

No. _____

IN THE
Supreme Court of the United States

JOSHUA KNAUP,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Did the district court abuse its discretion by imposing a sentence based on internally inconsistent factual findings?

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The unpublished memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. See Pet. App. 1a–2a.

JURISDICTION

The court of appeals entered judgment on February 16, 2018. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner was born in Michigan in 1976. He grew up poor in a “turbulent” household in which he was physically abused. He eventually escaped that poisonous environment when he joined the U.S. Air Force before finishing high school. He served for two years before receiving a General Discharge under Honorable Conditions. He subsequently worked at FedEx as a delivery driver until he was laid off in 2012.

After he lost his job, Petitioner set out in a misguided and ultimately fraudulent effort to start a hedge fund called EquityPro Capital in downtown San Diego, California. Petitioner raised over \$500,000 from a handful of investors (6 in total) by falsely claiming that his hedge fund was already up and running. He also guaranteed his investors a return on their investment.

Petitioner has always maintained that he intended to start a hedge fund with the raised capital and naively believed that he would eventually be able to pay back those initial investors once the hedge fund got going. To that end, Petitioner did not

just pocket all of the money he raised. Rather, he spent a substantial portion of the money on legitimate business expenses, such as rent for office space, employee salaries, and insurance. He also hired a master trader, someone who would be needed only if Petitioner actually intended to start up the hedge fund. Moreover, he did not attempt to keep the investors from learning more about the hedge fund. He hired one of the investors to work for him at the hedge fund and attempted to hire another investor as CEO.

By September 2015, about two years after he started the hedge fund, investors started asking for their money back. Petitioner, however, had spent all of the initial money to get the business started. He returned the little money he had left to the investors and entered into settlement agreements with others. All told, he paid back investors a little over \$31,000. That left Petitioner with no money at all.

Petitioner was subsequently arrested and indicted on two counts of wire fraud in violation of 18 U.S.C. § 1343. He thereafter pled guilty to the indictment pursuant to a plea agreement in which he agreed to pay full restitution to all of his victims. Under the plea agreement, Petitioner agreed that his base offense level was 7; that he should receive a 12-level enhancement for causing more than \$250,000 in loss; and a 3-level reduction for accepting responsibility for his conduct. The parties further agreed that Petitioner should receive a 2-level “[d]eparture/[v]ariance” because he had “used a substantial portion of investor funds on EquityPro Capital’s business expenses.” The Government also reserved the right to

argue that a victim-enhancement applied. Petitioner agreed to waive his appellate rights, unless he received a sentence above the high end of the Guidelines (as calculated by the Government).

2. The Government subsequently filed its sentencing memorandum. In the memorandum, the Government documented the Guidelines enhancements and reductions agreed-to in the plea agreement. Apart from those adjustments, the Government contended that Petitioner should receive a 2-level Guideline enhancement for causing substantial hardship to one of the victims. With the victim enhancement, the Government calculated an adjusted offense level of 16. Because Petitioner was in Criminal History Category I, the Government calculated his Guidelines range as 21 to 27 months and recommended a 24-month sentence.

In Petitioner's sentencing memorandum, counsel disputed that the 2-level victim enhancement applied. Counsel also asked for a 4-level departure/variance. (That included the 2-levels reduction agreed-upon by the parties in the plea agreement.) That resulted in a Guidelines calculation of 10 to 16 months. Petitioner asked for a sentence of 5 years of probation. In support of that request, defense counsel (among other things) attached a letter from Petitioner himself in which he explained how sorry he was for what happened, how he intended to build an actual hedge fund, and how he was trying to make things right with the victims.

At the sentencing hearing, defense counsel began by discussing the Guidelines range, noting that the only dispute between the parties was whether the 2-level victim enhancement applied. After some discussion, the court sided with the

prosecutor and held that the Government had proven that a victim had suffered a substantial financial hardship.

Defense counsel then explained why she thought Petitioner should receive five years of probation rather than jail time. Counsel first noted that the money Petitioner obtained was not just put directly into his own pocket. Instead, he had made efforts to start a hedge fund; his efforts, however, were just “completely misguided” and “without direction.” Counsel then noted the business expenses that Petitioner paid, including his employee’s salaries. Counsel argued that this “wasn’t a full self-enrichment situation[.]” Counsel also stressed that asking for probation was not “a pass”; a felony conviction would prevent Petitioner from getting any job beyond the construction jobs he had been working. The conviction itself would also ensure that he could never work in the financial industry again, so a similarly misguided idea could never get off the ground. Counsel concluded by noting that Petitioner just got in over his head and believed—naively—that he could start up the hedge fund.

