No. 15-16

In the Supreme Court of the United States

ALLEN RAYMOND JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to vacatur of his convictions under 28 U.S.C. 2255 on the ground that his convictions for honest-services fraud are invalid in light of *Skilling* v. *United States*, 561 U.S. 358 (2010).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 588 Fed. Appx. 743. The order of the district court (Pet. App. 5-14) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 338 Fed. Appx. 561.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2014. A petition for rehearing was denied on April 2, 2015 (Pet. App. 15). The petition for a writ of certiorari was filed on June 29, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted on six counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 (Supp. 2002), 1346, and 2, and on one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 1-2. The district court sentenced petitioner to one year and one day of imprisonment, to be followed by three years of supervised release. *Id.* at 5; C.A. E.R. 97. The court of appeals affirmed. 338 Fed. Appx. at 562.

Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence. The district court denied petitioner's motion. Pet. App. 5-14. The court of appeals affirmed. *Id.* at 1-4.

1. Petitioner, a licensed attorney, earned thousands of dollars by participating in a mortgage-fraud scheme with his acquaintance Kenneth Ketner. C.A. E.R. 8-9, 37. Ketner ran a company known as Mortgage Capital Resources (MCR), which had access to lines of credit from financial institutions for use in making home-equity loans. *Ibid.* The financial institutions, or "warehouse lenders," required that home loans arranged by MCR be executed through a "closing agent"—"a neutral third party," *id.* at 37, or "fiduciary," who was to "assure that money received from the warehouse lenders would be transferred directly to the borrower," *id.* at 16; see *id.* at 9, 37. In exchange, the closing agent was to receive a fee for each completed loan transaction. *Id.* at 16, 18, 37.

Petitioner violated those rules. He agreed to serve as a closing agent for MCR's home loans, but instead of serving as a neutral third party, he agreed to "split

the net profits from the closings between himself, Ketner, and another employee of MCR." C.A. E.R. 37. He and Ketner set up shell accounts, including an account in a false name, so that petitioner could transfer money from the closings to Ketner while concealing the transactions. *Id.* at 38-39. In addition, shortly after taking on the role of closing agent, petitioner agreed to transfer loan money from the financial institutions to MCR, instead of complying with his obligation to transfer the funds directly to the borrowers. *Id.* at 37-38.

Ketner then began to "misappropriat[e] the warehouse lender's money." C.A. E.R. 38. This became clear to petitioner in February or March of 2000, when he learned that MCR's checks to borrowers were bouncing, *id.* at 37, and that "the money in MCR's funding account was gone, despite the fact that there should have been money in the account to fund numerous home equity loans," *id.* at 38. When confronted, Ketner told petitioner that he could resolve the situation if given more time. *Ibid.* Until July 2000, petitioner "continued to send money directly to MCR's accounts * * * rather than to close the loans himself as he was obligated to do as the closing agent." *Ibid.* Over the course of the scheme, more than $7 million of the funds that petitioner transferred to MCR never reached the borrowers or their designees. *Ibid.*

2. A grand jury in the Central District of California returned an indictment charging petitioner and Ketner with various crimes relating to the fraudulent scheme. Six counts charged petitioner and Ketner with honest-services wire fraud, alleging that petitioner and Ketner had devised and executed a scheme

to defraud warehouse lenders of petitioner's honest services, in violation of 18 U.S.C. 1343 (Supp. 2002), 1346, and 2. C.A. E.R. 16-24. One count charged petitioner and Ketner with conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). C.A. E.R. 28-30. Seven counts charged wire fraud, in violation of 18 U.S.C. 1343 (Supp. 2002) and 2, on the theory that petitioner and Ketner had transmitted wire communications, and had aided and abetted the transmission of wire communications, as part of a scheme to defraud the warehouse lenders of money and property by false representations and the concealment of material facts. C.A. E.R. 25-27.[1]

Petitioner pleaded guilty to the seven honest-services fraud counts and the count charging conspiracy to commit money laundering. C.A. E.R. 33-34, 92-93. The government agreed to drop the remaining charges against petitioner as part of a plea agreement. The district court sentenced petitioner to 12 months and one day of imprisonment on each count, to

