No. 17-562

In the Supreme Court of the United States

SHELDON SILVER, 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

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QUESTION PRESENTED

Whether the court of appeals erred in vacating petitioner's convictions for honest-services fraud, extortion, and money laundering due to instructional error and remanding the case, rather than entering a judgment of acquittal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 864 F.3d 102. The opinion of the district court (Pet. App. 48a-82a) is reported at 184 F. Supp. 3d 33.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2017. The petition for a writ of certiorari was filed on October 11, 2017. 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 on two counts of honest-services mail fraud, in violation of 18 U.S.C. 1341, 1346, and 2; two counts of honest-services wire fraud, in violation of

18 U.S.C. 1343, 1346, and 2; two counts of extortion under color of official right, in violation of 18 U.S.C. 1951 and 2; and one count of money laundering, in violation of 18 U.S.C. 1957 and 2. Am. Judgment 1-2. Petitioner was sentenced to 12 years of imprisonment, to be followed by two years of supervised release. *Id.* at 3-4. The court of appeals vacated all of petitioner's convictions and remanded the case to the district court. Pet. App. 1a-47a.

1. From 1994 until his resignation in 2015, petitioner was the Speaker of the New York State Assembly. Pet. App. 3a. As Speaker, petitioner was one of the most powerful public officials in New York State, exercising significant control over the Assembly and state legislative matters. *Ibid.*; Gov't C.A. Br. 4-5. Petitioner leveraged that position to enrich himself in multiple ways.

a. Starting in 2003, petitioner orchestrated a scheme (the Mesothelioma Scheme) in which he agreed to provide state grant funds to Dr. Robert Taub, a New York City physician-researcher who specialized in mesothelioma treatment. He also agreed to perform other acts for Dr. Taub as opportunities arose. In exchange, Dr. Taub referred a steady stream of mesothelioma patients to a law firm where petitioner was of counsel. Petitioner received millions of dollars in law-firm referral fees from the scheme over the course of more than a decade. Pet. App. 4a-8a, 41a-44a, 49a-53a; Gov't C.A. Br. 3, 5-11.

While speaker of the New York State Assembly, petitioner had been of counsel to the law firm Weitz & Luxenberg (W&L), which maintained an active personal injury practice, since 2002. Pet. App. 4a. Lawsuits for mesothelioma, a rare form of cancer caused by exposure to asbestos, were particularly lucrative for the

firm. *Ibid.* Petitioner received referral fees from W&L for any case he brought to the firm. *Ibid.*

In fall 2003, Dr. Taub encountered petitioner at an event and asked him to encourage W&L to donate money to mesothelioma research. Pet. App. 5a. Dr. Taub believed that firms that profit from mesothelioma cases should donate to support mesothelioma research. *Id.* at 5a n.7. Petitioner responded that he could not get W&L to donate, but nonetheless asked Dr. Taub to refer mesothelioma cases to W&L through him. *Id.* at 5a. Dr. Taub obliged, and began to refer mesothelioma patients to petitioner for legal representation and to provide petitioner with names and contact information of unrepresented patients seeking counsel. *Ibid.* Dr. Taub believed that petitioner would benefit personally from the leads, and petitioner told Dr. Taub that he was "pleased with the referrals he was getting." *Ibid.* (quoting 11/4/15 Tr. 274). Over the course of ten years, petitioner received approximately $3 million in referral fees for cases that Dr. Taub referred to W&L. *Id.* at 8a.

In exchange, Dr. Taub wanted petitioner to help him receive research funding from state and federal appropriations and, in January 2004, sent petitioner a letter requesting state funding. Pet. App. 5a. Petitioner soon approved two $250,000 state grants to Columbia University to support Dr. Taub's research. *Id.* at 6a. The grants came out of a pool of discretionary funds that petitioner alone controlled. *Ibid.* Petitioner did not publicly disclose the grants or his interactions with Dr. Taub. *Ibid.* Dr. Taub understood that his mesothelioma referrals were a factor in petitioner's decision to approve the grants, and he sought to receive additional grant money annually. *Ibid.*

