No. 16-152

In the Supreme Court of the United States

GERARD DENAULT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
DANIEL S. GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove that petitioner intended to deprive the victim, New York City, of money or property, in violation of 18 U.S.C. 1343.

2. Whether the district court properly considered the sentencing factors under 18 U.S.C. 3553(a).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 16-152

GERARD DENAULT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The summary order and opinion of the court of appeals (Pet. App. 1a-18a) are not published in the Federal Reporter but are reprinted at 631 Fed. Appx. 57.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2015. A petition for rehearing was denied on March 31, 2016 (Pet. App. 19a-20a). On June 9, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 29, 2016, and the petition was filed on that date. 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 Southern District of New York, petitioner was convicted of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349; wire fraud, in violation of 18 U.S.C. 1343; conspiracy to commit honest services fraud, in violation of 18 U.S.C. 1349; honest services fraud, in violation of 18 U.S.C. 1343 and 18 U.S.C. 1346; conspiracy to violate the Travel Act (18 U.S.C. 1952), in violation of 18 U.S.C. 371; and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 3a-4a. He was sentenced to 20 years of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-18a.

1. Petitioner was the project manager on a multi-year municipal project called CityTime that was designed to modernize the timekeeping and payroll systems of 80 different New York City agencies (the City). Gov't C.A. Br. 4, 6-7; Pet. App. 4a, 9a. CityTime was funded from the City's capital budget, which was approved by the City Council. Gov't C.A. Br. 9. Most of the funds used to pay for the project came from the issuance of municipal bonds, including federally subsidized Build America Bonds. *Ibid.*

Petitioner managed the CityTime project for the prime contractor, Science Applications International Corp. (SAIC). Gov't C.A. Br. 4. As project manager, petitioner had the authority to choose whether to hire SAIC employees or subcontractors to work on the project, and he had the power to influence which subcontractors were hired. *Id.* at 8. Petitioner used his position to demand and receive millions of dollars in secret kickbacks from corrupt contractors. *Id.* at 4-5.

Before petitioner joined the CityTime project, SAIC operated on a fixed-price contract with the City, pursuant to which SAIC delivered the products or services defined in the contract for the listed prices, regardless of the actual costs to SAIC of materials and labor. Gov't C.A. Br. 7. In early 2006, the CityTime contract was amended to become effectively a time-and-materials contract, pursuant to which the City paid for the labor billed by SAIC at rates charged by SAIC. *Ibid.* Under the amended contract, SAIC set the billing rates it charged the City using a formula that took into account the invoices submitted by its subcontractors. *Id.* at 7-8. If SAIC chose a higher-priced subcontractor, SAIC would bill the City at a higher rate. *Id.* at 8.

Technodyne LLC was SAIC's primary staffing subcontractor for the CityTime project. Gov't C.A. Br. 5. Petitioner, in conjunction with others, demanded that Technodyne pay him a kickback of $5 for every hour billed by CityTime workers hired through Technodyne. *Id.* at 10. The principal owner of Technodyne agreed to the arrangement in part because his company was in bad financial shape and needed the CityTime business. *Ibid.* In order to get Technodyne hired onto the contract without competition, petitioner created and approved internal SAIC documents called "sole-source justifications" that fraudulently represented that Technodyne was uniquely qualified among all vendors to support the CityTime project. *Id.* at 10-11. He supported those fraudulent documents in oral presentations to SAIC executives. *Id.* at 11. Petitioner also used staff hired through Technodyne even when the same work could have been performed by SAIC employees, resulting in an increase in hours billed by Technodyne and thus in kickbacks to petitioner. *Ibid.* Further, petitioner allowed Technodyne to submit bills to the City "for full-time work on the CityTime project" during "lengthy periods of time when there was nothing for [the Technodyne contractors and subcontractors] to do" on the project. Presentence Investigation Report (PSR) ¶ 77(a). And petitioner prohibited SAIC employees from subjecting Technodyne to competition that could have resulted in Technodyne's replacement on the project or a reduction in its rates. Gov't C.A. Br. 11. Between 2004 and 2010, petitioner received more than $5.6 million in kickbacks from Technodyne in connection with his position as SAIC project manager for CityTime. PSR ¶¶ 70-76.

