No. 99-1422

In the Supreme Court of the United States

DAVID L. FLEMING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prosecution for conspiracy to commit bankruptcy fraud was brought within the applicable statute of limitations.

2. Whether petitioner's conviction for conspiracy to commit bankruptcy fraud was improper on the ground that the underlying object offense was legally impossible.

3. Whether the trial court committed plain error by not instructing the jury on the government's burden to prove materiality in a bankruptcy fraud charge.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is unpublished, but the judgment is noted at 193 F.3d 522 (Table). The order of the district court (Pet. App. 23-44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1999. A petition for rehearing was denied on December 23, 1999. The petition for a writ of certiorari was filed on February 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 1651(a), and 2241(a).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. 371.[1] He was sentenced to 18 months' imprisonment, to be followed by three years' supervised release. He was also ordered to pay $50,000 in restitution to the United States Bankruptcy Court. The court of appeals affirmed. Pet. App. 1-22.

1. Beginning in 1989, petitioner, who is an attorney, represented Wallace C. Yost, a real estate developer, in matters relating to several real estate properties that Yost owned in northwest Florida. Pet. App. 23-24. Yost began experiencing financial difficulties in the late 1980s. By 1989, several banks had instituted foreclosure actions against several of Yost's properties. *Id.* at 24. During that period, petitioner advised and assisted Yost to transfer real estate held in Yost's name to a number of corporations controlled by Yost. *Ibid.* On petitioner's advice, each of those corporations then immediately filed for bankruptcy under Chapter 11 of the Bankruptcy Code. Petitioner prepared the title transfers and the bankruptcy petitions, and filed them all on the same day. *Id.* at 6.

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[1] The jury found petitioner guilty on one count of conspiracy to commit bank fraud, bankruptcy fraud, mail fraud, wire fraud, and money laundering, all in violation of 18 U.S.C. 371, and two counts of bank fraud, in violation of 18 U.S.C. 1344 and 2. The district court granted petitioner's motion for judgment of acquittal as to the two bank fraud counts and as to the bank fraud objective of the conspiracy count. Pet. App. 23-44. The district court also later held that the mail fraud, wire fraud, and money laundering objectives of the conspiracy count were barred by the statute of limitations. *Id.* at 4.

One of the parcels of real estate that petitioner helped Yost transfer was a residence located at 112 Matamoros Drive, in Pensacola Beach, Florida (the Matamoros property). That property was transferred to Mariner Realty Associates, Inc. (MRA), which was one of the corporations controlled by Yost. Title to the Matamoros property was in both Yost's and his wife's name, but the quit-claim deed transferring title to MRA was signed only by Yost. Pet. App. 27. MRA filed for bankruptcy immediately after the transfer of the Matamoros property.

In early 1991, MRA reached agreement to sell the Matamoros property, including all items of personal property in the house, for $250,000. Yost sought petitioner's assistance in keeping some of the proceeds from the sale from going to MRA's bankruptcy estate. Pet. App. 27. Petitioner advised Yost that the sale could be structured so that $200,000 of the sale price would go to the bankruptcy estate to pay off the mortgage on the property, while $50,000 would go to Yost personally for the sale of the personal property in the house. *Ibid.* Under that arrangement, only $200,000 of the total sale price would be disclosed to the MRA bankruptcy estate.

The actual value of personal property in the house on the Matamoros property was between $25,000 and $30,000. Yost, however, followed petitioner's directions and prepared a list claiming the personal property was worth $50,000. Pet. App. 28. Petitioner filed notice in the bankruptcy court of Yost's intent to sell the Matamoros property, but he omitted any mention of the $50,000 "personal property" payment. *Id.* at 8.

The sale of the Matamoros property was completed in early June 1991. At that time, the $50,000 allocated to the sale of the personal property was placed in

petitioner's escrow account. Yost received $38,000 of those funds; petitioner retained the remainder as attorney's fees. Pet. App. 28. On June 18, 1991, the bankruptcy trustee deposed petitioner to determine how much money Yost had paid petitioner for his services in matters relating to the MRA bankruptcy. Petitioner stated that Yost had paid him less than $10,000, and that all such payments had been made before the end of December 1989. *Id.* at 9; Gov't C.A. Br. 11. Petitioner did not, therefore, disclose to the trustee the fee that he received for the "personal property" transaction associated with the sale of the Matamoros property earlier that month.

