No. 10-1477

In the Supreme Court of the United States

JACK L. HARGROVE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, on remand from this Court for further consideration of petitioner's mail and wire fraud convictions in light of *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), the court of appeals erred in determining that the government's partial reliance on an invalid theory of honest services fraud was harmless error.

2. Whether the district court should have instructed the jury that it could not find that petitioner received a "private gain" from his honest services fraud scheme based on his receipt of compensation as a corporate officer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

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OPINIONS BELOW

The order of the court of appeals on remand (Pet. App. 1-2) is not published in the *Federal Reporter* but is available at 412 Fed. Appx. 869. The earlier opinion of the court of appeals affirming petitioner's convictions (Pet. App. 3-7) is reported at 579 F.3d 752.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2011. The petition for a writ of certiorari was filed on June 2, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was con-

victed on seven counts of mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343; one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 371; and two counts of filing false tax returns, in violation of 26 U.S.C. 7206. He was sentenced to concurrent prison terms of 168 months on the mail and wire fraud counts; 60 months on the conspiracy count; and 36 months on the tax counts. The court of appeals affirmed. Pet. App. 3-7.

This Court then granted petitioner's petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of *Skilling* v. *United States*, 130 S. Ct. 2896 (2010). Pet. App. 8. On remand, the court of appeals reinstated the convictions and sentence. *Id.* at 1-2.

1. Petitioner and Laurence Capriotti owned a majority stake in Intercounty Title Company of Illinois (Intercounty), a title insurance and escrow agent. Capriotti was president of the company and petitioner was the chairman of its board of directors. By the late 1980s, Intercounty was running an annual deficit in the millions of dollars as the result of a price war in the title insurance market. Petitioner and Capriotti sought to cover their losses by investing Intercounty in junk bonds, but that strategy backfired when Intercounty incurred significant losses on the bonds, further increasing its deficit. Pet. App. 4; Gov't C.A. Br. 6-8.[1]

Over a ten-year period beginning in 1990, petitioner and Capriotti engaged in a scheme to misappropriate large sums from Intercounty's escrow account to cover Intercounty's deficits. The escrow account contained

[1] "Gov't C.A. Br." refers to the government's brief in petitioner's initial appeal. "Gov't C.A. Supp. Br." refers to the government's brief on remand to the court of appeals.

deposits from Intercounty's clients as well as customer accounts that petitioner arranged for another company, Independent Trust Company (Intrust), to entrust to Intercounty purportedly for investment in government obligations. Petitioner and Capriotti misappropriated the funds in Intercounty's escrow account in various ways. Among other things, they obtained loans secured by certificates of deposit purchased with funds from the escrow account, allowed the escrow-funded certificates of deposit to be cashed out in order to pay off the loans, and then applied the loan proceeds to Intercounty's operating account, all the while falsely representing to Intrust that the transferred funds were being held in escrow for Intrust and its customers. Petitioner and Capriotti used the stolen funds to pay off Intercounty's debt, increase its junk bond investments, purchase commercial property for Intercounty, and support Intercounty's troubled lender. Through these schemes, petitioner and Capriotti misappropriated more than $60 million. Pet. App. 4-5; Gov't C.A. Br. 9-16.

2. In 2004, a grand jury sitting in the Northern District of Illinois returned a superseding indictment charging petitioner with a number of offenses, including one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; several counts of filing false tax returns, in violation of 26 U.S.C. 7206; and several substantive counts of mail and wire fraud, in violation of 18 U.S.C. 1341, 1343 and 1346. Pet. App. 3-4. As relevant here, Sections 1341 and 1343 criminalize the use of the mail or wires to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. Section 1346 defines the term "scheme or artifice to defraud" to in-

clude "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

The government proceeded on two overlapping theories of mail and wire fraud. In particular, the government argued that, in scheming to steal money from the escrow accounts, petitioner deprived Intercounty's customers, Intrust, and Intrust's account holders (1) of money or property and (2) of their intangible right of honest services. See Indictment Count 1 ¶ 2; Gov't C.A. Br. 24-25; Gov't C.A. Supp. Br. 18-20. Before trial and again following the verdict, petitioner challenged the mail fraud and conspiracy charges on the ground that Section 1346 is unconstitutionally vague both on its face and as applied in this case. Pet. App. 5-6. The district court rejected these claims. *Id.* at 5.

Following a five-week trial, the jury found petitioner guilty of mail and wire fraud, conspiracy to commit mail and wire fraud, and filing false tax returns. Pet. App. 3-4; Gov't C.A. Br. 6, 25.