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[1] The parties disputed below whether these counts charged both petitioner and Ketner or only Ketner. See Pet. App. 12-13. The district court concluded that the counts charged both defendants. *Ibid.* The court noted that those counts alleged that "defendants Ketner and [petitioner], for the purpose of executing and attempting to execute the above described scheme to defraud, caused and aided and abetted the transmission of" specified wire communications. *Id.* at 12 (quoting C.A. E.R. 26) (capitalization altered). It further noted that the charge incorporated additional paragraphs that described conduct by petitioner. *Ibid.* The court explained as well that petitioner's plea agreement specified that the government would dismiss "the remaining counts" against petitioner—an action that would have been unnecessary if these counts had not charged petitioner. *Id.* at 12-13. The court of appeals did not address whether petitioner was charged in these counts. See *id.* at 1-4.

be served concurrently, to be followed by three years of supervised release. *Id.* at 97. The court also ordered restitution in the amount of $2,515,560. *Ibid.*

Petitioner appealed his order of restitution, and the court of appeals affirmed. 338 Fed. Appx. at 562.

3. In 2010, while serving his term of supervised release, petitioner filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255. C.A. E.R. 102-104. Petitioner relied on *Skilling* v. *United States*, 561 U.S. 358 (2010), which had narrowed the honest-services fraud statute to prevent unconstitutional vagueness. C.A. E.R. 103-104. Petitioner argued that, under *Skilling*, the conduct to which he had pleaded guilty was not criminal. *Ibid.*

The district court denied petitioner's motion in an unpublished order. Pet. App. 5-14. The court first noted that petitioner had procedurally defaulted a vagueness-based challenge to his convictions and that petitioner had failed to show cause and prejudice for his default. *Id.* at 9-10. As a result, the court explained, petitioner was entitled to relief under Section 2255 only if he could establish his actual innocence of the charges in the indictment, including any equally or more serious charge that the government had foregone "in the course of plea bargaining." *Id.* at 11 (quoting *Bousley* v. *United States*, 523 U.S. 614, 624 (1998)) (emphasis omitted); see *id.* at 10-11 & n.3.

The district court concluded that petitioner had failed to show that he was innocent of conduct that remained criminal after *Skilling*. Pet. App. 11. The court noted that bribery and kickback schemes remained criminal after *Skilling*, see *id.* at 8, and that petitioner had pleaded guilty to involvement in such a scheme, *id.* at 11. In particular, the indictment al-

leged that petitioner had "paid a kick back to Ketner in the form of a share of his closing fee," and petitioner had admitted payment of these kickbacks—fee-splitting—in connection with his money-laundering plea. *Ibid.* The court further noted the government's argument that "the transactions could also be characterized as a bribe from Ketner to [petitioner] which would also be viable post-*Skilling*." *Id.* at 11 n.4 (emphasis omitted).

The district court also found that petitioner could not show that he was actually innocent of the additional wire fraud counts in the indictment, which were not premised on an honest-services theory, but rather on a scheme to defraud lenders of money and property. Pet. App. 12-13. The court explained that petitioner was required to establish his actual innocence of those charges because they had been dismissed as part of petitioner's plea bargain. *Ibid.* The court rejected petitioner's claim that he had not been charged in those counts of the indictment, concluding that the indictment's text charged petitioner and that the plea agreement bolstered this interpretation. *Ibid.*

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-4. The court held that the conduct to which petitioner had pleaded guilty included conduct that remained criminal after *Skilling*—namely, "depriving a lender of its right to honest services by participating in a kickback scheme." *Id.* at 3; see *id.* at 2 n.2. Petitioner contended that he had not committed honest-services fraud "because he paid, as opposed to received, the kickbacks." *Id.* at 3. The court rejected that argument, explaining that "nothing in *Skilling* suggests the Supreme Court intended to draw a distinction between a fiduciary who deprives a

victim of the right to honest services by receiving a bribe or kickback and a fiduciary who does the same by paying a bribe or kickback." *Ibid.* In addition, it noted that petitioner's conduct—rather than involving payment of kickbacks alone—could "be characterized as receiving a bribe in the form of referrals, particularly since the net result of the scheme was that [petitioner] received a portion of the closing fees without actually conducting the closings." *Id.* at 3 n.3.

ARGUMENT

Petitioner contends (Pet. 6-18) that he is entitled to vacatur of his convictions under 28 U.S.C. 2255 because he is actually innocent of honest-services fraud. The court of appeals correctly rejected that argument, and further review is not warranted.