The prosecutor then spoke. He began by discussing the 2-level agreed-to Guidelines reduction in the plea agreement. He noted that Petitioner had not spent “all this money on a lavish lifestyle,” which is something the Guidelines did not account for. The prosecutor also noted, however, that Petitioner did spend some of the money on “personal purchases[.]” He also claimed that Petitioner “preyed on his victims” and “exploited their vulnerabilities[.]” The prosecutor then discussed the victims, their tragic stories, and how Petitioner had defrauded them. The

prosecutor also disputed that Petitioner genuinely intended to start a hedge fund, contending that he had rented space for the company to “convince people [that the business] was legitimate,” not because he was actually trying to build a business.

After some victims spoke and Petitioner apologized again for his actions, the court proceeded to calculate the Guidelines range. The court noted that the parties had requested a 2-level departure/variance because a substantial portion of the money collected went into the business rather than Petitioner’s pockets. The court refused to grant the reduction, concluding that the money put into the business was just an attempt to further the fraud:

There was no business. The money was used to create a storefront facade to convince people there was a business. ¶ Why in the world would you need 12 flat-screen TVs? It wasn’t relevant to running a hedge fund. You could have run a hedge fund from your kitchen as far as I could tell. All you need is a phone. But you rented space downtown in a high rent area, art work, furniture, television screens, and, yet, the government wants to offer you 2 points off because the money went into the business. And I’m not really sure there’s an appropriate departure here.

In response to the court’s question about whether she was “missing something,” the prosecutor said no and that the Government was just trying to distinguish the case from one in which the defendant spent the entire amount on personal expenses. Having rejected the departure/variance request, the court calculated the Guidelines range as 27 to 33 months.

The court first stated that the fraud was aggravating because Petitioner had stolen from someone he knew. The court also affirmed that Petitioner did genuinely think he was going to build a hedge fund, a belief without any basis in the facts:

I was reading . . . a social science article about lying and that we're living in a world right now where people lie and live in worlds where they create falsehoods and then they become so enamored with their lies and their falsehoods that it becomes the truth in their head. And based on the letter you sent to me, I feel like that's kind of where you are. ¶ In your mind, you believed you were going to run a business here and you were going to do something. But it was all a lie. It was all a sham. It was a house of cards. There was never anything substantive there.

Shortly thereafter, the court imposed a 33-month sentence and 3 years of supervised release. Defense counsel then confirmed that Petitioner had the right to appeal, since the sentence he received was above the high end of the Guidelines as calculated by the Government.

3. On appeal, Petitioner contended that the district court had abused its discretion, and imposed a substantively unreasonable sentence, by sentencing him based on internally inconsistent factual findings. On one hand, the court found that Petitioner never intended to build up a legitimate hedge fund; instead, while he had put money into building up the facade of a hedge fund, he had done so only to lure more victims into his fraud. On the other hand, the district court also found that Petitioner did genuinely believe that he was building up a hedge fund—that he believed unreasonably that he would create a successful, legitimate business. Both of those findings could not be true, and thus the court had abused its discretion.

The court of appeals affirmed. According to the court, “[t]he district court’s remarks consistently reflect its finding that Knaup defrauded investors. The court’s speculation that Knaup may have come to believe his misstatements was not

inconsistent with that finding.” Pet. App. 2a. Thus, the court held that the sentence imposed was substantively reasonable. Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

Courts must ensure that criminal sentences are substantively reasonable, which requires this Court to apply the “familiar abuse-of-discretion standard of review[.]” *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). A court abuses its discretion when it exercises its discretion in an “illogical” manner, *United States v. Doe*, 842 F.3d 1117, 1122 (9th Cir. 2016), including by exercising its discretion based on “internally inconsistent” findings, *United States v. Hinkson*, 585 F.3d 1247, 1262 n.21 (9th Cir. 2009) (en banc) (internal quotation marks omitted); *accord United States v. Garcia-Guizar*, 160 F.3d 511, 525 (9th Cir. 1998). Thus, if a court imposes a sentence based on “internally inconsistent” factual findings, a court imposes a substantively unreasonable sentence. *United States v. Portillo*, 458 F.3d 828, 830 (8th Cir. 2006); *United States v. Brown*, 453 F.3d 1024, 1026 (8th Cir. 2006). As explained in more detail below, that’s exactly what happened in this case. Given the fundamental nature of the lower court’s error, this is the rare case in which this Court should grant review for error-correction purposes.