In 2007, however, New York law changed to require public disclosure of grants originating from the pool that petitioner controlled, as well as disclosure of any potential conflicts of interest. Pet. App. 6a. Petitioner informed Dr. Taub that, as a result of the change, any further request for state grants would not be approved. *Ibid.* Nonetheless, in 2007 and 2008, Dr. Taub continued to send mesothelioma leads to petitioner to maintain their relationship and keep petitioner "incentivized." *Id.* at 7a (citation omitted). During this timeframe, petitioner also continued to help Dr. Taub, including by awarding $25,000 in state grant funding to a non-profit entity of which Dr. Taub's wife was a board member, and asking his office staff to call a state trial judge to ask him to hire Dr. Taub's daughter as an intern. *Ibid.*

In 2010, Dr. Taub started sending mesothelioma leads to another law firm that had started funding his research. Pet. App. 7a. Petitioner went to Dr. Taub's office to complain that he was receiving fewer referrals. *Ibid.* As a result, Dr. Taub continued to send referrals to petitioner to maintain the relationship and keep the door open for future state funding. *Ibid.* On the day he met with petitioner, Dr. Taub wrote to a colleague, "I will keep giving cases to [petitioner] because I may need him in the future—he is the most powerful man in New York State." *Ibid.* (citation omitted). In exchange, petitioner continued to perform favors for Dr. Taub, including: in May 2011, petitioner had his staff prepare an Assembly resolution with an official proclamation commending Dr. Taub, which petitioner sponsored and presented to Dr. Taub at a public event; in fall 2011, petitioner agreed to help Dr. Taub "navigate" the process

of securing permits for a planned charity race in petitioner's district to benefit mesothelioma research; and, in 2012, petitioner made calls and sent letters on Assembly letterhead in an effort to help Dr. Taub's son obtain a job with a non-profit organization that received millions in discretionary state funding controlled solely by petitioner. *Id.* at 8a.

b. In a separate scheme (the Real Estate Scheme), which began in 1997, petitioner agreed to pass legislation favorable to real estate developers Glenwood Management and the Witkoff Group, keep legislation unfavorable to those developers off the floor of the Assembly, and support more than $1 billion of the developers' state financing requests. In exchange, the developers generated hundreds of thousands of dollars in fees for petitioner. Pet. App. 9a-11a, 45a-47a, 53a-57a; Gov't C.A. Br. 3, 11-15.

As with the Mesothelioma Scheme, petitioner arranged to profit from referral fees from a law firm, this time Goldberg & Iryami (G&I). Pet. App. 9a. G&I specialized in tax certiorari work (involving challenges to property owners' real estate taxes), and Glenwood and Witkoff pursued tax certiorari cases to reduce property taxes on their buildings. *Ibid.* Petitioner induced Glenwood and Witkoff to hire G&I, and G&I agreed to pay petitioner a percentage of the resulting legal fees. *Id.* at 9a-10a. Over a period of about 18 years, petitioner received approximately $835,000 in fees from G&I for his referral of the developers. *Id.* at 11a.

Glenwood and Witkoff depended heavily on favorable state legislation, including rent regulation and tax abatement legislation. Pet. App. 9a. They also depended on tax-exempt financing, which must be approved by the Public Authorities Control Board

(PACB). *Ibid.* Petitioner, as Speaker, could effectively veto any legislation that he opposed by preventing it from coming to a vote, and, as a voting member on the PACB, had the power to unilaterally prevent the PACB from approving applications for state financing. *Ibid.*

In 1997, at a time when important real estate legislation was due for renewal, petitioner referred Glenwood to G&I. Pet. App. 10a. In 2005, petitioner did the same for Witkoff. *Ibid.* The developers complied because they did not want to alienate petitioner, given their need for petitioner's approval of favorable legislation. *Ibid.* They admitted that they gave tax certiorari work to G&I to influence petitioner's legislative work concerning real estate. *Ibid.*

In exchange, petitioner took several actions to benefit the developers. Pet. App. 10a-11a. Through a proxy, petitioner repeatedly voted to approve Glenwood's requests for tax-exempt financing for many of its projects. *Ibid.* He also regularly approved and voted for rent and tax abatement legislation that Glenwood sought. *Ibid.* And in 2011, petitioner publicly opposed the relocation of a methadone clinic that was to be located near one of Glenwood's rental buildings in petitioner's district. *Id.* at 11a.

c. Nearly $4 million in proceeds from the two schemes were deposited into petitioner's personal bank account, from which he then made investments in high-yield, private investment vehicles. Pet. App. 11a-12a, 57a-58a; Gov't C.A. Br. 15, 51; Gov't Trial Ex. 1511; see Superseding Indictment ¶ 45 (listing eight transactions, ranging in amounts from $10,243.96 to $100,000). Many of the transfers from petitioner's bank account to the investment vehicles occurred just days after funds from the schemes had been deposited into that account. See