1. The courts below correctly held that petitioner was not actually innocent of honest-services wire fraud. The mail and wire fraud statutes prohibit "scheme[s] or artifice[s] to defraud" using the mail or wires. 18 U.S.C. 1341, 1343. The term "scheme or artifice to defraud" reaches any scheme to deprive others of money or property, and also any scheme "to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Section 1346 was designed to reinstate the concept of "honest services" fraud developed by the courts of appeals, before this Court rejected a prosecution under that theory in *McNally* v. *United States*, 483 U.S. 350 (1987). *Skilling* v. *United States*, 561 U.S. 358, 402 (2010). Courts of appeals had found that officials and employees committed schemes to defraud when they violated their fiduciary duties in a manner that deprived employers of their "honest services," even where "a third party, who had not been deceived,

provided the enrichment" received by the corrupt employee. *Id.* at 400. For example, courts concluded that it would be fraud for a city official to "accept[] a bribe from a third party in exchange for awarding that party a city contract," even if "the contract terms were the same as any that could have been negotiated at arm's length," because the employer was deprived of the "honest services" of the employee or official—even though the bribe did not come from the employer's funds. *Ibid.* Although *McNally* held that the existing mail fraud statute did not prohibit the deprivation of honest services, Congress "responded swiftly" to "reinstate the body of pre-*McNally* honest-services law." *Id.* at 402, 405 (citation omitted).

In *Skilling*, this Court sustained the honest-services provision against a constitutional vagueness attack. Consistent with the core conduct addressed by pre-*McNally* honest-services cases, the Court construed the honest-services provision to reach only "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." 561 U.S. at 407. The Court found "no doubt that Congress intended [Section] 1346 to reach *at least* bribes and kickbacks." *Id.* at 408. And the Court concluded that construing the honest-services provision "to encompass only bribery and kickback schemes" ensures that the statute "is not unconstitutionally vague." *Id.* at 412. "As to fair notice," the Court explained, "whatever the school of thought concerning the scope and meaning of § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud." *Ibid.* (citation and internal quotation marks omitted). The Court also observed that "the statute's *mens rea* requirement further blunts any

notice concern." *Ibid.* Finally, the Court found no significant risk of arbitrary prosecutions from a statute limited to bribery and kickback schemes, because a "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." *Ibid.*

The conduct of which petitioner was convicted is unlawful under *Skilling* because petitioner violated his fiduciary duties through actions that involved both payment of kickbacks and receipt of what amounted to bribes. See Pet. App. 3 & n.3. As part of a fraud scheme in which petitioner transferred mortgage funds to his confederate Ketner, instead of to bona fide borrowers, petitioner received substantial fees readily "characterized as receiving a bribe in the form of referrals," *id.* at 3 n.3, and paid kickbacks from the money that he received, *id.* at 3. Because petitioner's breaches of his fiduciary duties involved both the payment of kickbacks and the receipt of what amounted to bribes, petitioner's conduct remains unlawful as honest-services fraud after *Skilling*. See *Skilling*, 561 U.S. at 412.

For several reasons, petitioner was not entitled to vacatur of his conviction based on his argument that, after *Skilling*, the honest-services fraud statute does not reach fiduciaries who *paid* kickbacks in violation of fiduciary duties. First, that view of honest-services fraud after *Skilling* is not correct. The statutory text does not support petitioner's view that honest-services fraud includes only schemes involving the deprivation of honest services through *receipt* of bribes or kickbacks. On the contrary, the statute reaches any "scheme or artifice to deprive another of the intangi-

ble right of honest services." 18 U.S.C. 1346. And while *Skilling* construed the statute to cover only "bribery and kickback schemes," it does not further limit the statute to cases involving fiduciaries who *received* bribes or kickbacks.

Petitioner principally grounds his proposed limitation (Pet. 8-9) in a passage in *Skilling* that identified no vagueness problem with a statute reaching employees who received bribes or kickbacks. See 561 U.S. at 412 (stating that "[a] prohibition on fraudulently depriving another of one's honest services by accepting bribes or kickbacks does not present a problem" under vagueness principles). But because the Court elsewhere made clear that there would be no vagueness problem if the honest-services provision were construed to reach those who deprived others of honest services through "bribery and kickback schemes" more generally—without distinguishing between sources and recipients—the passage on which petitioner relies is not properly read to suggest that only fiduciaries who receive bribes may be prosecuted. See *id.* at 368 ("We * * * hold that § 1346 covers only bribery and kickback schemes."); see also *ibid.* (stating that "Congress intended at least to reach schemes to defraud involving bribes and kickbacks" and declining "to extend [the statute] beyond that core meaning"); *id.* at 412 ("Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague."); *id.* at 408 n.42 (explaining that Court was "draw[ing] the honest-services line * * * at bribery and kickback schemes").

