No. 98-825

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMIEL CUETO, 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

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QUESTIONS PRESENTED

1. Whether the evidence that petitioner, an attorney, engaged in litigation-related activities with the purpose of obstructing justice and protecting his personal financial interests supported his convictions under the omnibus clause of 18 U.S.C. 1503.

2. Whether the First Amendment precluded petitioner's prosecution for endeavoring to obstruct justice by making false and criminally motivated allegations of misconduct against a government investigator.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 151 F.3d 620.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1998. The petition for rehearing was denied on August 24, 1998. The petition for a writ of certiorari was filed on November 18, 1998. 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 Southern District of Illinois, petitioner was convicted on one count of conspiring to defraud the

United States, in violation of 18 U.S.C. 371, and on three counts of obstructing justice, in violation of 18 U.S.C. 1503. He was sentenced to 87 months' imprisonment and fined $80,000. The court of appeals affirmed. Pet. App. 1-34.

1. a. Thomas Venezia operated an illegal video gambling business, known as B&H Vending/Ace Music corporation, which supplied video poker games to local bars in East St. Louis, Illinois, including a Veterans of Foreign Wars (VFW) post. The bars agreed with B&H to make illegal gambling payouts to their customers. In the early 1990s, the Illinois Liquor Control Commission (ILCC) and the State Police initiated a joint investigation of illegal gambling operations in southern Illinois. Eventually, the Federal Bureau of Investigation (FBI) became interested in the investigation, and it used ILCC Agent Bonds Robinson in an undercover role to gather evidence about Venezia and B&H. Pet. App. 3-4.

Petitioner, a prominent and politically influential local businessman and attorney, was Venezia's business partner in various enterprises, including illegal gambling operations. Pet. App. 8-9, 16-17, 21, 27. Several of those joint enterprises depended on the continued operation of B&H and the illegal gambling business to secure loans and cover the debts that petitioner and Venezia had incurred. *Id.* at 8-9. During the period that Venezia and B&H were under investigation, petitioner also served as Venezia's lawyer and advisor. *Id.* at 2. To protect his own business and financial interests, petitioner made a variety of false legal filings and took other fraudulent court actions motivated by the purpose of forestalling the federal investigation of Venezia and the illegal enterprises. *Id.* at 17- 18, 21-22.

b. Count 1 of the indictment in this case charged that petitioner conspired with Venezia and others to defraud the United States, in violation of 18 U.S.C. 371, by "interfer[ing] with the investigation and criminal prosecution of the B&H racketeering organization and its members and thereby prevent the dismantling by federal authorities of the multi-million dollar illegal gambling operation in an effort to safeguard the [conspirators'] valuable joint business and financial interests[.]" Indictment 8-9. Petitioner was convicted on that conspiracy count, and he does not seek review of that conviction in this Court.

Count 2, the first of several counts alleging violations of 18 U.S.C. 1503, charged petitioner with seeking to impede the investigation by filings in an action commenced in state court (and later removed to federal court) seeking to enjoin Robinson from investigating Venezia's business. Pet. App. 5. In that proceeding, which one court subsequently described as a "parody of legal procedure" (*Venezia* v. *Robinson*, 16 F.3d 209, 210 (7th Cir.), cert. denied, 513 U.S. 815 (1994)), petitioner used a fraudulent pretext to lure Robinson into a state courthouse, served him with a subpoena, and then had a judge compel him to reveal the confidential details of the FBI investigation. Pet. App. 5. As government agents testified at petitioner's trial, his plan "blew the lid off the ongoing investigation." *Id.* at 21. The goal of the proceeding was, in petitioner's words, to "get this guy [Robinson] before this guy get[s] us." 11 Tr. 22; see also Gov't C.A. Br. 7; 4 Tr. 147.

Count 6 charged petitioner with violating Section 1503 by seeking Robinson's indictment in state court as another means of trying to neutralize his investigatory efforts. Pet. App. 11; see Indictment 28 (petitioner "engag[ed] in acts to persuade [a state prosecutor] to

indict Agent Robinson, including by offering and causing to be offered a judicial position as a political favor to [the prosecutor] to permit [petitioner] to fill the vacancy and indict Robinson"). In pursuing that indictment, petitioner falsely told a state prosecutor that Robinson had committed perjury by denying (at a hearing involving one of Venezia's customers) petitioner's allegation that Robinson had accepted a bribe from beer distributor Tony Joynt. Petitioner made that accusation after he had forced Robinson to disclose in court that he was not in fact a corrupt state liquor agent but was working undercover for the FBI, and petitioner knew that the accusation was false. See note 7, *infra*; Pet. App. 22 n.11.

