No. 06-1384

In the Supreme Court of the United States

SERDAR KALAYCIOGLU, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was required to instruct the jury concerning the elements of the substantive offense of "honest services" wire fraud under 18 U.S.C. 1343 and 1346, where that offense was the alleged object of the conspiracy with which the defendant was charged.

2. Whether the district court correctly instructed the jury that, in order to prove "honest services" wire fraud in the private-sector context, the government must show that an employee or agent intended to breach a fiduciary duty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-23) is not published in the Federal Reporter, but is reprinted at 210 Fed. Appx. 825.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2006. A petition for rehearing was denied on January 31, 2007 (Pet. App. 27-28). The petition for a writ of certiorari was filed on April 17, 2007. 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 Florida, petitioner was convicted of 11 counts of committing wire fraud, in

violation of 18 U.S.C. 1343, and one count of conspiring to commit "honest services" wire fraud, in violation of 18 U.S.C. 371, 1343, and 1346. He was sentenced to 324 months of imprisonment, to be followed by three years of supervised release, and ordered to pay approximately $6.7 million in restitution. The court of appeals affirmed. Pet. App. 1-23.

1. From May 2000 to September 2001, petitioner, a Canadian citizen and employee of the Canadian Space Agency, defrauded numerous residents of South Florida by representing that he was authorized by the Federal Reserve Bank to trade high-yield bank instruments. Specifically, petitioner became the chairman and chief executive officer of Meridian Investment Bank (Meridian), a failing bank licensed in Grenada, and induced several individuals to invest in his instruments by purchasing certificates of deposit issued by Meridian. Pet. App. 2, 4.

In May 2001, an undercover agent from the Federal Bureau of Investigation and two cooperating witnesses, posing as securities traders working for "Connelly and Williams" (the fictitious American representative of a fictitious European mutual fund), approached an associate of petitioner's, Sheldon Mickelson, and said they were seeking an investment with a high rate of return. Mickelson told them about petitioner's high-yield bank instruments. After a series of telephone calls with petitioner and others, the agent and witnesses agreed to purchase $40 million in certificates of deposit from Meridian on behalf of their mutual fund. In return, the agent and witnesses would receive $10 million, which petitioner and others would deduct from the $40 million that Meridian received (without the fund's knowledge). Petitioner intended to keep the remaining $30 million

himself, and suggested to the agent and witnesses that they should also invest their $10 million in his instruments. The agent and witnesses withdrew from the deal before any money changed hands. Pet. App. 4-5; Gov't C.A. Br. 10-12.

2. On April 10, 2003, a grand jury in the Southern District of Florida returned a superseding indictment charging petitioner with 13 counts of committing wire fraud, in violation of 18 U.S.C. 1343. The indictment also charged petitioner, Mickelson, and two others with conspiring to commit "honest services" wire fraud, in violation of 18 U.S.C. 371, 1343, and 1346. Petitioner's co-defendants pleaded guilty to the conspiracy count; petitioner proceeded to trial. Pet. App. 1-2, 5, 24; Gov't C.A. Br. 1.

The "honest services" statute, 18 U.S.C. 1346, provides that, for purposes of the wire- and mail-fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." At the close of the evidence, and over petitioner's objection, the district court gave the jury the Eleventh Circuit's pattern jury instruction on "honest services" wire fraud. See 11th Cir. Pattern Jury Instructions—Criminal Cases, Offense Instruction No. 51.2 (2003). Specifically, the district court instructed the jury that, "with regard to employers or principals in the private sector, the Government must prove that the employee or agent intended to breach a fiduciary duty." Pet. App. 12 n.7. The court further instructed that "[u]nder the law every agent or employee representing or working for somebody else * * * has a duty, it is called a fiduciary duty to act honestly and faithfully in all of his or her dealing with the employer and to transact business in the best interest of

the employer." *Id.* at 13 n.7. The court explained that it would violate that duty if an employee were to accept an undisclosed payment where "the employee's personal financial interest interferes with the employee's duty to secure the most favorable bargain for the employer." *Ibid.*

The jury found petitioner guilty on the conspiracy count and 11 of the 13 wire-fraud counts. Petitioner was sentenced to 324 months of imprisonment, to be followed by three years of supervised release; that sentence consisted of consecutive terms of 60 months each on the first five wire-fraud counts and 24 months on the sixth, and concurrent terms on the remaining counts (including the conspiracy count). Petitioner was also ordered to pay approximately $6.7 million in restitution. Pet. App. 2, 24-25.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-23. As is relevant here, the court of appeals rejected petitioner's contention that the district court improperly instructed the jury on the conspiracy count. *Id.* at 10-13.

Before the court of appeals, petitioner contended that the instruction on the conspiracy count was erroneous because "it presumed as a matter of law the existence of a fiduciary duty owed by the supposed mutual fund representatives to the [f]und, and did not require the jury to determine the factual nature and existence of such a duty as an essential element of the conspiracy offense." Pet. App. 11. The court of appeals, however, rejected that contention as "unpersuasive." *Ibid.* As a preliminary matter, the court noted that petitioner was charged not with "a substantive offense involving honest services wire fraud," but rather with "a conspiracy to commit 'honest services' wire fraud." *Ibid.* As a result,

the court reasoned, the government was not required to prove "the *actual* existence of a fiduciary relationship." *Ibid.* (emphasis added).