1. At sentencing, an important dispute between the parties revolved around Petitioner’s intent in executing his fraudulent scheme. Petitioner has always maintained that, while he misled his investors into giving him sufficient funds to *start* his hedge fund, he intended to setup a real hedge fund that he

believed would eventually bring in the gains he promised his investors. In other words, he was not just taking people's money and pocketing it, like what occurs in some frauds. Instead, Petitioner intended to create an actual, genuine hedge fund that he believed would be successful. That would allow him to pay back his initial investors. Of course, that does not excuse his initial lies; that is why he is guilty of fraud. But it did mitigate the fraud and suggest a lower sentence was appropriate.

Petitioner pointed to a significant amount of evidence to support his own statements that he intended to start an actual hedge fund. As the plea agreement notes, he "used a substantial portion of investor funds to on EquityPro Capital's business expenses." That included spending money to hire a master trader. He likewise hired one of the investors to work for him, and attempted to hire another as the CEO. Those actions are consistent with someone who is attempting to start up a genuine hedge fund, not someone who intends to create a fake business to bring in money.

The prosecutor, by contrast, never agreed that Petitioner intended to start up a real hedge fund. He contended that, while Petitioner had used investor funds to start up the hedge fund, he had done so only to put on a façade to potential investors.

Thus, the parties presented the district court with two diametrically opposed narratives about Petitioner, both of which had support in the record.

2. At sentencing, rather than resolving the primary dispute between the parties about Petitioner's culpability, the court illogically agreed with both parties.

Initially, the district court sided with the Government and found that Petitioner did not genuinely intend to start a hedge fund and had instead built up a hedge fund as a means to deceive more people into investing. Specifically, the court said:

There was no business. **The money was used to create a storefront façade to convince people there was a business.** ¶ Why in the world would you need 12 flat-screen TVs? It wasn't relevant to running a hedge fund. You could have run a hedge fund from your kitchen as far as I could tell. All you need is a phone.

This finding was a costly one for Petitioner because the court relied on it to deny him the two-level departure/variance the parties had agreed-to in the plea agreement.

On the other hand, not long thereafter, the district court *agreed* with Petitioner that he genuinely intended to start a hedge fund, albeit noting that his belief was entirely unreasonable:

I was reading . . . a social science article about lying and that we're living in a world right now where people lie and live in worlds where they create falsehoods and then they become so enamored with their lies and their falsehoods that it becomes the truth in their head. And based on the letter you sent to me, I feel like that's kind of where you are. ¶ **In your mind, you believed you were going to run a business here and you were going to do something.** But it was all a lie. It was all a sham. It was a house of cards. There was never anything substantive there.

It cannot be true that Petitioner both did and did not intend to build a legitimate hedge fund, and the district court's findings were therefore "internally inconsistent." See *Hinkson*, 585 F.3d at 1262 n.21 (internal quotation marks omitted). By imposing sentence based on those findings, the district court abused

its discretion and imposed a substantively unreasonable sentence. See *Gall*, 552 U.S. at 46.

3. In affirming, the court of appeals claimed that the district court did not make internally inconsistent factual findings. See Pet. App. 2a. But the record is simply to the contrary. As the record discloses, the court found that Petitioner built up a storefront merely “to convince people there was a business.” In other words, he did not intend to create a real hedge fund. It was a “facade,” just as the prosecutor had claimed. That is the *opposite* of finding that Petitioner “believed” that he was “going to run a business[.]” Put simply, Petitioner cannot have both genuinely believed that he would run a real business while at the same time intending to build a fake business merely to attract more money.

* * *

In sum, the court of appeals erred when it affirmed Petitioner’s sentence, and Petitioner asks that this Court grant review in this case for the purposes of correcting that error. This is the rare case in which this Court should grant review for purposes of error correction.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 26, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Doug Keller', with a stylized, flowing script.

Doug Keller

Appendix

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 16 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSHUA D. KNAUP,

Defendant-Appellant.

No. 17-50107

D.C. No. 3:16-cr-00560-CAB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Submitted February 13, 2018**

Before: LEAVY, FERNANDEZ, and MURGUIA, Circuit Judges.

Joshua D. Knaup appeals from the district court's judgment and challenges the 33-month sentence imposed following his guilty-plea convictions for two counts of wire fraud, in violation of 18 U.S.C. § 1343. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Knaup contends that the district court abused its discretion by imposing

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

sentence based on internally inconsistent factual findings. We disagree. The district court's remarks consistently reflect its finding that Knaup defrauded investors. The court's speculation that Knaup may have come to believe his misstatements was not inconsistent with that finding. Further, the 33-month sentence is substantively reasonable in light of the 18 U.S.C. § 3553(a) sentencing factors and the totality of the circumstances, including the need to provide just punishment for the offense. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

AFFIRMED.