No. 02-374

In the Supreme Court of the United States

LOUIS B. OBERHAUSER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for money laundering under 18 U.S.C. 1956(a)(1)(A)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A10) is reported at 284 F.3d 827. The opinion of the district court (Pet. App. A11-A35) is reported at 142 F. Supp. 2d 1118.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2002. A petition for rehearing was denied on June 10, 2002 (Pet. App. A1). The petition for a writ of certiorari was filed on September 5, 2002. 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 Minnesota, petitioner was

convicted of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The district court granted petitioner's motion for a judgment of acquittal and conditionally granted petitioner's motion for a new trial. Pet. App. A11-A35. The court of appeals reversed the district court's judgment and reinstated the jury's guilty verdict. *Id.* at A2-A10.

1. Petitioner and his co-defendants perpetrated a ponzi scheme in which investors lost more than $11 million. The scheme operated through a shell corporation called K-7, the principals of which were petitioner's co-defendants—Richard Gravatt, Joe King, Richard King, Murray Evans, Frank Taylor, and Scott Wallis. Petitioner was K-7's lawyer and the escrow agent for some of the investors' funds. Pet. App. A2.

Potential investors in K-7 were told that the corporation planned to conduct a $5.5 million United States Treasury bill "leasing" program that would yield investors a risk-free, 2000 percent return. Pet. App. A4; see Gov't C.A. Br. 1. More specifically, investors were told that organizations holding large numbers of Treasury bills were willing to lease the securities at a modest interest rate. *Id.* at 4. The leased Treasury bills would be used as collateral to obtain a bank loan which, in turn, would be used to fund a "high-yield Trading program." *Ibid.* To protect the investors in case the Treasury bills were "liened or encumbered or confiscated," a K-7 principal was purported to have a $10 billion account with a New York brokerage house—the existence of which could only be verified in person in New York—which would be used to reimburse the owners of the Treasury bills. *Ibid.* To make the program attractive to employees and potential investors, K-7 planned to make contributions from its profits to the charity ChildHelp. *Id.* at 6; Pet. App. A4.

K-7 had two investment-generating mechanisms. Pet. App. A5. Under the first, investors contracted with K-7, and their funds were deposited into an account in the name of Group Resources, Inc., at the SunTrust Bank. *Ibid.*; Gov't C.A. Br. 17. The investor contracts represented that K-7 had the "knowledge, experience and contacts in the marketplace for bank instruments necessary to make prudent decisions in the contracting for leasing of United States Treasury" bills. Pet. App. A5. Under the second mechanism, investors contracted with petitioner, who placed investors' funds in an attorney trust account set up for the exclusive purpose of holding investors' money. The contracts specified that, when the account balance reached $5.5 million, petitioner was authorized "to act upon [the investor's] behalf for the purpose of entering into a trading program." *Ibid.*

On August 28, 1996, anticipating that the Group Resources account would be closed because of SunTrust's suspicions of money laundering, Joe King transferred $160,000 from that account to petitioner's attorney trust account. Gov't C.A. Br. 18; Pet. App. A5-A6. Petitioner was familiar with the Group Resources account because K-7 had previously used the account to pay him for legal services. Although petitioner did not have a contract with the investors whose funds were held in the Group Resources account, petitioner nonetheless accepted the $160,000 into his attorney trust account and identified the money as investor funds. *Id.* at A6.

Between October and November 1996—before the account balance reached $5.5 million—petitioner transferred the bulk of the investors' funds out of his attorney trust account. Pet. App. A6-A7. For example, he transferred several hundred thousand dollars to K-7,

and $2.4 million as a "broker's commission." *Id.* at A6. On November 25, 1996, petitioner transferred $160,000 to ChildHelp. *Id.* at A7.

Thereafter, petitioner repeatedly sought to lull nervous investors into staying with the K-7 program, and he actively dissuaded them from contacting law enforcement authorities. Gov't C.A. Br. 23-25, 27, 29-30. Investors eventually contacted the FBI, however, and began recording their conversations with petitioner. In the recordings, petitioner provided excuses for why the scheme had failed to pay out as promised and discouraged investors from reporting the scheme to law enforcement officials. *Id.* at 29-30.

2. a. On January 6, 2000, a federal grand jury in the District of Minnesota returned a second superseding indictment that charged petitioner with conspiracy to commit wire fraud, in violation of 18 U.S.C. 1956(h); wire fraud, in violation of 18 U.S.C. 1343; mail fraud, in violation of 18 U.S.C. 1341; money laundering, in violation of 18 U.S.C. 1956(a)(1); and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). One of the money laundering counts was based on petitioner's receipt into his attorney trust fund account of the $160,000 wired from the Group Resources account. Second Superceding Indictment 26. Another money laundering count was based on petitioner's subsequent wire transfer of $160,000 from the attorney trust fund account to the charity ChildHelp. *Id.* at 27.

b. A petit jury found petitioner guilty of those two counts of money laundering but found him not guilty of the remaining charges. Pet. App. A12-A13. The district court set aside the jury's verdict and directed a judgment of acquittal on the two money laundering counts. *Id.* at A11-A35. The district court also granted

petitioner's motion for a new trial "in the event that the Court's decision granting the judgment of acquittal is vacated or reversed on appeal." *Id.* at A35.