In exchange for additional kickbacks, petitioner also arranged for DA Solutions (DAS) to be hired as a subcontractor for Technodyne, even though other SAIC employees thought that DAS lacked the requisite experience to work on the CityTime project. Gov't C.A. Br. 11-12. Later, petitioner and others implemented a similar kickback agreement by arranging for Prime View (PV), a staffing firm, to serve as a Technodyne subcontractor. *Id.* at 13-14. The kickback arrangements with Technodyne, DAS, and PV proved to be extremely lucrative for petitioner—he accumulated a total of approximately $9 million in kickbacks from the three companies combined. *Id.* at 15.

As a result of his efforts to shield Technodyne from competition—in contravention of SAIC's policy of requiring competition for all subcontracts worth more than a nominal amount—petitioner ensured that the City would pay higher rates than necessary for the CityTime project. Gov't C.A. Br. 15-16. When another SAIC executive complained that Technodyne's rates were too high, petitioner removed him from pricing responsibilities for the project. *Id.* at 16. The

City was never informed that the rates it was billed for Techodyne's work could not be justified under SAIC's own criteria or by market data. *Id.* at 16-19.

Petitioner laundered his illicit profits through entities controlled by Technodyne's owners in India. Gov't C.A. Br. 21; PSR ¶¶ 70-76. Technodyne prepared fake documents and supplied them to petitioner's tax preparers, allowing petitioner to claim foreign tax credits on the kickback proceeds. Gov't C.A. Br. 21. Petitioner also received wire transfers from India falsely describing his kickbacks as fees for "imports" or "consultation charges." *Ibid.* From 2004 to 2010, petitioner arranged for his cohorts in India to wire $5,662,196 into a corporate entity that petitioner named "MKG Consulting." PSR ¶ 70. Petitioner reported that 100% of his income from MKG Consulting was derived from India and that he paid foreign taxes on that income. *Ibid.* In truth, the income petitioner earned through MKG Consulting was money that he received from Technodyne. PSR ¶ 72.

2. In June 2011, a federal grand jury in the Southern District of New York returned a 12-count indictment against petitioner and eight others. Gov't C.A. Br. 2. Petitioner was charged with, *inter alia*, conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349 (Count 1); wire fraud, in violation of 18 U.S.C. 1343, 2 (Count 2); conspiracy to commit honest services fraud, in violation of 18 U.S.C. 1349 (Count 3); honest services fraud, in violation of 18 U.S.C. 1343, 1346 (Count 4); conspiracy to violate the Travel Act, in violation of 18 U.S.C. 371 (Count 8); and conspiracy to

commit money laundering, in violation of 18 U.S.C. 1956(h) (Count 11).[1] Gov't C.A. Br. 2-3.

At the conclusion of the six-week trial, the district court gave the following jury instruction on the wire fraud charge against petitioner:

> The first element of wire fraud, as alleged * * * in Count Two of the indictment, is that there was a scheme or artifice to defraud or to obtain money or property from the City of New York by materially false and fraudulent pretenses, representations, or promises.

Tr. 5340. The court also explained petitioner's theory of defense to the wire fraud charge:

> [Petitioner] contends that he did not defraud the city, that the government has shown no more than that the city would have avoided entering into contracts with SAIC if it had known he received money from Technodyne.
>
> He contends that he did not make any material misrepresentations or omissions in his dealings with the city, and did not intend or contemplate any harm to the city.

---

[1] In the operative superseding indictment filed in June 2011, that money laundering conspiracy count was listed as Count 11. See Superseding Indictment 34-36. The United States elected not to proceed on Counts 9 and 10 of the Superseding Indictment (counts alleging obstruction of justice, in violation of 18 U.S.C. 1512(c)(2), and conspiracy to obstruct justice, in violation of 18 U.S.C. 1512(k)). As a result, Counts 11 and 12 of the Superseding Indictment were renumbered as Counts 9 and 10 of the trial indictment. The renumbered counts are reflected in the Judgment and in the PSR.