Petitioner continued to represent MRA in its bankruptcy proceedings after the sale of the Matamoros property. Pet. 10. Those proceedings were closed on September 20, 1993 with the confirmation of a Chapter 11 liquidation plan. R. Doc. 103, at 13.

2. On May 28, 1997, petitioner was indicted on two counts of bank fraud (in violation of 18 U.S.C. 1344 and 2) and one count of conspiracy to commit bank fraud, mail fraud, wire fraud, money laundering, and bankruptcy fraud (in violation of 18 U.S.C. 371). Before trial, petitioner filed a motion to dismiss, contending, *inter alia*, that the charge of conspiracy to commit bankruptcy fraud was barred by the five-year limitations period set out in 18 U.S.C. 3282.[2] The court rejected that argument. Noting that the substantive

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[2] 18 U.S.C. 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

offense of bankruptcy fraud is a continuing offense and that its limitations period is "tolled until the final discharge or denial of discharge of the debtor," the court reasoned that the limitations period for conspiracy to commit bankruptcy fraud is similarly tolled. R. Doc. 103, at 13. Accordingly, "[b]ecause the [MRA bankruptcy] proceeding was closed within five years of the indictment," the court held that "the charge of conspiracy to commit bankruptcy fraud is not barred, whether considered under [18 U.S.C.] 3284 [which supplies the limitations period for bankruptcy fraud] or under the general statute of limitations provided by Section 3282." *Ibid.*[3]

Following a seven-day trial, the jury returned guilty verdicts against petitioner on all counts. The district court granted petitioner's post-trial motion for judgment of acquittal as to the two bank fraud counts and the bank fraud objective of the conspiracy count. Pet. App. 23-44. The district court also later held that the statute of limitations barred the mail fraud, wire fraud, and money laundering objectives of the conspiracy count. *Id.* at 4.

The district court denied petitioner's motion for judgment of acquittal on the charge of conspiracy to commit bankruptcy fraud. Pet. App. 37-39. That charge focused on petitioner's concealment from the bankruptcy court of the $50,000 in "personal property" involved in the sale of the Matamoros property.

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[3] 18 U.S.C. 3284 provides:

> The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

Petitioner maintained that because title to the Matamoros property had been in both Yost's and his wife's name, and because only Yost signed the quit-claim deed transferring the property to MRA, the property never properly became part of the bankruptcy estate. Accordingly, petitioner argued, the concealment of assets relating to the sale of the Matamoros property could not constitute bankruptcy fraud. The district court rejected that argument. After noting that "all the parties treated the property as a part of the bankruptcy estate," the court held that "[e]ven [if] * * * it was impossible for [petitioner] to commit the substantive offense of bankruptcy fraud, impossibility is not a defense to a conspiracy charge." *Id.* at 38.

3. The court of appeals affirmed. The court first held that the charge of conspiracy to commit bankruptcy fraud was not barred by the statute of limitations. Pet. App. 10-15. The court held that just as the substantive offense of bankruptcy fraud is a continuing offense, conspiring to commit that offense "is itself a continuing violation for which the five-year statute of limitations period set forth in § 3282 does not begin to run until either the discharge of the bankruptcy or the denial of discharge, or in situations where neither of those two alternatives is available, at the closing of the bankruptcy case file." *Id.* at 14. The court arrived at that holding by "treat[ing] each day following the concealment of the asset as a continuation of [the] last overt act" of the conspiracy. *Id.* at 15. On that analysis, petitioner's conspiracy to commit bankruptcy fraud continued until the close of the MRA bankruptcy proceeding in September 1993, and the indictment returned against petitioner in May 1997 was within the five-year limitations period under Section 3282.