Gov't Trial Ex. 1511. And the amount of funds deposited into petitioner's bank account that were directly linked to the schemes often exceeded the amounts of the transfers to the investment vehicles that occurred shortly thereafter. See *ibid.* (approximately $100,662 in W&L Taub fees deposited on July 22, 2010 and July 30, 2010, $100,000 transferred to investment vehicle on August 12, 2010; approximately $69,728 in W&L Taub fees deposited on February 1, 2013, $50,000 transferred to investment vehicle on February 22, 2013; approximately $27,278 in W&L Taub fees deposited on April 15, 2013, approximately $19,005 transferred to investment vehicle on April 22, 2013).

2. Petitioner was indicted and tried on two counts of honest-services mail fraud, in violation of 18 U.S.C. 1341, 1346, and 2; two counts of honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346, and 2; two counts of extortion under color of official right, also known as Hobbs Act extortion, in violation of 18 U.S.C. 1951 and 2; and one count of money laundering, in violation of 18 U.S.C. 1957 and 2. Pet. App. 12a & n.22.

a. The government's theory of the extortion and honest-services fraud charges was that petitioner committed extortion and honest-services fraud under color of official right by engaging in quid pro quo bribery schemes with Dr. Taub and the real estate developers. See Gov't C.A. Br. 19-23 (detailing the government's closing arguments). The district court instructed the jury that, to prove honest-services fraud, the government had to prove that petitioner received bribes or kickbacks in a quid pro quo. 11/24/15 Tr. 3097. The court stated that "[t]he government does not have to prove that there was an express or explicit agreement that of-

ficial actions would be taken or that any particular action would be taken in exchange for the bribe or kickback." *Id.* at 3098. Instead, the government was required to prove that petitioner "understood that as a result of the bribe or kickback, he was expected to exercise official influence or make official decisions for the benefit of the pay[o]r and, at the time the bribe or kickback was accepted, he intended to do so as specific opportunities arose." *Ibid.*

In the extortion charge, the district court instructed that the government must prove a quid pro quo, *i.e.*, that "property was sought or received by [petitioner], directly or indirectly, in exchange for the promise or performance of official action." 11/24/15 Tr. 3106. The court also told the jury that petitioner must have been aware that the extorted party "was motivated, at least in part, by the expectation that as a result of the payment, [petitioner] would exercise official influence or decision-making for the benefit of the extorted party." *Ibid.*

The instructions did not list any specific official acts alleged to be part of the charged scheme, or assert that proving performance of any particular official act was sufficient (or necessary) to establish petitioner's guilt. Instead, the instructions made clear that the government was required to prove an "as-opportunities-arose" quid pro quo scheme, *i.e.*, that petitioner intended to perform official acts "as specific opportunities arose" in exchange for the financial benefits he was receiving. 11/24/15 Tr. 3098; see *id.* at 3107. The district court stated that "[o]fficial action includes any action taken or to be taken under color of official authority." *Id.* at 3098.

Finally, for the money-laundering charge, the district court instructed the jury that the government must prove that petitioner "engaged in a monetary transaction" that "involved criminally derived property worth more than $10,000." 11/24/15 Tr. 3109. The court instructed that "[p]roper[t]y is criminally derived if it is the proceeds of or comes from proceeds obtained from a criminal offense." *Id.* at 3112. The court stated that the "government is not required to prove that all of the property involved in the transaction at issue was criminally derived property," but rather "that more than $10,000 of the property involved was criminally derived property." *Ibid.*

b. The jury convicted petitioner on all counts. Pet. App. 2a. Petitioner moved pursuant to Federal Rules of Criminal Procedure 29 and 33 for a judgment of acquittal or, in the alternative, a new trial. Pet. App. 48a. As relevant here, he argued that the evidence was insufficient to support any of his convictions. *Id.* at 58a. With respect to the extortion counts, petitioner argued that extortion under 18 U.S.C. 1951 requires a "deprivation" of property and that he did not "deprive[]" Dr. Taub or the real estate developers of property. Pet. App. 68a. With respect to the honest-services fraud counts, petitioner argued that the government had failed to prove a bribe or kickback under *Skilling* v. *United States*, 561 U.S. 358, 409 (2010). Pet. App. 58a. And with respect to money laundering, petitioner argued that the government had failed to trace the transferred funds to criminal activity. *Id.* at 78a. The district court denied the motions. *Id.* at 48a-82a. The court sentenced petitioner to an aggregate term of 12 years of imprisonment, consisting of concurrent 12-year sentences on each of the honest-services and extortion

counts and a concurrent 10-year sentence on the money-laundering count, to be followed by two years of supervised release. Am. Judgment 3-4.

