No. 22-945

In the Supreme Court of the United States

JONATHAN DEAN DAVIS, 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

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QUESTIONS PRESENTED

1. Whether sufficient evidence supported petitioner's convictions for wire fraud, in violation of 18 U.S.C. 1343.

2. Whether sufficient evidence supported petitioner's convictions for money laundering, in violation of 18 U.S.C. 1957.

3. Whether, in awarding restitution and applying the Sentencing Guidelines, the district court correctly calculated the amount of the loss caused by petitioner's fraudulent scheme.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. *Davis*, No. 20-cr-575 (Sept. 24, 2021)

United States Court of Appeals (5th Cir.):

United States v. *Davis*, No. 21-10996 (Nov. 15, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 53 F.4th 833.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2022. A petition for rehearing was denied on December 27, 2022 (Pet. App. 54). The petition for a writ of certiorari was filed on March 27, 2023. 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 Northern District of Texas, petitioner was convicted on seven counts of wire fraud, in violation of 18 U.S.C. 1343, and four counts of money laundering, in violation of 18 U.S.C. 1957 and 2. Pet. App. 37-38. He

was sentenced to 235 months of imprisonment, to be followed by three years of supervised release, and ordered to pay $65.2 million in restitution. *Id.* at 39-46. The court of appeals affirmed. *Id.* at 1-36.

1. Petitioner schemed to defraud the Department of Veterans Affairs (VA) into paying millions of dollars of tuition to a trade school that he operated for climate control systems technicians. Pet. App. 2-3. The VA administers the Post 9/11 G.I. Bill, a program that funds education for veterans. *Ibid.* In order to receive tuition payments under the program, a school must first go through an approval process that is designed to "ensure that veterans receive sound training and that taxpayer funds are not wasted." *Id.* at 2.

Petitioner made a series of misrepresentations in seeking G.I. Bill funding for his trade school. Pet. App. 4-5. For example, he certified that the school's audited financial statements were accurate, but wrote in his journal that he had "lied to the accountant" and omitted information about an account "because it [wa]s a disaster and wouldn't project a very good picture." *Id.* at 4. He also certified that no criminal cases were pending against him, even though he had been criminally charged in connection with passing a bad $25,000 check. *Ibid.*; see C.A. ROA 4631, 4912-4913. And he certified that the trade school had been operational for two years—a requirement for approval—even though it had not. Pet. App. 4-5. Petitioner knew, from the denial of a previous application and from warnings on the application form, that compliance with the two-year requirement was "essential" for approval. *Id.* at 9.

Petitioner also lied in soliciting veteran students whose tuition would be funded through G.I. Bill payments. Pet. App. 5. Not only were those students

"unaware of the fraudulently obtained VA approval," but petitioner "did not disclose how many months of their GI-Bill benefits would be depleted" if they enrolled. *Ibid.* Students were accordingly surprised to learn that the six-week course offered by the school depleted nearly a year of benefits. *Ibid.*; see C.A. ROA 3845-3846, 4090-4093, 4135-4138. The students were also told that they would be trained "to work as technicians making $15-$16 an hour but then struggled to find work." Pet. App. 5.

Petitioner ultimately received $72.2 million in tuition payments from the VA, of which only $7 million, "for students who initially enrolled but did not complete the program," was recouped. Pet. 25; see Pet. App. 12. Petitioner spent the money on luxuries such as a $2.2 million home, a Lamborghini, a Ferrari, and a Bentley. Pet. App. 6.

2. A grand jury in the Northern District of Texas indicted petitioner on seven counts of wire fraud, in violation of 18 U.S.C. 1343; four counts of money laundering, in violation of 18 U.S.C. 1957; and two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. Pet. App. 2 & n.2. A jury found petitioner guilty on all counts except the ones charging aggravated identity theft. *Ibid.*

The district court denied the motions for acquittal that petitioner filed at the close of the government's evidence, see D. Ct. Doc. 155 (Apr. 13, 2021), and after trial, see D. Ct. Doc. 190 (July 15, 2021). The court sentenced petitioner to 235 months of imprisonment, to be followed by three years of supervised release. Pet. App. 39-40. The court also ordered petitioner to pay the VA $65.2 million ($72.2 million minus $7 million) in restitution. *Id.* at 47.