The court of appeals also rejected petitioner's argument that he was improperly convicted of conspiracy to commit bankruptcy fraud because he could not have been convicted of the substantive offense of bankruptcy fraud. The court found that petitioner's actions in connection with the Matamoros property showed that he "had the requisite intent to commit bankruptcy fraud by concealing from the bankruptcy estate certain proceeds from the sale of property which he placed in that estate and which he asserted belonged there." Pet. App. 18. The court further found that "the object of [petitioner's] conspiracy, as [petitioner] saw it, was indeed a federal crime," because petitioner believed that the Matamoros property was part of the bankruptcy estate. *Id.* at 19. Applying the "well-established principle" (*id.* at 17) that conspiring to commit a crime and committing the crime itself are two separate offenses, the court held that petitioner could be convicted for conspiring to commit bankruptcy fraud even if the bankruptcy fraud he conspired to commit was legally impossible because the property at issue was not properly part of the bankruptcy estate.

Petitioner filed a petition for rehearing in the court of appeals. In that petition, he contended for the first time that the trial court erred by not instructing the jury that the government must prove materiality in order to establish the offense of bankruptcy fraud. The court of appeals denied rehearing without comment. Pet. App. 45-47.

ARGUMENT

Petitioner raises three issues in his petition to this Court. First, he contends that the charge of conspiracy to commit bankruptcy fraud should have been dismissed as time-barred. Second, he argues that he could

not be convicted of conspiracy to commit bankruptcy fraud because the object of the conspiracy—concealing from the bankruptcy estate certain proceeds from the sale of the Matamoros property—was not a federal offense. Third, he renews an argument raised for the first time on petition for rehearing before the court of appeals: that the district court erred by failing to instruct the jury on the requirement of materiality in bankruptcy fraud. Petitioner's contentions are without merit, and there is no conflict warranting this Court's review.

1. The court of appeals correctly determined that the five-year statute of limitations did not bar petitioner's prosecution for conspiring to commit bankruptcy fraud. As this Court has long recognized, "[s]tatutes of limitations normally begin to run when the crime is complete." *Pendergast* v. *United States*, 317 U.S. 412, 418 (1943). Where the crime at issue is a conspiracy, the crime is not complete when the elements of the offense are first satisfied. Rather, conspiracy is "[t]he classic example of a continuing offense." *United States* v. *Yashar*, 166 F.3d 873, 875 (7th Cir. 1999). For continuing offenses, the statute of limitations begins to run only when the offense "expires." *Id.* at 876.

Here, the court of appeals correctly identified two relevant statutes of limitations. The general statute of limitations, 18 U.S.C. 3282, provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted * * * for any offense, not capital, unless the indictment is found * * * within five years next after such offense shall have been committed." A separate provision, 18 U.S.C. 3284, applies specifically to the concealment of a Chapter 11 debtor's assets from a bankruptcy estate, the object offense underlying the

conspiracy count at issue here. Section 3284 defines such concealment of assets as a "continuing offense until the debtor shall have been finally discharged or a discharge denied," and provides that the statute of limitations "shall not begin to run until such final discharge or denial of discharge." The court of appeals reasonably read Section 3282 in light of Section 3284 and concluded that, when the charged conspiracy involves concealing assets from a bankruptcy estate, the limitations period for the conspiracy does not begin to run until the last day before discharge of bankruptcy, *i.e.*, the date when the continuing object offense is completed. Pet. App. 15. Under that reading, "each day following the concealment of the asset [is] a continuation of that last overt act" in furtherance of the conspiracy. *Id.* at 15.[4] In this case, because the MRA bankruptcy was not discharged until September 1993 (see R. Doc. 103, at 13), the court of appeals correctly held that the May 1997 indictment was returned within the five-year limitations period.

Contrary to petitioner's assertions (Pet. 11-12), any tension between the court of appeals' unpublished decision and *United States* v. *Dolan*, 120 F.3d 856 (8th Cir. 1997), does not warrant this Court's review. In *Dolan*, the defendant was charged with conspiracy to conceal property of a bankruptcy estate. The evidence showed that the defendant had committed an overt act within five years of being indicted, thus satisfying the limitations period contained in Section 3282. See

[4] As the court of appeals recognized, to hold otherwise would be to prevent a prosecution for conspiracy to conceal an asset of a bankruptcy estate on the ground that the conspirators were successful in their efforts to conceal assets. Pet. App. 14-15. The court properly construed Section 3282 so as to avoid such an absurd result.