3. The court of appeals affirmed. Pet. App. 4-7. As relevant here, the court rejected petitioner's contention that Section 1346's prohibition of a scheme to deprive another of "the intangible right of honest services" is unconstitutionally vague. *Id.* at 5-6. The court relied (*ibid.*) on its prior decisions in *United States* v. *Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003), cert. denied, 541 U.S. 1072 (2004), and *United States* v. *Warner*, 498 F.3d 666, 697 (7th Cir. 2007), cert. denied, 553 U.S. 1064 (2008), in which it had held that "the mail and wire fraud statutes * * * are not unconstitutionally vague, as applied under the intangible-rights theory to a kickback

scheme enabled by the offender's misuse of his fiduciary position gain," *Hausmann*, 345 F.3d at 958.[2]

4. Petitioner filed a petition for a writ of certiorari, presenting two questions: whether the honest services fraud provision, 18 U.S.C. 1346, is unconstitutionally vague, and whether the district court should have instructed the jury that petitioner's receipt of compensation as a corporate officer did not constitute "private gain" from his honest services fraud scheme. Pet. i, *Hargrove* v. *United States*, 130 S. Ct. 3543 (2010) (No. 09-929).

This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of *Skilling* v. *United States*, *supra*. Pet. App. 8. In *Skilling*, this Court held that the honest services fraud provision in 18 U.S.C. 1346 criminalizes only schemes involving bribes or kickbacks. 130 S. Ct. at 2929-2931.

5. On remand, the government conceded that its honest services theory was invalid in light of *Skilling* because petitioner's offense did not involve bribery or kickbacks. Pet. App. 2; Gov't C.A. Supp. Br. 1-2. The government argued, however, that any error was harmless beyond a reasonable doubt because both theories of fraud—honest services fraud and money fraud—were based on a scheme to deprive victims of money, and so any verdict must have been based on the theory that petitioner stole money. See Gov't C.A. Supp. Br. 1-4, 18-22.

The court of appeals agreed and reinstated petitioner's convictions and sentence. Pet. App. 1-2. The

[2] Petitioner also argued in his appellate brief that his trial counsel was ineffective, but he withdrew that claim at oral argument. Pet. App. 5.

court accepted the government's concession that the honest services fraud theory was invalid and then considered whether the error was harmless. *Id.* at 2. The court noted that "[t]he only evidence that the government presented to the jury involved the fraudulent practices of [petitioner] and others to rob a variety of victims of millions of dollars," and that evidence "provided a basis to convict [petitioner] of both honest services fraud and money fraud." *Ibid.* The court also observed that "[n]o evidence was introduced at trial that suggested [petitioner] schemed in other ways to deprive any of the victims of [his] honest services apart from the theft of huge sums of money." *Ibid.* As a result, the court explained, "in order to convict [petitioner] of honest services fraud, the jury had to do so based on the evidence that also supported the money fraud"; petitioner did not "point to any evidence that suggests otherwise." *Ibid.* The court therefore concluded that "no reasonable jury could have acquitted [petitioner] of money fraud but convicted him of honest services fraud" and the instructional error was therefore harmless. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 22-37) that the court of appeals erred in finding that the honest service error was harmless beyond a reasonable doubt. He is mistaken, and his fact-bound contention does not warrant this Court's review.

In decisions issued before *Chapman* v. *California*, 386 U.S. 18 (1967), which established that constitutional errors can be harmless, this Court had held that a general verdict of guilty must be set aside if the jury was instructed on alternative theories of guilt and it is "impossible to tell" whether the jury relied on a valid or

invalid theory. See, *e.g.*, *Yates* v. *United States*, 354 U.S. 298, 311-312 (1957); *Stromberg* v. *California*, 283 U.S. 359, 368 (1931). Recently, however, the Court held that such an alternative theory error may be harmless even in cases in which the jury may have relied on the invalid theory. See *Hedgpeth* v. *Pulido*, 555 U.S. 57, 60-62 (2008) (per curiam). In those circumstances, reviewing courts must apply the same harmless-error analysis that applies when the trial court fails to instruct the jury on an element of an offense. *Id.* at 60-61 (citing *Neder* v. *United States*, 527 U.S. 1 (1999)). Under that analysis, an instructional error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18; see *Premo* v. *Moore*, 131 S. Ct. 733, 744 (2011). The Court further explained that the government may satisfy that standard by showing that the evidence of guilt was "overwhelming" and either that the defendant did not contest the omitted element or that he failed to present evidence sufficient to support a contrary finding. *Neder*, 527 U.S. at 17, 19.

In this case, application of the overwhelming evidence test was not necessary to uphold petitioner's mail and wire fraud convictions because the court of appeals concluded that the jury actually found facts establishing petitioner's guilt under the valid money fraud theory. See Pet. App. 1-2. As the court explained, the government's honest services and pecuniary fraud theories were both based on the identical scheme to misappropriate huge amounts of money from Intercounty's escrow account. *Id.* at 2. No evidence suggested that petitioner schemed to deprive his victims of his honest services in any other way. See Gov't C.A. Supp. Br. 1-22 (reviewing the evidence and explaining that the "government never

came close to arguing that the jury should convict on an honest-services theory even if it did not find a money-fraud violation").