Tr. 5338. The jury convicted petitioner on the above-listed counts. Gov't C.A. 3.

At sentencing on April 28, 2014, the district court announced that it accepted the factual recitations in the amended PSRs and that it had "reviewed completely" the submissions of petitioner, his co-defendants, and the government. Sent. Tr. 74. He accepted the guideline range proposed by the government, including the loss amount of "at least $100 million," see PSR ¶ 87, and the total offense level of 44, which was capped at 43, see PSR ¶ 98 & n.3, to reach an advisory guidelines sentence of 105 years of imprisonment, Gov't C.A. Br. 120-130. See Sent. Tr. 74. The court noted that, even if it had accepted the defendants' argument for a lower guideline range, the range would still have been "way beyond the maximum sentence on each count." *Ibid.* The court further noted that it had considered "all the factors" in 18 U.S.C. 3553(a). *Ibid.*

In the course of announcing the sentences, the district court explained that "the significant and notorious criminal conduct in this case warrants substantial sentences for each defendant." Sent. Tr. 74. The court described the defendants' conduct as follows:

> Their joint criminal conduct has been appropriately described as a massive kickback and fraud scheme of epic proportion. It's the largest city corruption scandal in decades. It is unparalleled in its amounts, duration and sophistication. The lengths to which each defendant went to plan, execute and conceal their crimes and the receipt and distribution of their criminal proceeds was complex, meticulously calculated and very deliberate. Upon the discovery of their fraudulent criminal conduct, their

> response has been simply that the City of New York got what it deserved.

Id. at 74-75. The court also explained that petitioner's crime was not victimless, noting that "stealing from the city robs both rich and poor of monies otherwise needed to fund city services paid for by taxpayers." *Id.* at 76. See PSR ¶ 147 ("The victim New York City[] received full restitution of $466 million, based on the deferred prosecution agreement the Government entered into with SAIC.").

Specifically addressing some of the sentencing factors in 18 U.S.C. 3553(a), the district court observed that "the defendants have demonstrated a lack of remorse, a lack of any real acceptance of responsibility, coupled with obstruction and avoidance. In each of these cases, just punishment, in both general and specific deterrence, warrant[s] the imposition of the maximum sentence as to each defendant on each count concurrently." Sent. Tr. 76. With respect to petitioner, that approach resulted in concurrent 20-year prison terms on the wire fraud conspiracy, wire fraud, honest services fraud conspiracy, honest services fraud, and money laundering conspiracy counts, and a concurrent five-year sentence on the Travel Act conspiracy count. *Id.* at 76-77. In the extended post-sentencing colloquy, no defendant's counsel objected to the adequacy of the court's explanation for the sentence. See *id.* at 78-93.

3. The court of appeals affirmed. Pet. App. 1a-18a.

As relevant here, the court of appeals rejected petitioner's argument that the evidence was insufficient to prove that he had the degree of fraudulent intent required to prove wire fraud. Pet. App. 6a-8a. Petitioner relied on Second Circuit precedent holding that the mail fraud statute does not prohibit a deceitful scheme that induces a victim to enter into a transaction in which "the purported victim receive[s] the full economic benefit of its bargain." See *id.* at 6a-7a (citation omitted). The court of appeals rejected petitioner's argument that "the City received precisely what it bargained for." *Ibid.* The court relied on evidence that: petitioner had "directed a subordinate to issue a letter to the City that described Technodyne * * * as a firm possessing 'unique combinations of technical capability and key personnel'"; that "Technodyne's capabilities were actually run of the mill"; and that, as a result of petitioner's misrepresentation about Technodyne's capabilities, SAIC opted to renew Technodyne's contract without a rebidding process that likely would have yielded a lower contract price. *Id.* at 7a. The court also noted that petitioner's co-defendant Mark Mazer, who was convicted on the same wire fraud conspiracy count as petitioner, "signed a series of timesheets that authorized payments for consultants for hours never worked." *Ibid.* As a result of petitioner's and Mazer's misrepresentations, the court of appeals explained, "the City agreed to pay for one thing—two weeks of hours worked and a uniquely capable subcontractor—but received another—no hours worked and an average, but high-priced, subcontractor." *Ibid.* Based on "this and other evidence presented at trial," the court of appeals found "sufficient evidence that the City did not receive the benefit of its bargain." *Ibid.* The court thus concluded that petitioner had not met his "heavy burden of establishing that no rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 7a-8a (internal quotation marks omitted).