Finally, Count 7 charged that petitioner obstructed justice by preparing, or assisting in the preparation of, false pleadings and court papers in the underlying racketeering proceeding against Venezia and B&H, for the purpose of impeding and obstructing the administration of justice in that case. See Pet. App. 11, 21.

2. On appeal, petitioner contended that his convictions for obstruction of justice should be reversed on the grounds that Section 1503 is "unconstitutionally vague as applied to the conduct charged in the indictment" and that the evidence was insufficient to support the convictions. Pet. App. 14.[1] The court of appeals rejected those arguments and affirmed petitioner's convictions.

In rejecting petitioner's vagueness claim, the court explained that, although it agreed that the omnibus

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[1] Petitioner also made challenges to his conspiracy conviction, to some of the district court's evidentiary rulings, and to his sentence. Pet. App. 12-13. The court of appeals rejected those claims, *id.* at 24-33, and they are not renewed here.

clause of Section 1503 must be read "to avoid chilling vigorous advocacy" by criminal defense lawyers, no such concerns were raised on the facts of this case. Pet. App. 19. Petitioner had acted here not as a lawyer in a typical attorney-client relationship, but as a partner with Venezia in corrupt businesses that he sought to conceal from official scrutiny: "The government's theory of prosecution is predicated on the fact that [petitioner] held a personal financial interest in protecting the illegal gambling enterprise, which formed the requisite corrupt intent for his conduct to qualify as violations of [Section 1503]." *Id.* at 16; see also *id.* at 26-27. The court emphasized that "it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest * * * that separates his conduct from that which is legal." *Id.* at 17; accord *id.* at 21, 27. The court concluded that its construction of "corruptly" was not "unconstitutionally vague as applied to the conduct" in this case. *Id.* at 19.

The court of appeals also held that the evidence was sufficient to support petitioner's convictions. It stated that the jury was entitled to conclude that petitioner's actions—including his institution of sham proceedings designed to disrupt the undercover FBI investigation, his fraudulent efforts to win Robinson's indictment, and his role in the filing of false motions and pleadings in Venezia's case—were corruptly motivated by his desire to stall the federal investigation and "safeguard his personal financial interest in the illegal gambling operation." Pet. App. 21.

The court separately rejected petitioner's "alternative argument that his attempts to persuade the local prosecutor to indict [Robinson] for misconduct are protected by the First Amendment." Pet. App. 22 n.11. Relying on this Court's precedent, it explained that

"meritless litigation based on false accusations and criminal intentions does not fall within the scope of protected speech and 'is not immunized by the First Amendment right to petition.'" *Ibid.* (quoting *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983)).

ARGUMENT

1. Petitioner contends (Pet. 10-19) that 18 U.S.C. 1503 does not reach the conduct for which he was convicted. The court of appeals correctly rejected that claim for reasons "limited to the specific facts of this case" (Pet. App. 23), and further review is not warranted.

a. The central thrust of petitioner's argument (Pet. 10) is that the court of appeals' decision exposes attorneys to prosecution for otherwise lawful and legitimate litigation conduct based solely on the showing of a "corrupt" motive. He further contends that such a motive means no more than an effort to "influence . . . the due administration of justice" (Pet. 14), and that this general standard "would cover most acts undertaken by lawyers" (*ibid.*). The court of appeals' decision does not reach that far.

The court of appeals emphasized that "[o]ur ruling today does not interfere with legitimate avenues of advocacy of even the most zealous of attorneys," Pet. App. 13, because it was limited to "corrupt endeavors to manipulate the administration of justice," *id.* at 18. The court observed that the district court correctly charged the jury that "[c]orruptly means to act with the purpose of obstructing justice." *Id.* at 15. Contrary to petitioner's suggestion (Pet. 14), such a purpose is not established merely by showing that an attorney representing a client attempted to win a case by legitimate,

lawful means. Rather, the purpose of "obstructing" connotes interfering with the lawful and proper disposition of a case. Normal advocacy does not fall within that concept.[2]

As the court of appeals observed, "[w]hatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case-by-case." Pet. App. 23. The question whether, in any particular prosecution, an attorney used the legal process for the purpose of obstructing, rather than advancing, the administration of justice thus depends on the facts. See *ibid.* ("our conclusion is limited to the specific facts of this case"). That determination does not raise a broad legal issue that warrants this Court's review. Nor does petitioner purport to identify such an issue. He does not specifically object to any instruction given