The court of appeals next recognized that "the cases suggest that the district court should ordinarily instruct the jury concerning the elements of the substantive offense or offenses constituting the object of an alleged conspiracy." Pet. App. 11 (footnote omitted). The court concluded, however, that "the district court's instructions in the circumstances of this case were clearly sufficient to meet that obligation." *Ibid.*

The court of appeals then specifically addressed petitioner's contention that the district court presumed the existence of a fiduciary duty in instructing the jury concerning the elements of the substantive offense of "honest services" wire fraud. The court of appeals explained that, in *United States* v. *DeVegter*, 198 F.3d 1324 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000), it had "concluded that it was unnecessary to decide in that instance whether a fiduciary duty is necessary in § 1346 private sector cases," though it had noted that other circuits had held that the government must show that an employee intended to breach a fiduciary duty. Pet. App. 12 (internal quotation marks and citation omitted). The court then "reach[ed] the same conclusion here," on the ground that "[t]here can be no doubt as a matter of law that persons employed to seek out investment opportunities for a mutual fund owe a fiduciary duty to the fund." *Ibid.* The court therefore held that, "whether or not proof of such a duty is a necessary element of an 'honest services' wire fraud offense, the district court's instructions to the jury, set out in the margin, constituted a fully sufficient and correct charge concerning honest services fraud." *Id.* at 12-13 (footnote omitted).

ARGUMENT

Petitioner contends (Pet. 7) that this Court should grant review to resolve circuit conflicts on "the extent to which [the] jury must be instructed on the criminal offense that is the object of the charged conspiracy under 18 U.S.C. § 371," and, "where that object offense is honest services wire fraud under 18 U.S.C. §§ 1343 and 1346, the essential elements of that offense." The court of appeals' decision in this case, however, does not conflict with any decision of this Court or of another court of appeals in any relevant respect. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 8-16) that, where a defendant is charged under the general federal conspiracy statute, 18 U.S.C. 371, a court must instruct the jury on the elements of the offense that was the object of the alleged conspiracy.

The Sixth Amendment of the Constitution requires a court to submit all of the elements of the charged offense to the jury. See, *e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995). Although this Court has never expressly defined the elements of the offense of conspiracy under Section 371, it has stated that "[t]he gist of the offense of conspiracy * * * is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Falcone*, 311 U.S. 205, 210 (1940). Lower courts have noted that, in order to prove a conspiracy under Section 371, the government must show, *inter alia*, that there was an agreement to commit a federal crime, see, *e.g.*, *United States* v. *Cure*, 804 F.2d 625, 628 (11th Cir. 1986), and that the defendant specifically intended that the federal crime be com-

mitted, see, *e.g.*, *United States* v. *Blair*, 54 F.3d 639, 642 (10th Cir.), cert. denied, 516 U.S. 883 (1995).

Petitioner asserts (Pet. 15) that the Fifth and Tenth Circuits have gone further and held that, in instructing the jury concerning the elements of conspiracy under Section 371, a court must also specifically instruct the jury concerning "the requirements of the law regarding th[e] underlying offense" that was the object of the conspiracy. See Pet. 10-11 (citing *United States* v. *Lake*, 472 F.3d 1247 (10th Cir. 2007), and *United States* v. *Harrelson*, 754 F.2d 1153 (5th Cir.), cert. denied, 474 U.S. 908 (1985)). To the extent that those decisions adopted such a requirement, however, the court of appeals' decision in this case does not conflict with them. The court of appeals did not hold, as petitioner suggests (Pet. 16), that "the jury need never be instructed on the legal standards applicable to the object offense"; to the contrary, citing cases from the former Fifth Circuit, it recognized that "the cases suggest that the district court should ordinarily instruct the jury concerning the elements of the substantive offense or offenses constituting the object to an alleged conspiracy." Pet. App. 11; see *id.* at 11 n.5 (citing *United States* v. *Vaglica*, 720 F.2d 388 (5th Cir. 1983), and *United States* v. *Martinez*, 496 F.2d 664 (5th Cir.), cert. denied, 419 U.S. 1051 (1974)). This case therefore does not give rise to a circuit conflict that warrants the Court's review.[1]

The court of appeals concluded that "the district court's instructions in the circumstances of this case

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[1] Although petitioner contends (Pet. 12-14) that *other* Eleventh Circuit decisions have held that it is sufficient merely to "paraphras[e]" the statute defining the underlying substantive offense, this Court does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

were clearly sufficient to meet [its] obligation" to instruct the jury concerning the elements of the underlying substantive offense. Pet. App. 11. Petitioner does not contend that the district court *omitted* any element of the underlying offense of committing "honest services" wire fraud, in violation of 18 U.S.C. 1343 and 1346—nor could he, in light of the fact that the district court, using the Eleventh Circuit's pattern jury instruction on "honest services" wire fraud, instructed the jury that the government was required to prove (1) that an employee or agent intentionally violated a fiduciary duty and (2) that the employee or agent foresaw or should have foreseen that the employer or principal might suffer an economic harm as a result of that breach. See Pet. App. 12-13 n.7 (quoting instruction). And even if petitioner could identify a relevant omission in the district court's instructions, such a case-specific error, without more, would not merit this Court's review.