For the first time petitioner also challenged "the sufficiency of the record of the district court's sentencing determination." Pet. App. 16a. The court of appeals rejected that argument, holding that "nothing in the record below warrants resentencing." *Id.* at 17a. The court also "remind[ed] the district court that it is best practice to provide a more thorough explanation of the reasons for the sentences imposed and to do so separately for each defendant." *Ibid.* The court elaborated that "a more tailored explanation informs the defendant of precisely what it is about his conduct, as distinct from the conduct of his co-defendants, that prompted the sentence, thereby advancing the aims of specific deterrence." *Ibid.* The court of appeals explained that, although it had "no reason to reverse the district court in this instance," it encouraged the district court "to provide more robust and individualized explanations even when our case law does not mandate it." *Ibid.*

ARGUMENT

Petitioner seeks this Court's review (Pet. 13-37) of the court of appeals' conclusions that sufficient evidence supported the jury's finding that petitioner had the requisite intent to commit wire fraud and that the district court properly considered the sentencing factors in 18 U.S.C. 3553. Neither issue merits review by this Court because the court of appeals correctly rejected petitioner's arguments and its decision does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner contends (Pet. 13-27) that the evidence was insufficient to prove that he had the requisite intent to defraud under the wire fraud statute because the evidence was insufficient to prove that he

intended to (or did) deprive the City of money or property. Petitioner's argument is based on a mischaracterization of the court of appeals' decision and on an incomplete picture of the evidence presented at trial. Understood correctly, petitioner's fraud convictions were based on the jury's finding that the evidence at trial proved beyond a reasonable doubt that he used deceptive means to deprive the City of economic value.

a. The mail and wire fraud statutes make it a crime to use the mail or a wire communication to execute "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. The statutes' use of the phrase a "scheme or artifice to defraud" covers "schemes to deprive [victims] of their money or property." *Cleveland* v. *United States*, 531 U.S. 12, 18-19 (2000) (citations omitted). The "object of the fraud" thus must "be '[money or] property' in the victim's hands." *Pasquantino* v. *United States*, 544 U.S. 349, 355 & n.2 (2005) (brackets in original) (quoting *Cleveland*, 531 U.S. at 26). In this context, the term "property" encompasses traditional property concepts, including an "entitlement to collect money" and a "right to be paid money," *id.* at 355-356, and is not limited to tangible property, see *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987). Indeed, "'a scheme to defraud' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Shaw* v. *United States*, No. 15-5991 (Dec. 12, 2016), slip op. 3 (punctuation omitted). Quoting Judge Learned Hand, this Court has confirmed "that '[a] man is none the less cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.'" *Ibid.* (quoting *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554 (1932)).[2]

Petitioner asserts (Pet. 17) that the court of appeals affirmed his wire fraud conviction based on evidence that his misrepresentations "affected the City's economic benefits from CityTime, even though" they did not and were not intended to "cause the City any financial injury or deprive it of the essential elements of its bargain." Even if that description of the evidence were accurate, it would not relieve petitioner of liability for fraud for deceiving the City about material information that deprived it of its "chance to bargain with the facts before [it]." *Shaw*, slip op. 4 (quoting *Rowe*, 56 F.2d at 749). In fact, the court of appeals correctly held that the "evidence presented at trial" was sufficient to support the jury's rational conclusion that petitioner's deceptive scheme did deprive the City of "the benefit of its bargain." Pet. App. 7a.

