No. 00-896

In the Supreme Court of the United States

JOHN O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN C. KEENEY
Acting Assistant Attorney General

DEBORAH WATSON
Attorney

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

QUESTION PRESENTED

Whether, when a court of appeals conducts plain-error analysis under Federal Rule of Criminal Procedure 52(b) of a claim of legal error that became clear only as the result of an intervening change in the settled law of the circuit, the defendant bears the burden of establishing that he was prejudiced by the error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is unpublished, but the decision is noted at 229 F.3d 1148 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A petition for rehearing was denied on September 14, 2000 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on December 1, 2000. 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 Eastern District of Louisiana, petitioner was convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371 (Count 1); wire fraud, in violation of 18 U.S.C. 1343 (Counts 2, 4, 5-8); and money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) (Counts 14-23). He was sentenced to 121 months' imprisonment, to be followed by a two-year term of supervised release, and was ordered to pay restitution in the amount of $1,174,849. 01-13-99 Judgment 1. The court of appeals affirmed. Pet. App. 1a-31a.

1. Petitioner and co-defendants Eric Schmidt, Michael O'Keefe, Sr., Gary Bennett, and Paul Schmitz engaged in a fraudulent scheme to siphon off millions of dollars in assets of Physicians National Risk Retention Group, Inc. (PNRRG), a Louisiana medical malpractice insurer.[1] O'Keefe, who had twice been convicted of fraud, was selected to operate Associated Auditors, the management company for PNRRG. Schmidt served as president of PNRRG. Petitioner and Bennett were also involved in the management of PNRRG, and Schmitz was a claims manager. Pet. App. 2a; Gov't C.A. Br. 7-8, 23.

PNRRG became insolvent, and the State of Louisiana moved to liquidate it. Petitioner and his co-defendants arranged to have Builders and Contractors Insurance Limited (BCI), a dormant Bahamian corporation, act as a reinsurer. The Louisiana Department of

[1] Co-defendants O'Keefe, Schmidt, and Bennett were also convicted of conspiracy, mail fraud, wire fraud, and money laundering. Co-defendant Schmitz was convicted on a single count of mail fraud. Gov't C.A. Br. 4; see Pet. App. 2a.

Insurance and the Board of PNRRG approved the reinsurance agreement, based on the assurances of petitioner and his co-defendants that the reinsurance program would be backed by Sphere Drake, an established reinsurance company with assets in excess of $500 million; that coverage of PNRRG's physicians would continue; and that all future claims would be paid by BCI. Pet. App. 2a-3a; Gov't C.A. Br. 7-8, 23-24.

Based on the representations of petitioner and his co-defendants that the reinsurance program would require additional funding, PNRRG and the Louisiana Department of Insurance authorized the transfer of more than $10 million in cash assets of PNRRG to a trust account of O'Keefe's law firm, with the funds to be held on behalf of BCI. Petitioner and his co-defendants entered into a reinsurance contract with Sphere Drake. At petitioner's direction, however, they canceled the contract a few months later. Neither PNRRG nor the Louisiana Department of Insurance was advised of the cancellation. Petitioner and his co-defendants also canceled the insurance coverage of a large number of physicians before the expiration date, and they failed to pay claims for the insured physicians as promised. Pet. App. 3a; Gov't C.A. Br. 7-8, 24-26.

Associated Insurance Consultants, Inc. (AIC), a management company owned by petitioner, Schmidt, and Bennett, signed a management contract to handle the claims and carry out the terms of the reinsurance agreement on BCI's behalf. The insured physicians, the Board of PNRRG, and the Louisiana Department of Insurance were unaware of that management contract, which resulted in AIC's receipt of over $5 million in profits generated by the cancellation of the Sphere Drake contract, the early cancellation of the physicians' insurance coverage, and the failure to pay claims.

Ultimately, that money was diverted to the personal bank accounts of petitioner, Schmidt, and Bennett. Pet. App. 3a; Gov't C.A. Br. 25-26, 28-30.