In granting the motions, the district court found that "the government simply did not prove that at the time of each financial transaction associated with [the money laundering counts], [petitioner] knew that the money represented the proceeds of some form of unlawful activity." Pet. App. A25. Although the district court found that there was "no credible evidence to suggest that there was ever * * * a legitimate program or that any of the so-called documents supposedly verifying the program were authentic," *id.* at A16, and that the evidence demonstrated that petitioner knew that the scheme was unlawful at later times, the court concluded that "both transfers occurred so early in the fraudulent scheme that there is no basis by which the government can argue that [petitioner] turned a blind eye or otherwise deliberately avoided criminal knowledge." *Id.* at A25. In addition, the district court relied on the court of appeals' decision in *United States* v. *Jolivet*, 224 F.3d 902 (8th Cir. 2000), to conclude that the mere transfer of criminally obtained funds into or out of an attorney trust account could not constitute money laundering with the intent to promote unlawful activity, in violation of 18 U.S.C. 1956(a)(1)(A)(i). Pet. App. A26-A27; see *id.* at A8.

3. The court of appeals reversed. Pet. App. A2-A10. The court observed that the K-7 scheme had promised "highly improbable" returns, petitioner drafted the legal documents involved in the scheme, petitioner did not himself invest in the scheme, petitioner contracted directly with investors and then violated his duties to them by transferring money out of the attorney trust account before it reached the $5.5 million threshold, and

petitioner had a financial motive to promote the fraudulent scheme. *Id.* at A8-A9. Accordingly, the court of appeals concluded that "a reasonable jury could find [that petitioner] knew K-7's program was not legitimate * * * by [the time of the two $160,000 transfers], and instead of withdrawing, continued as a willing participant in the scheme in return for substantial compensation." *Id.* at A8. The court of appeals also found that, "[b]ecause K-7 induced investors to give them money by stating their profits went to charity and by prominently displaying plaques commemorating their contributions, the transfer to the charity promoted continuation of the fraud scheme." *Id.* at A9.

For those reasons, the court of appeals rejected the district court's reliance on the court of appeals' decision in *Jolivet*. Pet. App. A7-A9. The court of appeals instead agreed with the government that petitioner's knowledge that the funds that he transferred were the proceeds of unlawful activity and his intent to promote the carrying on of unlawful activity were proved, not merely by his acceptance of funds into the attorney trust account, but "by direct proof of [his] understanding of the fraudulent nature of K-7's Treasury bill leasing program or his willful blindness to such facts." *Ibid.*[1]

ARGUMENT

Petitioner contends (Pet. 9-13) that this Court should grant certiorari to resolve a conflict among the courts of appeals on the question whether the intent to promote the carrying on of unlawful activity under 18 U.S.C.

[1] The court of appeals also concluded that the district court had abused its discretion in granting petitioner's motion for a new trial. Pet. App. A10. Petitioner does not raise that issue before this Court.

1956(a)(1)(A)(i) can be established by the defendant's "mere deposit" (Pet. 11) of the proceeds of unlawful activity. That question, however, is not presented here.[2]

There is some disagreement among the circuits on the question whether a defendant's receipt, deposit, or cashing of proceeds is sufficient to establish an intent to promote unlawful activity under Section 1956(a)(1)(A)(i). The Third, Fifth, and Ninth Circuits have held that the receipt, deposit, or cashing of proceeds is sufficient to establish the requisite intent when that activity is necessary for the defendant to realize the benefit of the underlying unlawful activity. See *United States* v. *Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993), cert. denied, 510 U.S. 1121 (1994); *United States* v. *Valuck*, 286 F.3d 221, 227-228 (5th Cir. 2002), cert. denied, No. 01-11006 (Nov. 4, 2002); *United States* v. *Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991); see also *United States* v. *Haun*, 90 F.3d 1096, 1100-1101 (6th Cir. 1996) (upholding promotion conviction because the deposit of checks derived from the fraud scheme promoted both "prior unlawful activity" and future unlawful acts), cert. denied, 519 U.S. 1059 (1997).