3. Less than two months after the district court entered judgment, this Court decided *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), which addressed "the proper interpretation of the term 'official act'" in the context of a prosecution for honest-services fraud and Hobbs Act extortion violations. *Id.* at 2367 (citation omitted). The Court stated that "an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.'" *Id.* at 2371; see 18 U.S.C. 201(a)(3). The Court established a two-part test to meet that definition. First, "[t]he 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 136 S. Ct. at 2372. Second "[t]o qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so." *Ibid.* The Court clarified that the "decision or action may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *Ibid.*

4. The court of appeals vacated all of petitioner's convictions and remanded the case to the district court. Pet. App. 1a-47a.

a. The court of appeals rejected petitioner's challenges to the sufficiency of the evidence. Pet. App. 17a-21a. The court declined to address the government's

argument that a deprivation of property is not an essential element of extortion under color of official right. *Id.* at 18a n.47. The court found it unnecessary to address that question because it concluded that petitioner's argument that "there was no evidence that * * * he deprived anyone of property" was "belied by the record." *Id.* at 18a. The court acknowledged that "[t]he 'property' at issue in a Hobbs Act extortion violation must be 'something of value from the victim that can be exercised, transferred, or sold.'" *Ibid.* (quoting *Sekhar* v. *United States*, 133 S. Ct. 2720, 2726 (2013)). And the court determined that "the evidence support[ed] a deprivation of property as to both schemes" because "both the mesothelioma leads and the tax certiorari business from which [petitioner] profited were valuable and transferable property (albeit intangible property)," of which Dr. Taub, the developers, and other law firms were deprived on account of petitioner's schemes. *Ibid.*

The court of appeals also rejected petitioner's claim that the government failed "to prove a 'paradigmatic bribe or kickback' for its honest services fraud charges." Pet. App. 19a (citation omitted). The court observed that honest-services fraud "includes instances where a defendant 'solicited or accepted side payments from a third party.'" *Ibid.* (quoting *Skilling*, 561 U.S. at 413). The court determined, based on the record, that "both the mesothelioma leads and tax certiorari business indisputably came from Dr. Taub and the Developers, which resulted in payments to [petitioner] from other third parties, W&L and G&I." *Ibid.* "These payments, solicited by [petitioner]," the court explained, "were thus bribes and kickbacks within the meaning of *Skilling*." *Ibid.*

The court of appeals additionally rejected petitioner's sufficiency challenge to his money-laundering conviction. Pet. App. 19a-21a. Petitioner argued that "because he deposited the proceeds of his schemes into an account with legitimate funds, the Government could not prove that the funds at issue were criminally derived." *Id.* at 20a. The court noted that a "minority" of its sister circuits "require the Government to trace criminally derived proceeds when they have been commingled with funds from legitimate sources to prove money laundering under Section 1957." *Ibid.* (citing *United States* v. *Loe*, 248 F.3d 449, 467 (5th Cir.), cert. denied, 534 U.S. 974 (2001), and *United States* v. *Rutgard*, 116 F.3d 1270, 1292-1293 (9th Cir. 1997)).

The court of appeals, however, "adopt[ed] the majority view" of several other circuit courts "that the Government is not required to trace criminal funds that are comingled with legitimate funds to prove a violation of Section 1957." Pet. App. 21a; see *id.* at 20a n.53 (citing decisions from the First, Third, Fourth, Seventh, Eighth, Tenth, and D.C. Circuits). The court reasoned that "[b]ecause money is fungible, once funds obtained from illegal activity are combined with funds from lawful activity in a single account, the 'dirty' and 'clean' funds cannot be distinguished from each other." *Id.* at 21a (citation omitted). "As such, a requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds." *Ibid.* (brackets and citation omitted).

b. Although the court of appeals rejected petitioner's sufficiency challenges, the court was persuaded by petitioner's "primar[y] argu[ment] that the District Court's jury instructions on the definition of an 'official act' in its honest service fraud and extortion charges were erroneous under *McDonnell*." Pet. App. 17a; *id* at 26a. The court held that the district court's instruction "encompassing '*any action* taken or to be taken under color of official authority,' was overbroad" in that it "captured lawful conduct, such as arranging meetings or hosting events with constituents." *Id.* at 26a (citation and footnote omitted). The court of appeals rejected the government's argument that the instructional error was harmless beyond a reasonable doubt. *Id.* at 29a-38a.