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1-36.

The court of appeals rejected petitioner's claim that he should be acquitted on the wire fraud counts due to insufficient evidence of wire communications to further his fraudulent scheme. Pet. App. 7-8. The court observed that the wire-fraud statute applies to a defendant who either "transmit[s] or cause[s] to be transmitted" the relevant wire communications. *Id.* at 8 (quoting 18 U.S.C. 1343). It then explained that, through his "initial deceptions in the VA-approval process and the continual enrollment of veterans in the program," petitioner had "caused" the VA to wire funds to his trade school. *Ibid.*

The court of appeals also rejected petitioner's contention that insufficient evidence supported petitioner's money-laundering convictions under 18 U.S.C. 1957. Pet. App. 10-13. The court found sufficient evidence that petitioner knew that the property used in the transactions at issue was criminally derived. *Id.* at 13; see *ibid.* (discussing evidence that showed that petitioner "knew he was acquiring his VA approval through fraud").

The court of appeals then affirmed the district court's $65.2 million restitution award, Pet. App. 23-26, as well as its calculation of the amount of the VA's loss for purposes of applying the Sentencing Guidelines, *id.* at 26-27. In doing so, the court of appeals rejected petitioner's contention that the VA suffered no loss at all. *Id.* at 24. The court explained that the VA "would not have paid for anything absent [petitioner's] fraudulent misrepresentations" and that "its actual loss was the $65.2 million it was fraudulently induced to pay." *Id.* at 25-26.

The court of appeals separately vacated an order in which the district court had ordered petitioner to forfeit certain property and remanded the case to the district court for further proceedings concerning forfeiture. Pet. App. 30-36.

ARGUMENT

Petitioner renews his contentions (Pet. 9-28) that insufficient evidence supported his wire-fraud and money-laundering convictions and that the district court miscalculated the amount of the loss suffered by the VA as a result of his fraudulent scheme. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals' finding that sufficient evidence supported petitioner's convictions for wire fraud does not warrant this Court's review.

a. A person commits wire fraud if, "having devised * * * any scheme or artifice to defraud," he "transmits or causes to be transmitted" communications by means of interstate wires "for the purpose of executing such scheme or artifice." 18 U.S.C. 1343. As petitioner acknowledges (Pet. 13 n.3), this Court has read that statute in parallel with the mail-fraud statute, 18 U.S.C. 1341, which uses nearly identical language. See, *e.g.*, *Ciminelli* v. *United States*, No. 21-1170 (May 11, 2023), slip op. 5 n.2. And in interpreting the latter statute, the Court has held that even "'innocent' mailings—ones that contain no false information—may supply the mailing element." *Schmuck* v. *United States*, 489 U.S. 705, 715 (1989). Indeed, "the use of the mails need not be an essential element of the scheme"; rather, "[i]t is sufficient for the mailing to be 'incident to an essential part

of the scheme,' or 'a step in the plot.'" *Id.* at 710-711 (brackets and citations omitted).

The wire-fraud counts in this case were based on seven wire transfers in 2016 and 2017 from the United States Treasury to petitioner's trade school. C.A. ROA 990-991. Although those wire transfers did not "contain * * * false information," they were, at a minimum, "'incident to an essential part of the scheme'" or "'a step in the plot.'" *Schmuck*, 489 U.S. at 711, 715 (brackets and citations omitted). The entire point of the scheme was to obtain, on false pretenses, VA funds for veterans' tuition. That suffices to satisfy the use-of-wires element of wire fraud.

Petitioner's contrary arguments lack merit. First, he errs in arguing that a wire-fraud conviction requires proof that either "the defendant" or "someone acting on his behalf or at his direction" "sen[t] the wire" at issue. Pet. 15-16 (emphasis omitted). The wire-fraud statute applies not only when a defendant "transmits" the wire communication, but also when he "causes [such a communication] to be transmitted." 18 U.S.C. 1343. Applying similar language in the mail-fraud statute, the Court has held that a defendant "'causes' the mails to be used" when he acts "with knowledge that the use of the mails will follow in the ordinary course of business" or "such use can reasonably be foreseen." *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954) (citation omitted).