In support of its assessment of the evidence, the court of appeals cited two examples of fraudulent misrepresentations that together explained one manner in which the City was deprived of the benefit of its bargain: "the City agreed to pay for one thing—two

[2] To the extent petitioner's position turns on his criticism of this principle from *Rowe* (Pet. 14-17) and his claim (Pet. 17-21) that the circuits disagree about its validity, this Court's recent decision in *Shaw* reaffirming *Rowe* obviates any need for further review on that basis. While *Shaw* was a bank fraud case, its analysis of general fraud principles equally applies to mail and wire fraud. See, *e.g.*, *Shaw*, slip op. 6 (looking to "relevant authority in the area of mail fraud, wire fraud, financial frauds, or the like" in construing bank fraud statute).

weeks of hours worked and a uniquely capable subcontractor—but received another—no hours worked and an average, but high-priced, subcontractor." Pet. App. 7a; *ibid.* ("In light of this *and other evidence* presented at trial, we conclude that there was sufficient evidence that the City did not receive the benefit of its bargain.") (emphasis added). The evidence introduced at trial established that the City approved the retention of Technodyne as a subcontractor based on petitioner's material misrepresentations to the City about Technodyne, and that, as a result, the City was required to pay more money—*i.e.*, was deprived of money—than it would have paid absent the misrepresentations. Such a deprivation of money based on deceptive communications is the essence of fraud. Evidence also established that petitioner's co-conspirator Mazer falsely certified that certain individuals had worked when they had not worked—the result of which was that the City parted with money in exchange for nothing rather than in exchange for the work Mazer falsely represented had been performed.

Petitioner presents an incomplete picture of the evidence when he contends (Pet. 2, 26) that the City would not have received the benefit of a lower-priced subcontractor if SAIC had put Technodyne through a competitive bidding process because, petitioner claims, SAIC was under no obligation to pass the benefit of a lower price on to the City. To the contrary, the evidence presented at trial (viewed in the light most favorable to the government, as it must be) established that, after the City and SAIC renegotiated their contract in 2006, the rates that SAIC charged to the City were based in part on the rates that subcontractors charged to SAIC. Gov't C.A. Br. 7-8, 32 n.4. Under that pricing scheme, SAIC would have been required by the contract to charge the City less if it had replaced Technodyne with a less expensive subcontractor. As a result of petitioner's material misrepresentations, SAIC did not make such a replacement—which directly resulted in the City's payment of money it would not otherwise have paid. The court of appeals thus correctly held that the evidence was sufficient to establish petitioner's intent to defraud.

Understood correctly, petitioner's argument boils down to a contention that the evidence was insufficient to establish that his deceit deprived the City of money or property by depriving it of the benefit of its bargain. This Court normally does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Petitioner's case is no exception to that rule.

b. Because petitioner mischaracterizes the court of appeals' conception of the property at issue in this case, his argument that the court of appeals' decision conflicts with decisions of this Court and of other courts of appeals lacks merit.

i. Petitioner errs in asserting (Pet. 24-25) that the court of appeals' decision conflicts with this Court's decisions in *Cleveland* v. *United States*, 531 U.S. 12 (2000), and *Carpenter* v. *United States*, 484 U.S. 19 (1987). Unlike this case, *Cleveland* did not involve a defendant who participated in a scheme that employed misrepresentations to cause a victim to pay for services that were not in fact delivered (in the quality or quantity promised). Rather, the Court held in *Cleveland* that the mail fraud statute did "not reach fraud in obtaining a state or municipal [video poker] license" because "such a license is not 'property' in the government regulator's hands." 531 U.S. at 20. The Court also noted that the government's right to control the issuance, renewal, or revocation of such licenses is not property. *Id.* at 23. Nothing in that decision casts doubt on the court of appeals' decision that a city has a property interest in not paying for services that are promised but not delivered.

To the extent petitioner asserts (Pet. 23-25) that the decision below conflicts with *Carpenter*, *supra*, and *McNally* v. *United States*, 483 U.S. 350 (1987), he is further mistaken. *Carpenter* embraced the notion that a victim can be defrauded of "intangible" property—namely confidential business information. And *McNally*, which was later superseded by statute, addressed the "honest services" theory of fraud, which is not at issue in the counts of conviction petitioner challenges here.

ii. Petitioner's contention (Pet. 13-23) that the court of appeals' decision conflicts with decisions of the Third and Sixth Circuits is similarly premised on petitioner's mischaracterization of the decision below. None of the decisions on which petitioner relies involved victims who were deprived of money or the services they contracted and paid for.