Dolan, 120 F.3d at 864-865. Accordingly, since the defendant in that case clearly had committed overt acts within the five-year period prescribed by Section 3282, the court was not required to issue a definitive holding on Section 3284's effect on the limitations period for a conspiracy to commit bankruptcy fraud. Petitioner identifies no other court of appeals decision addressing the appropriate statute of limitations for a charge of conspiracy to commit bankruptcy fraud. Given the paucity of lower court cases directly addressing the issue, this Court's review is not warranted.

2. Petitioner also argues (Pet. 15-19) that he was wrongly convicted on the conspiracy count because the object of the conspiracy—concealing some of the proceeds from the sale of the Matamoros property—was not a federal offense. He bases that claim on the observation that the Matamoros property was never properly a part of the bankruptcy estate, such that proceeds from its sale could not have been illegally concealed. In rejecting that argument, the court of appeals concluded that even if the Matamoros property was never properly transferred to the bankruptcy estate, petitioner "had the requisite intent to commit bankruptcy fraud by concealing from the bankruptcy estate certain proceeds from the sale of property which he placed in that estate and which he asserted belonged there." Pet. App. 18. Thus, "the object of [petitioner's] conspiracy, as [petitioner] saw it, was indeed a federal crime." *Id.* at 19. That fact-bound determination does not warrant further review by this Court.

Moreover, even if the Matamoros property was never properly a part of the bankruptcy estate so that the concealment of the proceeds from its sale could not constitute a federal offense, the court of appeals correctly held that such legal impossibility does not preclude

conspiracy liability. See Pet. App. 20-21. As this Court has explained, "A person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas* v. *United States*, 522 U.S. 52, 64 (1997); see *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915). Accordingly, "[w]here * * * an indictment alleges conspiracy, legal impossibility affords a conspirator no defense." *United States* v. *Trapilo*, 130 F.3d 547, 552 n.9 (2d Cir. 1997), cert. denied, 525 U.S. 812 (1998); see *United States* v. *Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) ("[T]he impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself."); *United States* v. *LaBudda*, 882 F.2d 244, 248 (7th Cir. 1989); *United States* v. *Petit*, 841 F.2d 1546, 1550 (11th Cir.), cert. denied, 487 U.S. 1237 (1988); *United States* v. *Everett*, 692 F.2d 596, 599 (9th Cir. 1982), cert. denied, 460 U.S. 1051 (1983). In this case, therefore, even if the object offense was legally impossible because the Matamoros property was never part of the bankruptcy estate, the court of appeals correctly held that petitioner could still be convicted of conspiracy to commit that offense.

The Ninth Circuit's decision in *Lubin* v. *United States*, 313 F.2d 419 (1963), overruled on other grounds, *United States* v. *Valles-Valencia*, 823 F.2d 381, 381-382 (9th Cir. 1987), is not to the contrary. In that case, the defendants were charged with conspiring to steal money belonging to federally insured banks. The money that the defendants stole was in an armored car at the time they stole it. The court held that the indictment alleged a federal offense only if the defendants conspired (with the intent) to steal property or money belonging to a federally protected bank, not belonging to the armored car company. *Lubin*, 313 F.2d at 420. Because the government could not establish

such intent, the court reversed the defendants' convictions for failure to state a federal offense. The circumstances of this case distinguish it from *Lubin*. Here, the court of appeals found that "the concealment of assets was unquestionably from the bankruptcy estate," and that petitioner "conspired to conceal assets from the bankruptcy estate – such concealment being a clear violation of federal law." Pet. App. 19. Accordingly, because petitioner conspired to violate federal law in this case, *Lubin* is inapposite.[5]