For example, the Court has held that a defendant causes the use of the mails if he deposits a check with a bank, knowing that, in the ordinary course of business, the bank will mail the check to a different bank for collection. *Pereira*, 347 U.S. at 8-9. Here, petitioner made fraudulent representations to the VA and to his trade school's students, with knowledge that, "in the ordinary

course of business," *id.* at 9, the VA would use the wires to transfer funds to the school. Petitioner thus "caused" the wire transfers, just as the statute requires. See Pet. App. 8.

Second, contrary to petitioner's suggestion, the wire-fraud statute does not require proof that the entity that transmitted the wire communications itself acted with "the purpose of executing" the fraudulent scheme. Pet. 16 (citation omitted). The statute does not ask about the *sender's* purpose; instead, it asks whether *the defendant* "cause[d] [the wire] to be transmitted" "for the purpose of executing" the scheme. 18 U.S.C. 1343; see, *e.g.*, *Pereira*, 347 U.S. at 8-9 (holding that a defendant caused the use of the mails by causing an innocent bank to mail a check to a different bank for collection). And here, petitioner plainly acted with the purpose of executing his scheme.

Third, petitioner errs in arguing that the use of the wires in this case occurred "after [the] scheme had reached 'fruition.'" Pet. 16 (citation omitted). Although petitioner lied to the VA in 2014, those lies "led to an ongoing receipt of funds" by wire in 2016 and 2017. Pet. App. 10. That ongoing receipt of the funds was as much a part of the fraudulent scheme as the initial lies—indeed, the receipt of those funds was the scheme's object. Moreover, petitioner's wire-fraud convictions rested not only on his lies to the VA but also on his lies to students, including veterans whose attendance would trigger the receipt of additional VA funds. And the deception of students was still ongoing at the time of the use of the wires. See, *e.g.*, C.A. ROA 4090-4093, 4135-4138.

b. There is no merit to petitioner's suggestion (Pet. 14) that the decision below conflicts with this Court's

decisions in *Kann* v. *United States*, 323 U.S. 88 (1944), *Parr* v. *United States*, 363 U.S. 370 (1960), and *United States* v. *Maze*, 414 U.S. 395 (1974). As this Court has already explained, the mailings in those cases "involved little more than post-fraud accounting among the potential victims of the various schemes, and the long-term success of the fraud did not turn on which of the potential victims bore the ultimate loss." *Schmuck*, 489 U.S. at 714. In this case, in contrast, the wiring of VA funds to petitioner's trade school was not only "incident to an essential part of the scheme" to defraud the VA, it was the scheme's goal. *Id.* at 711 (citation omitted).

There also is no merit to petitioner's contention (Pet. 17-19) that the decision below conflicts with decisions of other courts of appeals. Every case that petitioner cites (Pet. 18-19) involved mailings or wire communications that occurred after the completion of the fraudulent scheme presented to the jury and did not further that scheme.* The use of the wires here, in contrast, did not

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* See *United States* v. *Tavares*, 844 F.3d 46, 61 (1st Cir. 2016) (finding insufficient evidence that "the letters tended to perpetuate the scheme," or "perpetuate" it by reducing likelihood of discovery); *United States* v. *Hagen*, 917 F.3d 668, 675 (8th Cir. 2019) (explaining that, because the fraudulent scheme "was already completed" and the defendants "had already received their payments" by the time of the mailings, the mailings "had no effect on the success or failure of the alleged scheme"); *United States* v. *Lazarenko*, 564 F.3d 1026, 1037 (9th Cir.) (finding insufficient evidence use of wires where the "fraudulent activity was completed" and the defendant used the wires for "downstream transactions" involving the proceeds of the fraud), cert. denied, 558 U.S. 1007 (2009); see also *United States* v. *Takhalov*, 838 F.3d 1168, 1170 (11th Cir. 2016) (per curiam) (concluding that principal fraud already completed at time of mailing and government had not pressed additional concealment theory); *United States* v. *Narum*, 577 Fed. Appx. 689, 691 (9th Cir. 2014) (concluding that a defendant's "subsequent use of the wires to buy

occur after the completion of the fraud; instead, as explained above, it was integral to that scheme by enabling petitioner to obtain funds from the VA. See p. 7, *supra*.