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[2] Petitioner argues (Pet. 15-16) that the limitations on the reach of its opinion noted by the court of appeals "provide no real bounds" to the decision. He claims that the corrupt-motive showing did not protect him because the jury was not asked to decide whether his purpose was to protect his own interests and the illegal gambling operation. Petitioner was charged and convicted, however, on the theory that he "held a personal financial interest in protecting the illegal gambling enterprise, which formed the requisite corrupt intent for his conduct to qualify as violations of the statute" (Pet. App. 16), and petitioner presents no claim here that he was denied, upon timely objection, a request for any particular instruction. Petitioner also suggests that a requirement of showing that a lawyer had the purpose of advancing his "personal financial interest" is not a limiting principle, because all lawyers have that, at least as to their fees. But the court of appeals' conclusion that it is corrupt for a lawyer to seek to protect his personal interests in an illegal business (see pp. 8-9, *infra*) gives no indication that it took a similar view of a motive to earn bona fide legal fees.

the jury.[3] He does not renew his claim, which the court of appeals rejected, that Section 1503 is unconstitutionally vague as applied to the conduct charged in this case. See Pet. i (Questions Presented). Nor does petitioner make clear in what particular respect the court of appeals may have misconstrued Section 1503 (or indicate how that claim was preserved below). He simply submits that "[t]he criminal justice system cannot function properly if attorneys are at risk of criminal prosecution for otherwise wholly lawful conduct, including the filing of briefs, whenever their motives may be questioned." Pet. 18. That broad policy-based statement does not warrant this Court's review.

b. In any event, on the facts of this case, there is no merit to petitioner's policy concerns about the application of Section 1503 to an attorney's litigation-related conduct. As the court of appeals found, petitioner's conduct fell far outside the range of acceptable professional representation of a client in numerous respects.

The court of appeals' affirmance of petitioner's convictions under Section 1503 rests on two considerations. First, the court stressed that petitioner was not simply (or even primarily) Venezia's "lawyer," but his partner in corrupt business enterprises. See Pet. App. 8-9, 16-17. The court repeatedly emphasized that what made Cueto's "nominally litigation-related conduct" unlawful was his motive "to safeguard his personal financial interest in the illegal gambling operation." *Id.* at 21;

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[3] Although he states that the jury "was never asked to decide" certain issues (*e.g.*, Pet. 16, 17), petitioner does not identify any proposed instruction that (in his view) the district court erroneously rejected, nor does he describe what relevant objections, if any, he preserved to the instructions that were actually given.

accord *id.* at 16-17, 27.[4] Petitioner was, therefore, not acting in the conventional role of a lawyer who is representing solely another person's interests. Second, the court also found it important that much of that "nominally litigation-related conduct" was itself "prohibited by the rules of professional responsibility and the canons of legal ethics," as confirmed by extensive expert testimony at trial (see 22 Tr. 1-114). Pet. App. 27; see, *e.g.*, *id.* at 18 (petitioner "file[d] papers in bad faith knowing that they contain[ed] false representations"), 21 (petitioner "file[d] frivolous appeals" and "false motions and pleadings"), 22 n.11 (petitioner engaged in "meritless litigation based on false accusations").

In short, contrary to petitioner's suggestion, the decision below does not subject "most lawyers" to "indictment and conviction" (Pet. 10), because "most lawyers" do not try to thwart criminal investigations through a pattern of misconduct (such as false and

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[4] Although petitioner suggests that he might not have been involved in the "underlying gambling/racketeering" crimes (Pet. 17), the court of appeals simply disagreed. A central theme of the government's case on Count 1 (see Indictment 1-24), as presented and argued to the jury, was that petitioner had a direct interest in the underlying illegal enterprises; the jury found petitioner guilty on that count, and petitioner does not challenge that conviction here. In passing, petitioner also expresses disagreement (Pet. 16) with the district court's order barring him from collaterally attacking Venezia's racketeering conviction. That issue is not properly before the Court, however, because petitioner did not raise it on appeal and, moreover, has not included any evidentiary issue as a question presented for review in this Court. See Pet. i. In any event, petitioner would have been free, in seeking to rebut the government's allegation of corrupt motive, to introduce any evidence that he himself was not implicated in illegal gambling activity.

frivolous filings) for the purpose of protecting their own direct financial interests in corrupt business activities. And petitioner does not identify any disagreement among the lower courts on the proper application of Section 1503 to a lawyer's litigation-related activity. What little authority exists on that issue is wholly consistent with the decision below, as petitioner appears to acknowledge. See Pet. 12; *United States* v. *Cintolo*, 818 F.2d 980, 993 (1st Cir.) ("[n]othing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the madding crowd and sheltered from the rigors of 18 U.S.C. § 1503"), cert. denied, 484 U.S. 913 (1987).[5]