3. Finally, petitioner argues (Pet. 19-21) that the district court erred in not instructing the jury that in order to find petitioner guilty of bankruptcy fraud (or conspiracy to commit bankruptcy fraud), it had to find that petitioner had materially defrauded the bankruptcy estate. Petitioner did not raise that argument until his petition for rehearing before the court of appeals. Therefore, he has waived it. See *United States* v. *Bouyea*, 152 F.3d 192, 195-196 (2d Cir. 1998) (per curiam) (deeming a challenge to a jury charge raised for the first time in a petition for rehearing to be waived), cert. denied, 120 S. Ct. 245 (1999); *United States* v. *Martinez*, 96 F.3d 473, 475 (11th Cir. 1996) (per curiam) (issues or arguments raised for the first

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[5] The Ninth Circuit itself has limited *Lubin*'s scope. In *United States* v. *Sanford*, 547 F.2d 1085 (1976), the Ninth Circuit held that defendants charged with conspiracy to transport illegally killed wildlife in interstate commerce could be prosecuted for that offense even though the scheme, if completed, would not have constituted a federal offense because federal undercover officers were the ones who killed the wildlife in question. The court held that "the crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts . . ., and is not at all dependent upon the ultimate success or failure of the planned scheme." *Id.* at 1091 (citation omitted).

time on petition for rehearing will not be considered), cert. denied, 519 U.S. 1133 (1997); *United States* v. *Estrada-Trochez*, 66 F.3d 733, 736 (5th Cir. 1995); *Boardman* v. *Estelle*, 957 F.2d 1523, 1534 (9th Cir.), cert. denied, 506 U.S. 904 (1992).

Even if petitioner has not waived his argument on this point, because he failed to raise it at trial he must establish plain error in order for reversal to be warranted. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Olano*, 507 U.S. 725, 732 (1993); Fed. R. Crim. P. 52(b). Petitioner cannot carry that burden. To establish plain error, petitioner must demonstrate that the district court's omission of a materiality instruction was (1) an error, (2) that was plain, and (3) that affected his substantial rights. Even if those three conditions are met, this Court will notice the forfeited error only if it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Johnson*, 520 U.S. at 466-467; *Olano*, 507 U.S. at 732. In *Johnson*, this Court held that although materiality is an element of perjury under 18 U.S.C. 1623 and should be decided by the jury, a district court's failure to submit the materiality issue to the jury was not plain error. The Court questioned whether the district court's error affected substantial rights, but avoided resolving that issue because it was clear that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. See 520 U.S. at 469-470. In reaching that conclusion, the Court stressed that "the evidence supporting materiality was 'overwhelming,'" and that "[m]ateriality was essentially uncontroverted at trial." *Id.* at 470.

In this case, the district court's instructions to the jury did not impair petitioner's substantial rights. Although the court did not explicitly instruct the jury

on materiality, its instruction on fraudulent concealment implicitly satisfied the requirement for such an instruction. In the bankruptcy fraud context, materiality is satisfied where "the false oath or account * * * pertain[s] to the discovery of assets or to the debtor's financial transactions." *United States* v. *Gellene*, 182 F.3d 578, 588 (7th Cir. 1999). Here, the district court instructed the jury that "[a] person 'fraudulently conceals' property * * * when that person knowingly withholds information or property, or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or to cheat a creditor or a custodian." Pet. App. 64. Thus, any error in the instructions was not so great as to affect petitioner's substantial rights.

In any event, the district court's instructions did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings in this case. As in *Johnson*, ample evidence of materiality was introduced at trial. In particular, petitioner's conspiracy to conceal part of the proceeds from the Matamoros property sale clearly "pertain[ed] to the discovery of assets or to the debtor's financial transactions." *Gellene*, 182 F.3d at 588. Accordingly, any error by the district court did not rise to the level of plain error.[6]

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[6] This Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), is not to the contrary. That case did not involve a plain error analysis, as the defendant objected to the district court's materiality instruction at trial. *Id.* at 5-7. Thus, even if *Neder*'s analysis of the need for a materiality instruction in the mail fraud, bank fraud, and wire fraud contexts applies in the bankruptcy fraud context as well, *Neder* does not establish that failure to give such an instruction constitutes plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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