To the extent that petitioner is simply contesting the court of appeals' specific application of the uniform legal rule—whether the defendant used or caused the use of the wires to "further th[e] scheme," Pet. App. 7—to the facts of his case, that fact-bound claim does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and decide specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). That is particularly so given that the district court denied petitioner's motions for acquittal. See *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

2. Petitioner's challenge to his money-laundering convictions likewise does not warrant review.

A person violates the money-laundering statute if, in certain circumstances, he "knowingly engages * * * in a monetary transaction" using property that was "derived from specified unlawful activity." 18 U.S.C. 1957(a). The "monetary transaction[s]" at issue here were petitioner's purchases of a home and three luxury

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[products]" using the proceeds of a completed fraud does not satisfy the use-of-wires element).

cars, and the property "derived from specified unlawful activity" consisted of the funds derived from petitioner's wire-fraud scheme. *Ibid.*; see Pet. App. 10-11.

Petitioner argues (Pet. 23-25) that the government failed to satisfy the statute's mens rea element ("knowingly"), asserting that the government failed to prove that he knew that the proceeds of his wire fraud were "derived from specified unlawful activity." 18 U.S.C. 1957(a). The court of appeals correctly rejected that contention. Pet. App. 13. The government introduced extensive evidence—for example, statements from petitioner's journal that "more lying is in order" and that petitioner "lied to the accountant"—showing that petitioner "knew he was acquiring his VA approval through fraud." *Ibid.* Petitioner emphasizes (Pet. 24) that he "lied in 2014" but engaged in the relevant monetary transactions "in 2016 and 2017," but that is simply a repackaging of the erroneous contention that petitioner's fraudulent scheme concluded in 2014. As discussed above, the scheme persisted through 2016 and 2017. See p. 7, *supra*.

In any event, petitioner does not contest any aspect of the court of appeals' interpretation of the money-laundering statute; instead, he simply challenges the court's application of the statute's mental-state element in this case. That fact-bound claim does not warrant this Court's review. See *Johnston*, 268 U.S. at 227; Sup. Ct. R. 10. Indeed, petitioner acknowledges (Pet. 25) that the "money laundering issue alone would not justify the Court taking this case" and argues that the Court should grant review on that question only "if the Court is going to address * * * wire fraud" anyway.

3. Finally, petitioner's challenge to the district court's calculation of the amount of the VA's loss does not warrant review.

a. A district court, in sentencing for certain offenses—including "any offense committed by fraud or deceit"—must order "that the defendant make restitution to the victim." 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii). Where the offense results in the "loss * * * of property," the "order of restitution shall require that [the] defendant * * * pay an amount equal to * * * the value of the property." 18 U.S.C. 3663A(b)(1). In this case, the district court correctly calculated that the VA (the victim of petitioner's fraud) lost $65.2 million. See Pet. App. 24. As petitioner acknowledges (Pet. 25), the VA paid petitioner roughly $72 million as a result of his deception, of which it only recouped $7 million (based on students who "enrolled but did not complete the program," resulting in a loss of $65.2 million.

Petitioner errs in arguing (Pet. 26) that, because the VA "must pay for a particular veteran's education," it "was not harmed and could not suffer a 'loss' by paying for a student to attend one school as opposed to another." The VA does not have a statutory obligation to pay for education generally; rather, it has an obligation to pay only for education at schools that satisfy certain requirements. See, *e.g.*, 38 U.S.C. 3313(a) ("The Secretary shall pay to each individual * * * who is pursuing *an approved program of education* * * * the amounts specified.") (emphasis added). As a VA official testified at trial, those requirements protect "the veteran" and "the taxpayer" by ensuring that federal money is not wasted on "fly-by-night schools" or schools that do not provide sufficient "value." C.A. ROA 28,896. That is why the VA required the certification process in which

petitioner lied, and it was harmed—and thus suffered a loss—when it paid money for education at a school that did not satisfy the applicable requirements. See Pet. App. 25.