In *United States* v. *Henry*, 29 F.3d 112 (1994), the Third Circuit reviewed a district court's dismissal of fraud claims against defendants who received kickbacks in exchange for disclosing bid information to a bank that was competing to receive the defendants' employer's deposits. *Id.* at 112-113. The theory of fraud alleged in the indictment was that the defendants had defrauded other banks who were competing for the contract at issue of their "interest in having a fair opportunity to bid for something that would become their property if and when it w[as] received." *Id.* at 115. The Third Circuit affirmed dismissal of the fraud counts, reasoning that, because "the money had not yet been deposited," there was "no way of knowing to which, if any, of the bidding banks [the money] would have gone." *Id.* at 114-115. The court did not consider whether the defendants had defrauded their employer agency "of its confidential business information and the right to control how its money was invested," because that theory had not been advanced in the indictment. *Id.* at 114. Here, in contrast, the indictment alleged, the jury found, and the court of appeals agreed that petitioner's fraudulent scheme deprived the victim City of money. The court of appeals' decision in this case therefore does not conflict with the decision in *Henry*.

The Third Circuit's decision in *United States* v. *Zauber*, 857 F.2d 137 (1988), cert. denied, 489 U.S. 1066 (1989) (see Pet. 19-20), also did not involve a scheme that deprived the purported victim of money or property. In *Zauber*, the defendants were pension fund trustees who took kickbacks from an asset management firm in exchange for investing money from the pension fund with the firm. 857 F.2d at 140-142. The Third Circuit affirmed dismissal of the fraud counts because the indictment included "no allegation of an actual money or property loss to the [pension] fund," the purported victim of the defendants' scheme. *Id.* at 143. Thus, that decision also does not conflict with the decision below.

Finally, the decision below does not conflict with the decision in *United States* v. *Sadler*, 750 F.3d 585 (6th Cir. 2014). *Sadler* also did not involve a victim that was induced by deceit to pay for a particular quality and quantity of services that were not delivered or that was induced to enter into a contract that was less economically valuable than the victim reasonably anticipated. *Sadler* instead involved a husband and wife team of defendants who operated pain-management clinics that illegally dispensed prescription medications. *Id.* at 588-589. The court of appeals reversed the wife's wire fraud conviction for purchasing drugs at full price from pharmaceutical distributors based on false information about the customers to whom she intended to distribute the drugs. The victim distributors would not have made sales to the defendant had they known the truth about the ultimate destination of their product. *Id.* at 590-591. But the sellers obtained full price for their product, and the Sixth Circuit therefore concluded that the defendant did not deprive the victim of any money or property. Because, as the court of appeals here held, petitioner's deceptions did deprive the City of the full economic "benefit of its bargain," Pet. App. 7a, the decision below does not conflict with the decision in *Sadler*.[3]

[3] Similarly, petitioner errs in suggesting (Pet. 21 n.8) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *United States* v. *Bruchhausen*, 977 F.2d 464 (1992). As in *Sadler*, the defendant in that case paid full price—the price the purported victim would have charged to any customer—for technology that the defendant intended to export to Soviet Bloc countries. *Id.* at 466-467. The defendant intentionally misled the seller about the ultimate destination of its products and the seller would not have made the sale had it known that material fact. *Id.* at 467-468. The Ninth Circuit held that the defendant had not committed wire fraud, however, because the purported victim was not deprived of any tangible or intangible property with economic value. *Id.* at

2. Petitioner further contends (Pet. 27-37) that the district court failed to provide an adequate explanation for his sentence as required by 18 U.S.C. 3553(c), because in his view the court did not sufficiently discuss the sentencing factors in 18 U.S.C. 3553(a). He adds (Pet. 32) that the court of appeals subsequently erred in relieving the district court of its "statutory duty to explain the reasons for [his] sentence." Review of that argument is unwarranted because petitioner failed to object in the district court to the adequacy of the district court's explanation and has not even attempted in his petition for a writ of certiorari to argue that his objection survives plain-error review. Petitioner also misstates the legal standard applicable in the Second Circuit and does not present a complete picture of the district court's explanation of petitioner's sentence.