Before the court of appeals, petitioner did not "point to any evidence that suggests" that the jury could have convicted him based on a theory of honest services fraud that did not involve stealing money. Pet. App. 2. Petitioner likewise does not make that argument before this Court; instead, he attempts to relitigate the question whether he had sufficient knowledge of the scheme to be found criminally liable. See Pet. 35-36. (That fact-bound challenge to petitioner's conviction, which was not addressed on remand, does not implicate any legal issue and does not warrant further review.) Accordingly, the jury could not reasonably have found that petitioner schemed to deprive his victims of his honest services without also finding that he schemed to deprive them of their money.

Unlike in *Yates* and *Stromberg*, then, it *is* possible in this case to tell that the jury found facts establishing guilt on the valid theory. Accordingly, examination of the strength of the government's proof and of any evidence supporting acquittal is not necessary to show that the *Skilling* error was harmless. In *Neder*, the Court recognized that one way alternative theory errors may be harmless is if the jury must have found facts establishing guilt under the valid theory. See 527 U.S. at 13-14; see also, *e.g.*, *Monsanto* v. *United States*, 348 F.3d 345, 350-351 & n.6 (2d Cir. 2003), cert. denied, 543 U.S. 831 (2004). The Court referred to that analysis as the "functional equivalence" test—a test that finds harmlessness when the facts necessarily found by the jury are the "functional equivalent" of a finding of guilt on the valid theory. *Neder*, 527 U.S. at 13-14; see also

Carella v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in the judgment).

The courts of appeals have routinely applied functional equivalence analysis to find errors harmless, including alternative theory errors. See, *e.g.*, *United States* v. *Segal*, 644 F.3d 364, 366-367 (7th Cir.), petition for cert. pending, No. 11-343 (filed Sept. 16, 2011); *United States* v. *Brown*, 161 F.3d 256, 259 (5th Cir. 1998); *United States* v. *Hastings*, 134 F.3d 235, 241-242 (4th Cir.), cert. denied, 523 U.S. 1143 (1998); *United States* v. *Washington*, 106 F.3d 983, 1013 (D.C. Cir.) (per curiam), cert. denied, 522 U.S. 984 (1997); *United States* v. *Doherty*, 867 F.2d 47, 57-58 (1st Cir.), cert. denied, 492 U.S. 918 (1989); *Moore* v. *United States*, 865 F.2d 149, 154 (7th Cir. 1989); *United States* v. *Asher*, 854 F.2d 1483, 1496 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989); see also *United States* v. *Skilling*, 638 F.3d 480, 482 (5th Cir. 2011) ("[A]n alternative-theory error is harmless if the jury, in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory."). The court below correctly employed that analysis in determining that the *Skilling* error was harmless, and its case-specific determination does not warrant this Court's review. Because the court of appeals relied on the "functional equivalence" test and not on the overwhelming evidence test, petitioner's argument based on the overwhelming evidence test is beside the point.[3]

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[3] Petitioner suggests (Pet. 28-29) that, in reinstating his convictions on remand, the court below relied solely on his statement filed under Seventh Circuit Rule 54 and ignored the trial and appellate records. The court's opinion, however, plainly states that it reviewed both the Rule 54 statements and the record on appeal. Pet. App. 1.

2. Petitioner also seeks review (Pet. 37-42) of the district court's instructions to the jury on the elements of honest services fraud. The district court instructed the jury that, in order to convict petitioner of honest services fraud, it must find that petitioner "intentionally caused [his fiduciary duty to a victim] to be violated for the personal gain of some participant in the scheme whether or not [petitioner] benefitted," Pet. App. 40; in petitioner's view (Pet. 37-42), the court should have included a further instruction that petitioner's compensation as a corporate officer could not qualify as "personal gain."

The issue petitioner raises has no relevance to this case. The government conceded in the court of appeals that its honest services theory was invalid in light of *Skilling* because petitioner's scheme did not involve bribery or kickbacks, and the court of appeals reinstated petitioner's convictions strictly on the basis that he committed and conspired to commit money fraud. See Pet. App. 1-2. Accordingly, the question whether the district court properly instructed the jury on the elements of the invalid honest services charges is no longer germane. In any event, petitioner failed to preserve this claim in the courts below. He did not request the instruction he now contends was necessary in the district court,[4] nor object in a timely manner to the court's failure to give such an

[4] Petitioner appears to suggest (Pet. 19) that he requested an instruction that employee compensation does not qualify as private gain in connection with the jury's mid-deliberations request for clarification of the court's "personal gain" instruction. But the record of that proceeding shows only that petitioner requested an instruction that "intent to economically deprive the victim" is an element of honest services fraud. See Pet. App. 27.

instruction.[5] He also failed to raise the issue on appeal, and the court of appeals did not address it. See *id.* at 3-7. Accordingly, the claim is not properly before this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Further review of this claim is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

OCTOBER 2011

[5] Petitioner raised the employee-compensation issue for the first time in his post-trial motion for a new trial, Pet. App. 35; that action was insufficient to preserve his instructional claim, see Fed. R. Crim. P. 30(d).