A representative of the Louisiana Department of Insurance testified that the Department would not have entered into the reinsurance agreement if it had known that petitioner and his co-defendants intended to cancel physicians' insurance coverage. Pet. App. 10a; Gov't C.A. Br. 53. An attorney for the Department testified that in approving the reinsurance agreement with BCI, the Department sought a solvent insurer for the plan, and that the Department was not informed of the cancellation of the reinsurance contract with Sphere Drake. *Id.* at 54. Physician PNRRG board members similarly testified to their understanding, based on representations from petitioner and his co-defendants, that the agreement would protect doctors. *Ibid.* The physicians also testified that they were unaware of the profit diversion or the cancellation of the Sphere Drake reinsurance contract. *Ibid.*

2. The court of appeals affirmed the convictions of petitioner and his co-defendants. Pet. App. 1a-31a. During the pendency of the appeal in this case, this Court held in *Neder* v. *United States*, 527 U.S. 1 (1999), that materiality is an element of wire fraud under 18 U.S.C. 1343. On appeal, petitioner and his co-defendants contended that the district court had failed to submit the question of materiality to the jury and that the omission required reversal of their convictions.

The court of appeals agreed that the jury instructions had not clearly identified materiality as an essential element of the mail and wire fraud offenses. Pet. App.

15a-16a.[2] The court stated, however, that in the absence of a timely objection at trial, the omission of that element was reviewable only for plain error. *Id.* at 16a (citing *Johnson* v. *United States*, 520 U.S. 461, 463-466 (1997)). Under the plain-error standard, the court explained, an appellant must establish error that is "plain" and affects his "substantial rights." *Ibid.* "Even if these requirements are met," the court of appeals observed, "an appellate court may in its discretion correct a plain error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (citing *Johnson*, 520 U.S. at 467). The court held that petitioner and his co-defendants had not established reversible error under that standard because

> the evidence would support a jury finding that the misrepresentations and omissions were in fact material. Defendants do not show that the inclusion of a materiality instruction in the already complex charge would have altered the outcome of the jury's deliberations. While defendants put on a vigorous

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[2] The court explained:

> As the government points out, there is some language in the jury instructions regarding materiality, such as the instructions that intent to defraud may be found "from a material misstatement of fact made with reckless disregard of the facts," and that "[a] statement * * * or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud." However, the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes. Defendants did not object to the trial court's failure to so instruct the jury.

Pet. App. 15a-16a.

> defense, the jury obviously accepted the government's theory that defendants schemed to fraudulently siphon off the assets of PNRRG from the inception of their dealings with PNRRG and the [Department of Insurance]. There was clear evidence of materiality.

Id. at 16a-17a.

ARGUMENT

Petitioner contends (Pet. 4-15) that the court of appeals erred in placing on him the burden of establishing prejudice from the district court's failure to instruct the jury on materiality. Petitioner asserts (Pet. 5) that the Court in *United States* v. *Olano*, 507 U.S. 725, 734 (1993), "expressly left open the question of which party bears the burden of persuasion when the defendant has committed no forfeiture and the appeal is based not on an error that the defendant could have objected to at trial, but on an error that was made clear only after trial by a change in the law." Petitioner urges the Court to grant certiorari to resolve that issue, which he contends (Pet. 14) "sharply divides" the courts of appeals. Petitioner's claim does not warrant further review.

1. Federal Rule of Criminal Procedure 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *Olano*, this Court explained that under Rule 52(b), a criminal defendant who fails to object to an alleged error at trial is entitled to relief on appeal only if he can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," in the sense of "clear" or "obvious," and (3) that "affect[ed] [his] substantial rights." 507 U.S. at 732-735.

Under the third ("substantial rights") prong of the *Olano* analysis, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* at 734. Even when those showings are made, a reviewing court may exercise its discretion to reverse a conviction for plain error only "if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (internal quotation marks omitted).

In *Olano*, the government "essentially concede[d]" that the error in question—the presence of alternate jurors during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c)—was "plain." 507 U.S. at 737. In concluding that the error satisfied the second prong of the "plain error" standard, the Court therefore was not required to "consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 734. In *Johnson* v. *United States*, 520 U.S. 461, 468 (1997), the Court decided the question left open in *Olano*, holding that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."