The limitation that petitioner advocates is not necessary to ensure "fair notice" or to avoid "arbitrary and discriminatory prosecutions." *Skilling*, 561 U.S.

at 412. Because it has long been "plain as a pikestaff" that bribery and kickback schemes are unlawful, and because bribery and kickbacks are well-defined concepts that draw meaning from numerous provisions of federal law, defendants will have fair notice and can avoid arbitrary prosecution even if Section 1346 is construed to cover employees who pay bribes and kickbacks as well as those who receive them. See *ibid.*

In any event, the analysis of kickbacks in the nonprecedential opinion below was not necessary to the court of appeals' affirmance because the court concluded that, in addition to paying kickbacks, petitioner had *received* payments that were tantamount to bribes. See Pet. App. 3 n.3. Petitioner acknowledges that this holding "provided an alternative basis for the court of appeals' decision." Pet. 15. He asserts, however, that this holding was also mistaken because "[t]he indictment did not charge [petitioner] with participating in a scheme to deprive the lenders of their right to his honest services by accepting bribes from the loan originator." Pet. 17-18. This fact-specific argument is mistaken.

The indictment described a scheme in which petitioner had received corrupt payments arranged by a co-conspirator, for work he did not actually complete, in connection with his breaches of fiduciary duty. C.A. E.R. 18. It alleged that Ketner had "us[ed] [petitioner's] law firm as the closing agent" and that petitioner "was to receive a fee of $450 for each loan closed." *Ibid.* It further alleged that those fees were not payment for work petitioner had actually performed, since petitioner had not fulfilled his responsibilities as the closing agent. *Ibid.* (explaining that closing agent was paid to "confirm that the lender's money was

going to the borrower," but that petitioner and Ketner had instead "divert[ed] the warehouse lenders' money into MCR's bank accounts"). The indictment also alleged that, in exchange for the stream of closing fees, petitioner had diverted a portion of the fees to Ketner as secret kickbacks. *Id.* at 19-20. The indictment thus in substance alleged that, in the course of the fraudulent scheme, petitioner had received what amounted to bribes as well as paying kickbacks. Petitioner therefore would not have been entitled to vacatur of his convictions even if his arguments regarding a fiduciary's payment of kickbacks were correct.

2. The unpublished decision below, which sets no precedent, does not implicate any disagreement among courts of appeals.

a. Petitioner asserts (Pet. 12) that the decision below conflicts with decisions of other courts that have "limited § 1346's reach to schemes involving the solicitation or acceptance of a bribe or kickback by the person owing [a] duty of honest services." The cases on which petitioner relies, however, did not present, discuss, or decide the question whether an honest-services conviction could be based on the payment of a bribe or kickback in violation of fiduciary duties. Three of the decisions affirmed convictions of government officials, where the evidence presented to the jury established that the officials had received bribes. *United States* v. *Terry*, 707 F.3d 607, 612-614 (6th Cir. 2013) (rejecting challenge to jury instructions, where the instructions properly advised jurors that they could convict if they found defendant took campaign contribution as quid pro quo for official acts), cert. denied, 132 S. Ct. 1490 (2014); *United States* v. *Wright*, 665 F.3d 560, 568-569 (3d Cir. 2012) (rejecting

sufficiency-of-the-evidence challenge); *United States* v. *Langford*, 647 F.3d 1309, 1321-1322 (11th Cir. 2011) (same), cert. denied, 132 S. Ct. 1121 (2012). While these decisions described a defendant's receipt of a bribe as an element of honest-services fraud, they did so in the context of prosecutions in which the government's theory had been that an official took bribes—not that the official paid bribes. See *Terry*, 707 F.3d at 610, 614-615; *Wright*, 665 F.3d at 565-566; *Langford*, 647 F.3d at 1322. Those decisions accordingly did not address the viability of a prosecution based on the latter theory.