The Fourth and Eighth Circuits have held to the contrary. *United States* v. *Heaps*, 39 F.3d 479, 485-486 (4th Cir. 1994); *United States* v. *Jolivet*, 224 F.3d 902, 909-911 (8th Cir. 2000). In *Heaps*, the Fourth Circuit reasoned that money laundering must be distinct from the

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[2] The government has petitioned for certiorari in *United States* v. *Scialabba*, No. 02-442, on the question whether "proceeds" in 18 U.S.C. 1956(a)(1) means the gross receipts from unlawful activities or only the profits. Because petitioner does not dispute that the transactions underlying his money laundering convictions involved the proceeds of unlawful activity, there is no reason to hold the petition in this case pending the Court's disposition of the government's petition in *Scialabba*.

underlying offense, and that the receipt and cashing of proceeds of a drug transaction is not sufficiently distinct from the drug transaction itself. 39 F.3d at 485-486. In *Jolivet*, the Eighth Circuit reasoned that a defendant may not promote the carrying on of an already completed crime. 224 F.3d at 909. See also *United States* v. *Calderon*, 169 F.3d 718, 721-722 (11th Cir. 1999) (finding it unnecessary to decide whether *Montoya*, *Paramo*, and *Haun* were correctly decided, but reversing promotional money laundering conviction based on the delivery of cash to an undercover agent because there was no evidence that the delivery furthered the underlying unlawful activity).[3]

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[3] The other cases on which petitioner relies (Pet. 12-13) do not address the receipt or deposit issue. *United States* v. *Sanders*, 928 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845 (1991), and *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994), interpret 18 U.S.C. 1956(a)(1)(B)(i), a section of the money laundering statute that is not at issue in this case and that addresses transactions designed to conceal the criminal nature of proceeds rather than to promote unlawful activity. *United States* v. *Brown*, 186 F.3d 661 (5th Cir. 1999), and *United States* v. *Olaniyi-Oke*, 199 F.3d 767 (5th Cir. 1999), hold that mere spending of money, without more, does not constitute promotional money laundering. See *Valuck*, 286 F.3d at 225-227 (discussing and distinguishing those cases). *United States* v. *Jackson*, 935 F.2d 832, 841-842 (7th Cir. 1991), is also a spending case. The court there held that spending the proceeds of unlawful activity establishes an intent to promote unlawful activity when the proceeds are "plow[ed] back" into the activity, but spending on unrelated items does not establish the requisite intent to promote. *Id.* at 842. To the extent that petitioner's convictions are based on his expenditure of funds in the attorney trust account on ChildHelp, that expenditure promoted an ongoing underlying fraud by conveying the impression that the purported Treasury bill leasing program was profitable and that the profits were being donated to charity as investors had been promised. Those expenditures are thus quite different from the expenditures in

This case does not present the question on which the courts of appeals are divided because the Eighth Circuit did not hold that petitioner's intent to promote unlawful activity was established merely by his receipt or deposit of the proceeds of the fraud scheme. As noted above, that court previously held, in *Jolivet*, that a defendant's mere deposit of proceeds is *not* sufficient to establish his intent to promote unlawful activity. The court here concluded that petitioner's case is not governed by *Jolivet* because the government presented significant additional evidence of his criminal knowledge and intent to promote an ongoing scheme. See Pet. App. A8-A9.

As the court of appeals explained, petitioner's criminal knowledge and intent were established by "direct proof of [his] understanding of the fraudulent nature of K-7's Treasury bill leasing program" and evidence from which the jury could reasonably have concluded that he was "a willing participant in the scheme in return for substantial compensation." Pet. App. A8. The transfers of $160,000 in investor funds first into petitioner's attorney trust account and then from that account to ChildHelp "promoted continuation of the fraud scheme." *Id.* at A9. Investors were induced to participate in the scheme by promises that profits would be donated to charity, and the transfers enabled the defendants to maintain the impression that the scheme was profitable and that the promised charitable contributions would be made. *Id.* at A7, A9. Because the evidence shows that petitioner intended to do more than receive and deposit the proceeds of unlawful activity, and in fact sought to promote its success,

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Brown, *Olaniyi-Oke*, and *Jackson*, which were unrelated to the underlying criminal activity.

petitioner would not be entitled to relief under the law of any circuit.

Nor does petitioner present any other reason for this Court to grant review. Petitioner urges (Pet. 9-10) that his role as the lawyer for the K-7 scheme should exempt him from the reach of Section 1956(a)(1)(A)(i). Relying on *United States* v. *Beckner*, 134 F.3d 714, 719 (5th Cir. 1998), he argues that the statute should not apply to "the defendant who does no more than discharge properly his duties as an attorney." Pet. 10 (internal quotation marks omitted). But in *Beckner*—which did not involve money laundering—the court of appeals overturned an attorney's conviction for aiding and abetting his client's wire fraud because the government failed to prove that the attorney either was aware of his client's fraud or possessed information "that would lead a reasonable person to believe that fraud was occurring." *Beckner*, 134 F.3d at 719. Here, in contrast, the government presented ample evidence from which a reasonable jury could infer that petitioner either knew that the K-7 scheme was a fraud or was willfully blind to that fact. See Pet. App. A8-A9.

Petitioner also asserts that the district court's jury instructions did not define the phrase "to promote" in Section 1956(a)(1)(A)(i) and thus "[t]he jury was confused as to what intentionality meant." Pet. 11. Petitioner did not, however, raise that claim in the court of appeals, and the court of appeals did not address it. There is thus no reason for this Court to depart from its practice of not considering in the first instance claims that were not pressed or passed on below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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