The court of appeals held that the money-laundering count must also be vacated because "the specified unlawful activity charged in the indictment and proven at trial" was the now-vacated "honest services fraud and extortion verdict." Pet. App. 38a. With all convictions vacated, the court remanded the case to the district court for further proceedings consistent with the court of appeals' opinion. *Id.* at 39a-40a.

ARGUMENT

Petitioner contends (Pet. 24-29) that the court of appeals misinterpreted 18 U.S.C. 1957 by holding that the government is not required to trace criminal funds that are comingled with legitimate funds to prove money laundering under the statute. Although two circuits have previously agreed with that view, seven have rejected it and this case, in which no final judgment has been entered, is not a suitable vehicle for addressing the issue. Petitioner further challenges (Pet. 29-32) the sufficiency of the evidence supporting his extortion and honest-services fraud convictions. The court of appeals

correctly rejected those challenges and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. This Court's review is not warranted at this time because this case is in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (A case remanded to district court "is not yet ripe for review by this Court."); see also *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

This Court routinely denies petitions for writs of certiorari filed by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if a defendant is convicted and his conviction and sentence are ultimately affirmed on appeal. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 283 & n.72 (10th ed. 2013). That approach promotes judicial efficiency because the issues raised in the petition may be rendered moot by further proceedings on remand. The court of appeals vacated petitioner's convictions and sentence and remanded the case to the district court. Pet. App. 39a-40a. The district court has tentatively set the date for the start of a new trial on April 16, 2018. See D. Ct. Doc. 334 (Aug. 15, 2017). If petitioner is acquitted on remand, his current claims seeking judgment of acquittal

on the money-laundering, honest-services fraud, and extortion counts will be moot. Alternatively, if petitioner is convicted, he may assert his current contentions—together with any other claims that may arise on remand—in a single petition following the entry of final judgment. See *Hamilton-Brown Shoe Co.*, 240 U.S. at 258; see also *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Petitioner provides no sound reason to depart in this case from the Court's usual practice of awaiting final judgment.

2. Petitioner contends (Pet. 12-19) that "[t]his case presents a longstanding and widespread circuit conflict over the proper construction" of 18 U.S.C. 1957. Petitioner is correct that the courts of appeals disagree about the proof required for a money-laundering conviction under Section 1957 when a defendant transfers funds from an account that commingled "dirty" and "clean" funds. But petitioner's interpretation has been adopted by at most two courts of appeals, while a least seven courts of appeals have supported the interpretation adopted by the court of appeals in this case. Furthermore, the minority position is unworkable, while the majority position gives the statute effect and is consistent with the surrounding statutory scheme.

a. To obtain a conviction for money laundering under Section 1957, the government must prove that the defendant "knowingly engage[d] or attempt[ed] to engage in a monetary transaction in criminally derived property of a value greater than $10,000" and that the property was "derived from specified unlawful activity."

18 U.S.C. 1957(a). Petitioner contends (Pet. 24-27) that because he deposited the proceeds of his schemes into an account that also contained legitimate funds, the government could not prove that his investment activities involved criminally derived funds. The court of appeals rejected that view, "adopt[ing] the majority view of [its] sister Circuits—that the Government is not required to trace criminal funds that are commingled with legitimate funds to prove a violation of Section 1957." Pet. App. 21a; see *United States* v. *Haddad*, 462 F.3d 783, 792 (7th Cir. 2006); *United States* v. *Pizano*, 421 F.3d 707, 723 (8th Cir. 2005), cert. denied, 546 U.S. 1204 (2006); *United States* v. *Sokolow*, 91 F.3d 396, 409 (3d Cir. 1996), cert. denied, 519 U.S. 1116 (1997); *United States* v. *Moore*, 27 F.3d 969, 976-977 (4th Cir.), cert. denied, 513 U.S. 979 (1994); *United States* v. *Johnson*, 971 F.2d 562, 570 (10th Cir. 1992); cf. *United States* v. *Braxtonbrown-Smith*, 278 F.3d 1348, 1354 (D.C. Cir.) (addressing a conviction under 18 U.S.C. 1956 (1994 & Supp. V 1999) and describing the Ninth Circuit's holding in *United States* v. *Rutgard*, 116 F.3d 1270 (1997), "that tracing is required under [Section] 1957[,] a[s] a minority view"), cert. denied, 536 U.S. 932 (2002).