The two other decisions petitioner cites (Pet. 13), which involved flawed pre-*Skilling* jury instructions, also did not address the kickback-payment theory considered by the court of appeals in this case. In each of the relevant cases, the government had presented evidence that a fiduciary had accepted bribes, but the jury instructions—in trials before *Skilling*—had not required a finding of any participation in a bribery or kickback scheme. *United States* v. *Nouri*, 711 F.3d 129, 139 (2d Cir.), cert. denied, 134 S. Ct. 309 (2013); *United States* v. *Bruno*, 661 F.3d 733, 740 (2d Cir. 2011). Addressing this flaw, the court in *Bruno* vacated the honest-services conviction of a public official. 661 F.3d at 745. It explained that, although the government had presented evidence that the official accepted bribes, *id.* at 744-745, the jury had been instructed that it could convict based solely on an undisclosed conflict of interest, *id.* at 739-740. The court in *Nouri* affirmed the honest-services convictions of several defendants, based on overwhelming evidence that they had accepted bribes, even though the pre-*Skilling* jury instructions had not required the

jury to make any findings as to bribes or kickbacks. The court concluded that the defendants were not entitled to relief on appeal because they had forfeited their claims and therefore were entitled only to plain-error review. 711 F.3d at 139-140.

While these decisions noted that the jury instructions at issue had been flawed because they did not allege that the defendants had accepted bribes, they did so in the context of prosecutions involving evidence that fiduciaries or officials had received bribes, but no evidence that fiduciaries or officials had paid bribes or kickbacks. See *Nouri*, 711 F.3d at 133-137; *Bruno*, 661 F.3d at 736-739, 744-745. The Second Circuit in *Nouri* and *Bruno* therefore had no occasion to address, and did not in fact consider, whether a fiduciary's payment of bribes or kickbacks could support a prosecution. As a result, the discussion of kickbacks in petitioner's case—which is in any event an unpublished discussion not necessary to the disposition below—does not conflict with the decisions that petitioner cites.

b. Petitioner asserts (Pet. 15-18) that the unpublished decision below generates a conflict concerning the showing that a defendant must make to establish "actual innocence" under Section 2255. As petitioner notes (Pet. 15-17), the Court in *Bousley* v. *United States*, 523 U.S. 614 (1998), held that defendants seeking to establish actual innocence on collateral review must show factual innocence of the charges of which they were convicted and of any more serious charge given up as part of a plea bargain, but not of charges never set out in the indictment or given up in plea negotiations. *Id.* at 623-624. Other courts have ap-

plied that principle. See Pet. 17 (citing *United States* v. *Davies*, 394 F.3d 182, 194 n.9 (3d Cir. 2005)).

Contrary to petitioner's suggestion, the decision below does not create a circuit conflict concerning the principles set forth in *Bousley*. The Ninth Circuit, like the Third Circuit, has recognized that under *Bousley,* a defendant need not demonstrate "actual innocence" of a crime with which he was never charged in order to obtain relief under Section 2255. *Lorentsen* v. *Hood*, 223 F.3d 950, 954 (9th Cir. 2000). The unpublished decision below does not articulate any contrary legal principle. Nor does the court's conclusion that petitioner's conduct amounted to bribe-taking depend on an implicit rejection of *Bousley*. While petitioner argues (Pet. 17-18) that the indictment should not be read to charge a bribery theory, the conduct that the court of appeals found amounted to bribe-taking was fully described in the indictment. See Pet. App. 3 n.3 (describing as conduct that "may be characterized as receiving a bribe" petitioner's receipt of "referrals," when "the net result of the scheme was that [petitioner] received a portion of the closing fees without actually conducting the closings"); C.A. E.R. 17-20; see also pp. 11-12, *supra*. Nothing in the decision below suggests that the court of appeals found these portions of the indictment to be inadequate to charge bribery, but believed (contrary to this Court's holdings) that petitioner's conviction could be sustained on a bribery theory not charged in the indictment or given up as part of a plea bargain.

3. This case would be a poor vehicle for considering the claims petitioner raises because the decision below could be affirmed without consideration of those claims—on the ground that petitioner failed to demon-

strate his actual innocence of other counts in the indictment charging a scheme to defraud lenders of money or property. The district court concluded that petitioner was charged in these ordinary wire-fraud counts, rejecting petitioner's arguments to the contrary, and it further concluded that petitioner had not shown his actual innocence of those charges. Pet. App. 12-13. Because the court of appeals affirmed the denial of relief for other reasons, it was unnecessary for the court to decide whether that aspect of the district court's analysis was correct. If this Court granted certiorari, however, it could affirm the court of appeals' judgment based on that analysis without reaching the questions presented by petitioner for review. See *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (noting that a respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). The availability of this alternative ground would make this case a poor vehicle for consideration of the legal claims that petitioner raises, even if the questions presented in the petition otherwise warranted this Court's review, which they do not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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