2. In the second question presented, petitioner challenges his conviction on Count 6 of the indictment on the theory that the First Amendment protected his efforts to obstruct the federal investigation by urging state prosecutor Robert Haida to indict federal investigator Bonds Robinson.[6] That claim is without

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[5] See also *Maness* v. *Meyers*, 419 U.S. 449, 470 n.19 (1975) (lawyer may be subject to contempt penalties where advice to client to plead Fifth Amendment is "given in bad faith" or is "patently frivolous or for purposes of delay"); *Cole* v. *United States*, 329 F.2d 437 (9th Cir.) (affirming conviction of lawyer under Section 1503 for corruptly encouraging client to plead Fifth Amendment), cert. denied, 377 U.S. 954 (1964); see generally *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) ("Defense counsel is limited to legitimate, lawful conduct.") (internal quotation marks omitted); *Nix* v. *Whiteside*, 475 U.S. 157, 166 (1986) ("counsel's duty of loyalty" to client "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth").

[6] Petitioner suggests in passing (Pet. 23) that the First Amendment is relevant to certain "additional conduct" as well, such as his political and editorial activities. Any such claim would not be properly presented for this Court's review. The court of appeals treated petitioner's First Amendment claim, which he had included as part of his challenge to Count 6 (see Cueto C.A. Br. 28-

merit. As the court of appeals observed, petitioner's attempts to secure that indictment were "meritless," motivated by "criminal intentions," and based on "false accusations" against the investigator. Pet. App. 22 n.11.[7] The First Amendment does not protect false accusations made with the intent to obstruct an ongoing investigation. As this Court has held, "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech, see *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983).

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32), as limited to "his attempts to persuade the local prosecutor to indict [Robinson] for misconduct." Pet. App. 22 n.11. Similarly, in his questions presented for review in this Court, petitioner confines his First Amendment challenge to his "efforts to persuade a local prosecutor to indict a state official for misconduct." Pet. i; see Sup. Ct. R. 14.1(a).

[7] In seeking Robinson's indictment, petitioner told State's Attorney Robert Haida that Robinson had taken a bribe from beer distributor Tony Joynt and had then lied about it under oath at a hearing in the State's prosecution of Venezia's customer George Vogt. Haida testified that, based in part on his discussions with Joynt, he concluded that petitioner's allegation was false (13 Tr. 113-114), that it "was an attempt by [petitioner] to manipulate or use my office to get at Robinson" (*id.* at 125), and that it was designed "to negate the federal investigation" (*id.* at 118). The government also introduced evidence at trial indicating that petitioner had fabricated a false account of how he supposedly learned about the non-existent bribe. See 8 Tr. 122-123. Petitioner is incorrect in claiming that the government "introduced no evidence whatsoever that Petitioner's complaint about Robinson was untrue, let alone that it was made with knowledge that it was baseless." Pet. 19-20.

Petitioner argues that *Bill Johnson's Restaurants* is distinguishable from this case on the ground that there the Court held that "the NLRB could not enjoin as an unfair labor practice a suit brought against an employee for a retaliatory motive unless the suit was also shown to be baseless or frivolous." Pet. 21 n.5 (emphasis omitted). But here the court of appeals did find that petitioner's statements to the local prosecutor were criminally motivated, "meritless," "misleading," and "false." Pet. App. 22 n.11. At bottom, petitioner disagrees with that fact-specific determination, which warrants no further review, and not with the court of appeals' articulation of First Amendment principles.

Similarly without merit is petitioner's attempt to present a conflict between this case and the Fifth Circuit's decision in *United States* v. *Hylton*, 710 F.2d 1106 (1983). In *Hylton*, the court found that the First Amendment protected the right of a taxpayer to file "a factually accurate, nonfraudulent criminal complaint" (*id.* at 1111) against agents of the Internal Revenue Service who had come onto her property without a warrant despite prominent "No Trespassing" signs. The court emphasized, however, that "a totally different result might follow" if the taxpayer's complaints had been "frivolous and based upon contrived allegations," *id.* at 1112, and other courts have distinguished *Hylton* on precisely that ground, *e.g.*, *United States* v. *Price*, 951 F.2d 1028, 1032 (9th Cir. 1991); see also *United States* v. *Citrowske*, 951 F.2d 899, 901 (8th Cir. 1991). Again, the "different result" in this case follows not from disagreement on any point of law, but from the court of appeals' factbound determination that petitioner's allegations were indeed "meritless," "false," and "misleading." Pet. App. 22 n.11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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