Petitioner's remaining arguments misread the court of appeals' decision. For example, petitioner asserts (Pet. 27) that the court of appeals measured the VA's loss "solely by looking at [petitioner's] gross receipts." But the court in fact "consider[ed] 'the victims' loss,' *not* the gross gain by the defendant." Pet. App. 24 (emphasis added; citation omitted). Petitioner also asserts (Pet. 26) that the court of appeals "relied on commentary to the Sentencing Guidelines," "without reference to the applicable statutes." But the court in fact relied on one of its precedents interpreting the restitution statutes. See Pet. App. 25 (citing *United States* v. *Mahmood*, 820 F.3d 177 (5th Cir. 2016)). And the court referred to the Sentencing Guidelines to support a view *favorable* to petitioner—*i.e.*, that he would be "entitled to a credit for the fair market value of services rendered" if he could show that "the benefits program would have paid for the services had he not fraudulently billed them." *Ibid.*

b. To the extent that petitioner also means to challenge the district court's calculation of the VA's loss for purposes of applying the Sentencing Guidelines, see, *e.g.*, Pet. 25 & n.4, that issue does not warrant this Court's review. Congress has charged the Sentencing Commission with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). In light of that responsibility of the Commission, the Court ordinarily does not grant review on

issues of Guidelines interpretation. See, *e.g.*, *Guerrant* v. *United States*, 142 S. Ct. 640, 640-641 (2022) (statement of Sotomayor, J., respecting the denial of certiorari); *Longoria* v. *United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., respecting the denial of certiorari). Petitioner identifies no reason for the Court to depart from that practice in this case.

In any event, the court of appeals correctly affirmed the district court's application of the Sentencing Guidelines. Section 2B1.1 of the Guidelines increases a defendant's offense level based on the amount of "loss." Sentencing Guidelines § 2B1.1(b)(1) (2018). The Guidelines' commentary defines "loss" as "the greater of actual loss or intended loss." *Id.* § 2B1.1, comment. (n.3(A)). And here the district court found that the "intended loss" (*i.e.*, without the unanticipated need to refund $7 million for the students who did not finish their schooling) was $72.2 million, the total amount that petitioner's trade school received from the VA. See D. Ct. Doc. 275, at 35 (Nov. 8, 2021).

Petitioner suggests (Pet. 27) that the decision below conflicts with *United States* v. *Banks*, 55 F.4th 246 (2022), where the Third Circuit concluded that Section 2B1.1's commentary improperly expands the definition of "loss" beyond the text of the Guidelines. But petitioner did not argue below that the commentary's inclusion of "intended loss" conflicted with the text, and the court of appeals accordingly did not address that question. See Pet. App. 26-30. This Court is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and ordinarily does not address issues that were neither raised nor addressed below, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992). And in any event, whether "loss" includes "intended loss"

would not affect petitioner's sentence. Petitioner would be subject to the same 24-level enhancement regardless of whether the district court considered the intended loss ($72.2 million) or the actual loss ($65.2 million, once the refund is taken into account). See Sentencing Guidelines § 2B1.1(b)(1)(M).

Petitioner also errs in suggesting (Pet. 27) that the decision below conflicts with *United States* v. *Riccardi*, 989 F.3d 476 (6th Cir. 2021), and *United States* v. *Kirilyuk*, 29 F.4th 1128 (9th Cir. 2022). Those decisions addressed a different portion of the Guidelines commentary, Sentencing Guidelines § 2B1.1, comment. (n.3(F)(i)), that did not apply in this case. See *Riccardi*, 989 F.3d at 488; *Kirilyuk*, 29 F.4th at 1137.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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