 U.S.C. 1512(c)(1) and (2). The Court held that Subsection (c)(1) limits the scope of Subsection (c)(2), such that the latter requires proof that the defendant impaired or attempted to impair "the availability or integrity for use in an official proceeding of records, documents, objects, or * * * other things used in the proceeding." Fischer, 144 S. Ct. at 2190.

Fischer does not affect petitioner's conviction under Section 1512(k). That provision prohibits "conspir[ing] to commit any offense under this section." 18 U.S.C. 1512(k). And petitioner was charged with conspiring not just to violate Section 1512(c)(2), the provision at issue in Fischer, but also to violate 18 U.S.C. 1512(b)(3), which prohibits, among other things, "engag[ing] in

misleading conduct" with intent to "hinder, delay, or prevent the communication to a law enforcement officer * * * of information relating to the commission or possible commission of a Federal offense or a violation of conditions of * * * supervised release." 18 U.S.C. 1512(b)(3); see Indictment 82-83.

Petitioner does not dispute that he violated Section 1512(k) by conspiring to violate Section 1512(b)(3); he merely asserts (Pet. 3, 17-18, 20, 24-25) -- erroneously, see Indictment 82-83 -- that he was not in fact indicted for conspiring to violate that provision. And he cannot show a reasonable probability that a jury found him guilty only for conspiring to violate Subsection (c)(2), where the charge was predicated on deception of Scarfo's probation officer for purposes of affecting his supervised release. See, e.g., Indictment 83-84. For similar reasons, petitioner's contention (Pet. 22-25) that Section 1512(c)(2) is void for vagueness is beside the point, in addition to being meritless. Nor does anything in Fischer suggest that Section 1512(c)(2) is unconstitutionally vague.

d. Finally, petitioner's alternative request that the Court GVR (Pet. 30-33) is also misplaced. A GVR order is "potentially appropriate" when "intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the

litigation." Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam). For the reasons set forth above, the decisions cited by petitioner do not affect his convictions, they provide no reasonable probability of a different outcome, and a GVR is accordingly unwarranted.

2. Petitioner separately contends that the district court committed structural error by failing to "admit[] into evidence" "six exhibits and their transcripts," totaling 276 exhibits. Pet. 29; see Pet. 25-32. That contention appears to relate to the evidentiary matter raised in Scarfo's posttrial motion to correct the record. See pp. 5-6, supra. And by "admit[] into evidence," Pet. 29, petitioner appears to refer to the customary procedure whereby counsel formally offers an exhibit, opposing counsel voices any objection, and the court expressly enters the exhibit into evidence. E.g., C.A. App. C344; see Pet. 25.

Petitioner never raised this claim in the lower courts, and because this Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), it traditionally does not grant a writ of certiorari to review a claim that "was not pressed or passed upon below," United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). At most, his claim would be reviewable for plain error. And while petitioner asserts (Pet. 27-28) that an error in admitting the exhibits would be structural, he identifies no authority placing this kind of claim in "[t]he 'highly exceptional' category of structural errors" requiring

"automatic vacatur." Greer, 593 U.S. at 513 (quoting United States v. Davila, 569 U.S. 597, 611 (2013)). To the contrary, claims relating to the erroneous consideration of evidence are regularly subject to review for prejudice. See, e.g., Ohler v. United States, 529 U.S. 753, 756 (2000); Schneble v. Florida, 405 U.S. 427, 428 (1972).

In any event, petitioner's claim would not warrant this Court's review. Petitioner does not contend that the evidence in question was inadmissible or that he actually lacked an opportunity to object to the evidence's presentation to the jury or its consideration during the jury's deliberations. See D. Ct. Doc. 1566, at 1 (describing the district court's and the parties' regular review during trial of all exhibits presented to the jury); C.A. App. E3893-3894 (same). And although formally "admitting" evidence is good trial practice, petitioner identifies no authority holding that any specific ritual or incantation is required to admit an exhibit into evidence. See United States v. Barrett, 111 F.3d 947, 951 (D.C. Cir.) (rejecting claim of error where trial exhibits "were never formally admitted into evidence" but "were treated below, without objection, as if they were admitted into evidence; they are therefore deemed admitted"), cert. denied, 522 U.S. 867 (1997); see also Fed. R. Evid. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if," inter alia, "the error affects a substantial right of

the party[.]"). Nor does petitioner identify any court of appeals that would grant him relief on his claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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