2. In *United States* v. *Viola*, 35 F.3d 37, 41-42 (1994), cert. denied, 513 U.S. 1198 (1995), the Second Circuit relied on the above-quoted language from *Olano* in fashioning an exception to the general rule that the defendant bears the burden of establishing prejudice in a plain-error inquiry under Rule 52(b). The *Viola* court held that "[w]hen a supervening decision alters settled law, the three *Olano* conditions for reviewing plain error under Rule 52(b) still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by

the government, and not the defendant." 35 F.3d at 42;[3] see also *United States* v. *Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998); *United States* v. *Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996), cert. denied, 520 U.S. 1150 (1997); *Napoli* v. *United States*, 45 F.3d 680, 683 (2d Cir.), cert. denied, 514 U.S. 1084 (1995). That holding is incorrect and has been effectively superseded by this Court's decision in *Johnson*.

a. The Court in *Olano* did not leave open (or explicitly allude to) the question whether, in a plain-error inquiry under Rule 52(b), the burden of persuasion as to prejudice should shift to the government when a supervening decision alters settled law. Rather, the *Olano* Court noted (while declining to resolve) the distinct question whether an error is "plain" within the meaning of Rule 52(b) when the law is unsettled at the time of trial but the erroneous character of a district court ruling is clear by the time that the court of appeals decides the case. 507 U.S. at 734; see p. 7, *supra*. The Court later resolved that question in *Johnson*, holding that under those circumstances an error is "plain" for purposes of the second prong of Rule 52(b) analysis. 520 U.S. at 468; see p. 7, *supra*. Nothing in *Olano* suggests the existence of a "settled law" exception to the Court's facially unqualified holding that under Rule

[3] The court in *Viola* acknowledged that a defendant who fails to assert a timely objection at trial "rightly bears the burden of proving prejudice in the ordinary case." 35 F.3d at 42. The court found, however, that "[t]he situation is different when a supervening decision alters settled law. A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have 'forfeited a right' by not making an objection, since at the time of trial no legal right existed." *Ibid.*

52(b), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 507 U.S. at 734.

b. *Johnson* was decided after *Viola* and effectively supersedes *Viola*'s "settled law" exception to the generally applicable requirements of Rule 52(b). In *Johnson*, the district court, in accordance with existing circuit precedent, decided the issue of materiality in a perjury prosecution. 520 U.S. at 463-464. After Johnson was convicted, this Court issued its decision in *United States* v. *Gaudin*, 515 U.S. 506 (1995), which held that the materiality of a false statement is a question for the jury. See 520 U.S. at 464. On appeal, Johnson argued that the district court's failure to submit the issue of materiality to the jury required reversal of his conviction. *Ibid.*

This Court held that, given the defendant's failure to assert a timely objection at trial, his challenge was reviewable for plain error under Rule 52(b). Applying the plain-error standard set forth in *Olano*, the *Johnson* Court held that the district court's failure to submit the question of materiality to the jury was error and that the error was plain. 520 U.S. at 467-468. The Court questioned whether the district court's error had affected Johnson's substantial rights. *Id.* at 468-469. The Court declined to resolve that issue, however, finding that in any event the error did not meet the final requirement of *Olano* because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *id.* at 469-470.

Johnson thus makes clear that, even when a district court ruling accords with existing circuit precedent at the time of trial, a defendant who fails to assert a timely objection may obtain relief on appeal only if he can establish plain error under the standards set forth in

Olano. And, as *Olano* clearly provides, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 507 U.S. at 734; see also *id.* at 741 ("Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that the [error] was prejudicial.").

c. Contrary to petitioner's suggestion (Pet. 6-10, 14), no other circuit has adopted the modified plain-error rule embraced by the Second Circuit in *Viola*. In *United States* v. *Baumgardner*, 85 F.3d 1305, 1309 n.2 (1996), the Eighth Circuit noted the Second Circuit's holding in *Viola*. The Eighth Circuit declined to address the question, however, stating that "although we find the *Viola* analysis persuasive, we leave the issue of burden-shifting for another day." *Ibid.* The court's decision in *Baumgardner*, moreover, predates *Johnson*, which clarifies that the usual plain-error analysis applies in cases where the contested district court ruling is consistent with then-existing circuit precedent.