The court of appeals' determination that the evidence was sufficient to support a conviction under Section 1957 is correct. Section 1957 prohibits "monetary transaction[s] in criminally derived property." 18 U.S.C. 1957(a). "[M]onetary transaction" is defined to mean "the deposit, withdrawal, transfer, or exchange * * * of funds or a monetary instrument * * * by, through, or to a financial institution." 18 U.S.C. 1957(f)(1). The term "criminally derived property" is defined as "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. 1957(f)(2).

The government in this case introduced evidence that proceeds of illegal activity were deposited into petitioner's bank account shortly before similar amounts were transferred out into high-yield investment vehicles. See pp. 6-7, *supra*. Petitioner's contention that such evidence could never sustain a conviction under Section 1957, under any set of jury instructions, because the government must trace every individual dollar in a sufficiently large commingled account, is unsound. The strict tracing requirement for which petitioner advocates would frustrate any prosecution under Section 1957 where an account contains sufficient "clean" funds to cover a withdrawal, effectively immunizing a defendant from criminal prosecution. "Money is fungible, and when funds obtained from unlawful activity have been combined with funds from lawful activity into a single asset, the illicitly-acquired funds and the legitimately-acquired funds (or the respective portions of the property purchased with each) cannot be distinguished from each other." *Moore*, 27 F.3d at 976-977; see *Johnson*, 971 F.2d at 570. Therefore, "[a] requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds." *Moore*, 27 F.3d at 977.

As a result, the only reasonable interpretation of Section 1957 in a case involving commingled funds is one that does not require each dollar to be traced to a specific criminal source. That interpretation is consistent with the way that Section 1957's companion statute, 18 U.S.C. 1956, has been interpreted. See *United States* v. *McGauley*, 279 F.3d 62, 71 (1st Cir. 2002) (tracing requirement "would eviscerate [Section 1956], permitting

one to avoid its reach simply by commingling proceeds of unlawful activity with legitimate funds"); *United States* v. *Baker*, 227 F.3d 955, 965 (7th Cir. 2000) ("We cannot believe that Congress intended that participants in unlawful activity could prevent their own convictions under the money laundering statute simply by commingling funds derived from both 'specified unlawful activities' and other activities.") (citation and internal quotation marks omitted), cert. denied, 531 U.S. 1151 (2001); *United States* v. *Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990). At a minimum, a jury could be instructed as to potential accounting techniques under which the evidence here could suffice for conviction.* Review of the issue in this case, in a pure sufficiency posture, with a new trial already imminent, is not warranted.

b. Two courts of appeals have held that "where an account contains clean funds sufficient to cover a withdrawal, the Government can not prove beyond a reasonable doubt that the withdrawal contained dirty money." *United States* v. *Loe*, 248 F.3d 449, 467 (5th Cir.), cert. denied, 534 U.S. 974 (2001); see *Rutgard*, 116 F.3d at 1292-1293.

Petitioner claims (Pet. 18) that this circuit conflict is "entrenched" and that "[b]oth the Fifth and Ninth Circuits have rejected opportunities to reconsider their po-

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* Potential tests include: a "proportionality" rule, under which "courts would treat any withdrawal from an account as containing proportional fractions of clean and dirty money," *Loe*, 248 F.3d at 467 n.81; and instructing the jury that it may consider any reasonable accounting method in determining whether money is clean or dirty, see *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1159-1160 (2d Cir. 1986) (drug proceeds commingled with legitimate funds are potentially traceable through the "first-in, first-out," pro rata "averaging," and "first-in, last-out" methods).