2. Petitioner next contends (Pet. 20-26) that the district court misinstructed the jury concerning the duty that must be breached in order to establish "honest services" wire fraud in the private-sector context.

The district court instructed the jury that, in order to prove "honest services" wire fraud in the private-sector context, the government must show that an employee or agent "intended to breach a fiduciary duty." Pet. App. 12 n.7. Petitioner asserts (Pet. 21) that, while some circuits require the employee to owe a *fiduciary* duty to the employer, the Fifth Circuit "more broadly appl[ies] the statute to all employer/employee relationships," and the Second Circuit similarly applies the statute where the employee merely owes the employer a duty of *loyalty*. See Pet. 21-22 (citing *United States* v. *Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), cert. de-

nied, 543 U.S. 809 (2004), and *United States* v. *Brumley*, 116 F.3d 728 (5th Cir.), cert. denied, 522 U.S. 1028 (1997)). Even assuming there is a genuine circuit conflict on the requisite duty for a violation of the "honest services" statute, however, it would not assist petitioner, because the district court required the government to prove the breach of a fiduciary duty—the most stringent of the asserted standards.

The district court suggested that the pattern jury instruction correctly indicated that a defendant would violate the "honest services" statute by inducing an employee to breach a duty of loyalty, but questioned whether all of the conduct covered by the pattern instruction would amount to the breach of a *fiduciary* relationship. Pet. App. 42-43. Even assuming that the instruction erroneously covered non-fiduciary breaches, however, any instructional error was harmless in this case, because, as the court of appeals explained, "[t]here can be no doubt as a matter of law that persons employed to seek out investment opportunities for a mutual fund owe a fiduciary duty to the fund." *Id.* at 12.[2] For that reason, the court of appeals concluded that it was unnecessary to decide whether proof of a fiduciary duty is a necessary element of the offense of "honest services" wire fraud. See *id.* at 12-13.[3] Because the court

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[2] Indeed, petitioner freely conceded below that the agent and the witnesses would have owed a fiduciary duty to the fictitious mutual fund that would have been the victim of the conspiracy. See Pet. C.A. Reply Br. 10 (stating that petitioner "has not challenged here, or before the trial court, the existence of a fiduciary relationship").

[3] In deciding to administer the instruction, the district court similarly noted that the instruction "do[es not] * * * in any way lower the barrier in a way that would harm [petitioner]." Pet. App. 43.

of appeals left that issue open, this case would constitute a singularly poor vehicle for its resolution.

Petitioner suggests (Pet. 26) that the district court's instruction effectively foreclosed him from arguing to the jury that, under English law, it would have been permissible for a mutual-fund manager to accept a payment from the seller of a security, even if such a payment would constitute an unlawful "kickback" under American law. The suggestion that the court of appeals should have turned to foreign law, rather than American law, to define the duties owed on the facts of this case warrants no further review. In any event, petitioner remained free to argue that, even if the agent and the witnesses would have owed a fiduciary duty to the fictitious mutual fund, they would not have *breached* that duty under English law by accepting the $10 million that petitioner offered to pay them in return for the $40 million investment. The instruction in this case did not foreclose petitioner from making that argument; instead, it indicated only that an employee would breach his duty by accepting an undisclosed payment where "the employee's personal financial interest interferes with the employee's duty to secure the most favorable bargain for the employer." Pet. App. 13 n.7. And even if that language could be read to foreclose petitioner from making that argument, the instructions in this case unquestionably did not foreclose petitioner from arguing to the jury that he "reasonably believed such a commission was proper under these circumstances," Pet. 26, and thus lacked the intent required to be convicted of conspiracy to commit "honest services" wire fraud under 18 U.S.C. 371. See 1/16/04 Tr. 4642-4643 (instructing jury on elements of the offense of conspiracy).

3. Finally, petitioner contends (Pet. 19-20, 26-27) that there are conflicts among the circuits on (1) what intent an individual must possess in order to be liable for "honest services" fraud and (2) whether the individual must cause or intend to cause actual tangible harm. Petitioner does not allege, however, that the district court's instruction on "honest services" wire fraud was deficient in a way that implicates either alleged conflict. Moreover, petitioner argued below only that the district court erred by instructing the jury concerning the type of duty that must be breached in order to establish "honest services" wire fraud in the private-sector context, see Pet. C.A. Br. 33-43, and the court of appeals therefore did not pass on any other aspect of the district court's instruction, see Pet. App. 10-13. This Court does not usually consider questions that were neither pressed nor passed upon below, see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and there is every reason to adhere to that settled practice in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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