d. In light of this Court's decision in *Johnson*, it is questionable whether the Second Circuit will continue to adhere to *Viola*'s modified plain-error rule. In *United States* v. *Knoll*, 116 F.3d 994 (1997), cert. denied, 522 U.S. 1118 (1998), decided after *Johnson*, the Second Circuit rejected the defendant's claim that the trial court's pre-*Gaudin* failure to submit the issue of materiality to the jury in his perjury prosecution constituted plain error. Like this Court in *Johnson*, the Second Circuit in *Knoll* found that the first two prongs of *Olano* were satisfied, but declined to decide whether

the error affected the defendant's substantial rights, on the ground that there was no basis for finding that the materiality element was not met and the error therefore did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." See *id.* at 1000-1002. The court declined to address the defendant's argument that *Viola*'s "modified" plain-error standard of review should apply in determining whether the third prong of *Olano* was met. *Id.* at 1001 ("There is no need for us to address this argument * * * because we resolve this appeal without reaching possible issues raised by the third prong of *Olano*."). Until the Second Circuit has either reaffirmed or disavowed the *Viola* standard in light of *Johnson*, review by this Court would be premature.[4]

3. Even if the question whether the defendant or the government bears the burden of persuasion in this context otherwise warranted this Court's review, the instant case would be an unsuitable vehicle for deciding it. The theory of the government's case was that petitioner and his co-defendants persuaded PNRRG and the Louisiana Department of Insurance to approve the reinsurance agreement and to authorize the transfer of more than $10 million in cash assets of PNRRG to a trust account with the funds to be held on behalf of BCI, based on the defendants' false assurances that the reinsurance program would be backed by Sphere Drake, that coverage of PNRRG's physicians would continue, and that BCI would pay all future claims. In defining "scheme to defraud," the district court's

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[4] In *United States* v. *Malpeso*, *supra*, decided less than one month after this Court's decision in *Johnson*, the Second Circuit applied *Viola*'s modified plain-error standard, without any discussion of *Johnson*. See 115 F.3d at 165.

instructions concerning the government's intangible rights offense allegation emphasized that a criminal breach of the employee's duty of loyalty may be found "when, with specific intent to defraud, the employee conceals or fails to disclose information which the employee has reason to believe would cause harm to the employer or would lead a reasonable employer to change its business conduct." 86 R.A. 127. The district court also instructed the jury that "[a] statement or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud. To act with intent to defraud means to act with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self." *Ibid.* The court further instructed that "[s]pecific intent to defraud may also be found from a material misstatement of fact made with reckless disregard of the facts." *Id.* at 128. Thus, although "the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes," Pet. App. 16a, the district court's instructions adequately ensured that petitioner and his co-defendants would not be convicted of mail or wire fraud based on false statements having no natural capacity to influence the conduct of PNRRG or the Louisiana Department of Insurance.

Indeed, despite petitioner's contrary assertion (Pet. 13, 14), materiality was not seriously contested at trial. Petitioner and his co-defendants did not dispute that their activities were capable of influencing the Insurance Department and the insured physicians. Rather, their defense was one of good faith—that their diversion of millions of dollars was legitimate business con-

duct, undertaken not with intent to defraud, but for a legal purpose. See Gov't C.A. Br. 55-56.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DEBORAH WATSON
Attorney

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[5] Petitioner states (Pet. 13) that "[t]he court below found that, with specific reference to the issue of materiality, the 'defendants put on a vigorous defense.'" The court, however, did not find that petitioner and his co-defendants put on a vigorous defense as to materiality. Rather, in context, it is clear that the court was finding that petitioner and his co-defendants had put on a vigorous defense of good faith:

> Defendants do not show that the inclusion of a materiality instruction in the already complex charge would have altered the outcome of the jury's deliberations. While defendants put on a vigorous defense, the jury obviously accepted the government's theory that defendants schemed to fraudulently siphon off the assets of PNRRG from the inception of their dealings with PNRRG and the [Department of Insurance]. There was clear evidence of materiality.

Pet. App. 16a-17a.