sitions despite the diverging approaches of other circuits." The Fifth Circuit, however, does not employ a strict tracing requirement. Instead, it has held that "when the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account." *United States* v. *Davis*, 226 F.3d 346, 357 (2000), cert. denied, 531 U.S. 1181 (2001); see *United States* v. *Fuchs*, 467 F.3d 889, 907 (5th Cir. 2006) (rejecting a sufficiency challenge to a Section 1957 conviction, despite a lack of evidence tracing any one individual transaction of more than $10,000 to specified illicit funds in a commingled account, "[b]ecause the total amount of the financial transactions ($4 million) exceeded the amount of clean funds ($3 million)"), cert. denied, 549 U.S. 1272 (2007). The Fifth Circuit's "aggregate" approach is based on the court's recognition that "when tainted money is mingled with untainted money in a bank account, there is no longer any way to distinguish the tainted from the untainted because money is fungible." *Id.* at 357; see *United States* v. *Heath*, 970 F.2d 1397, 1403-1404 (5th Cir. 1992) ("It defies logic to require that the Government trace these tainted funds through each transfer. Such proof is impossible because money is fungible."), cert. denied, 507 U.S. 1004 (1993).

The Ninth Circuit is thus the only court that appears to apply a strict tracing requirement of the sort petitioner urges. See, *e.g.*, *United States* v. *Hanley*, 190 F.3d 1017, 1026 (1999) (the "tracing of criminally derived funds" under *Rutgard* requires the government to establish that the entire account consists of criminal proceeds). That lopsided conflict does not warrant this

Court's review at this time, especially where the court of appeals' interpretation of the statute is correct, no final judgment has been entered against petitioner, and all of petitioner's convictions have been vacated.

3. Petitioner briefly claims (Pet. 29-32) that the "court of appeals' sufficiency rulings on the extortion and honest services counts contravene this Court's precedents." Those claims are meritless and fact-bound and do not warrant this Court's review.

a. Petitioner contends (Pet. 29-30) that he should have been acquitted of extortion because he "did not 'deprive' either Dr. Taub or the developers of anything." But to establish extortion under color of official right, the government "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans* v. *United States*, 504 U.S. 255, 268 (1992). That requirement was plainly satisfied by petitioner's receipt of money representing a portion of the value to the law firms of the mesothelioma leads and the tax certiorari business.

In any event, the court of appeals correctly determined (Pet. App. 18a) that a "deprivation of property" of the sort petitioner asserts to be required occurred in this case. As the court recognized, "both the mesothelioma leads and the tax certiorari business from which [petitioner] profited were valuable and transferable property (albeit intangible property)." Pet. App. 18a; see *Sekhar* v. *United States*, 133 S. Ct. 2720, 2725 n.2 & 2726 (property for Hobbs Act extortion must be "something of value from the victim that can be exercised, transferred, or sold" and may be tangible or intangible). Their value is established by the law firms' willingness to pay petitioner for providing them; they resulted in

additional income for the firms and referral fees for petitioner. Their transferability is established by the potential for the leads or the business to go elsewhere—that is precisely why the law firms would pay to obtain them. And given their inherent value to the law firms—which was readily noticeable to Dr. Taub himself by selling the leads for money or to the real estate companies by negotiating a fee when providing its business—the victims here were deprived of property that petitioner acquired.

b. Petitioner also claims (Pet. 30-31) that the referral fees he received were not bribes or kickbacks within the meaning of *Skilling* because the payments were referral fees from his law firms, not payments from a third party. That argument is misconceived.

In *Skilling*, the Court limited honest-services fraud to cases that involved "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Skilling* v. *United States*, 561 U.S. 358, 404 (2010). The Court concluded that the defendant in that case did not commit honest-services fraud because, although the defendant had defrauded his company's shareholders by misrepresenting the company's fiscal health and thereby artificially inflating its stock price, the defendant had not "solicited or accepted side payments from a third party in exchange for making th[o]se misrepresentations." *Id.* at 413.

Unlike the defendant's scheme in *Skilling*, petitioner's schemes were classic kickback schemes. The court of appeals correctly recognized that Dr. Taub and the developers are the third parties that gave kickbacks to petitioner in the form of referrals to his law firms, which resulted in the payment of money to petitioner.

Pet. App. 19a. It makes no difference that the third-party payments were routed through petitioner's law firm or that they were "the same referral fees that other lawyers at the firms received" when they brought in business. Pet. 30. Petitioner used his position to confer benefits on Dr. Taub and the developers in exchange for referrals that enriched petitioner. That is a classic scheme to "deprive another of honest services through bribes or kickbacks supplied by a third party." *Skilling*, 561 U.S. at 404.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2017