a. Because petitioner failed to object in the district court to the adequacy of the district court's explanation of his sentence, his argument now that the district court's explanation was materially lacking must be reviewed under the plain-error standard. Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 732 (1993). In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court confirmed its expectation that "reviewing courts" deciding claims of sentencing error will "apply ordinary prudential doctrines, determin-

---

468. The purported victims, the court emphasized, "clearly suffered no monetary loss" because they "received the full sale price for their products." *Id.* at 467. In other words, the sellers received the full economic benefit of their bargain. For that reason, even assuming that *Bruchhausen* is a correct application of the law after this Court's recent decision in *Shaw*, the decision in *Bruchhausen* does not conflict with the decision in this case.

ing, for example, whether the issue was raised below and whether it fails the 'plain error' test." *Id.* at 268. When a defendant asserts a procedural sentencing error for the first time on appeal, that claim is therefore subject to the general principle that any error "not brought to the [district] court's attention" is forfeited on appeal, unless it meets the four part standard for reversible plain error. Fed. R. Crim. P. 52(b); see *United States* v. *Wagner-Dano*, 679 F.3d 83, 89 (2d Cir. 2012) (because the defendant "did not object that the district court procedurally erred by failing to give adequate consideration to the § 3553(a) factors" but "raises that argument for the first time on appeal * * * the plain-error standard applies"). Application of the plain-error standard is particularly appropriate when a defendant claims that a district court failed to put on the record a sufficient explanation of the defendant's sentence, or when a defendant argues that a sentencing court failed to consider one of the defendant's arguments for a lower sentence. Bringing such a purported error to the attention of the district court at the time of sentencing gives the district court an opportunity to remedy any perceived or actual error. That is exactly the type of efficiency the plain-error rule is intended to promote.

Petitioner makes no effort in his petition for a writ of certiorari to establish that he can satisfy the plain-error standard—and he cannot. In particular, petitioner cannot establish that, if the district court plainly erred by failing to adequately explain why petitioner's below-guidelines sentence is consistent with Section 3553 and why petitioner's arguments for an even lower sentence were unavailing (and the government does not believe that it did), the paucity of the explanation affected petitioner's substantial rights and "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (brackets in original). As the district court explained, petitioner's advisory guidelines range was "way beyond the maximum sentence on each count"—and would have been so even if the court had accepted the defendants' proposed lower guidelines range. Sent. Tr. 74. But rather than run the sentences consecutively pursuant to Sentencing Guidelines § 5G1.2(d) in order to approach the advisory guideline range, the district court sentenced petitioner to a term of imprisonment that was well below the applicable guidelines range for his role in the "massive kickback and fraud scheme of epic proportion." Sent. Tr. 74. Petitioner therefore received a 20-year sentence that was significantly shorter than the 105-year sentence dictated by the guidelines. Gov't C.A. Br. 129-130. Petitioner did not challenge the substantive unreasonableness of his sentence in the court of appeals, see *id.* at 118, and does not do so in his petition. And nothing in the petition for a writ of certiorari suggests how such a downward variance could have affected his substantial rights, let alone seriously affected the fairness, integrity, or public reputation of judicial proceedings, *Olano*, 507 U.S. at 736, even if petitioner were correct that the district court's explanation of the sentence was inadequate.

b. Petitioner seeks this Court's review of the Second Circuit's standard for reviewing the adequacy of a sentencing court's explanation, arguing (Pet. 27-28) that the Second Circuit applies a presumption that a district court complied with 18 U.S.C. 3553 when imposing a sentence, without requiring a district court to explain why the sentence complies with Section 3553. Such an approach, petitioner contends (Pet. 29-34), conflicts with the approach of several other courts of appeals. Those claims lack merit.

The Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, requires a district court to state "the reasons for its imposition of [a] particular sentence." 18 U.S.C. 3553(c); *Gall* v. *United States*, 552 U.S. 38, 50 (2007). In deciding whether a particular sentence is procedurally reasonable, courts of appeals must ask whether the sentencing judge "adequately explain[ed] the chosen sentence to allow for meaningful appellate review." *Gall*, 552 U.S. at 50. What constitutes an adequate explanation will vary from case to case. *Rita* v. *United States*, 551 U.S. 338, 356 (2007). "The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances." *Ibid.* "The law leaves much, in this respect, to the judge's own professional judgment." *Ibid.*

In this case, the district court pronounced sentence after hearing a very detailed argument from petitioner's counsel, Sent. Tr. 12-33, and after reviewing the written submissions of petitioner and his co-defendants, *id.* at 74. The court stated that it had "considered all the factors in 18[] U.S.C.[] 3553(a) relevant to sentence," *ibid.*, and specifically alluded to several of them, including the nature and circumstances of the offense, *id.* at 74-75; the characteristics of petitioner and his co-defendants, describing them as "very deliberate" and "demonstrat[ing] a lack of remorse," *id.* at 75-76; adequate "general and specific deterrence," *id.* at 76; and the applicable guideline range, *id.* at 74. The district court rejected petitioner's argument that "the loss calculations found in the presentence report" were not supported by adequate proof, *id.* at 20, explaining "that the evidence in this case fully supports the loss amount in this case," *id.* at 74. The court then pronounced sentence separately for each defendant on each count. *Id.* at 76-77. When petitioner's counsel spoke again, he addressed petitioner's placement in an appropriate Bureau of Prisons facility, the possibility of self-surrender, and an application for bail pending appeal. *Id.* at 80-87. But he did not object to the adequacy of the court's explanation of his sentence. See *id.* at 74-93.

Petitioner contends (Pet. 32) that the Second Circuit—both in affirming his sentence and more generally—has applied a rule that "relieves a sentencing judge of his statutory duty to explain the reasons for a sentence and improperly places the burden on a defendant to disprove that a judge considered his arguments." That contention misstates the governing law of the Second Circuit and misapprehends the sentencing portion of the court of appeals' opinion in this case. Pet. App. 16a-17a.

The Second Circuit has held that it "require[s] more than a few magic words" when it reviews whether the district court adequately addressed the Section 3553(a) sentencing factors, *United States* v. *Corsey*, 723 F.3d 366, 376 (2013); that "[a] district court commits procedural error * * * by failing to consider the section 3553(a) factors," *United States* v. *Preacely*, 628 F.3d 72, 79 (2d Cir. 2010); and that a district court must "come to an independent determination of the appropriate punishment for each defendant, and must create a record of that individualized determination," *Corsey*, 723 F.3d at 377. The Second Circuit thus applies a standard for reviewing allegations of procedural sentencing error that, understood correctly, is materially similar to those employed by other courts of appeals. Petitioner's contentions (Pet. 29-34) to the contrary are premised on his erroneous assertion (Pet. 32) that "the Second Circuit will uphold a sentence so long as it is not clear that the district court failed to meet its statutory obligation."

Here, moreover, the court of appeals considered petitioner's challenge to "the sufficiency of the record of the district court's sentencing determination" and correctly found "no reversible error." Pet. App. 16a. In so holding, the court of appeals relied on its earlier decision in *Corsey*, which held that a district court must provide a sufficient record to satisfy a reviewing court that the sentencing court considered all of the required factors. In *Corsey*, the court of appeals vacated and remanded the defendants' sentences because "the sentencing court gave only a passing mention to any of the section 3553(a) factors." 723 F.3d at 377. The court of appeals found no similar error in this case. It nevertheless encouraged the district court in the future "to provide more robust and individualized explanations even when [the applicable] case law does not mandate it." Pet. App. 17a. Nothing in the court of appeals' unpublished opinion supports petitioner's contention (Pet. 28) that "a district court in the Second Circuit does not actually have to address a defendant's arguments at sentencing."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
DANIEL S. GOODMAN
Attorney

DECEMBER 2016