No. 17-562

IN THE
Supreme Court of the United States

SHELDON SILVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

The Government does not dispute that the courts of appeals are divided over what the Government must prove to obtain a money laundering conviction under 18 U.S.C. § 1957 when a defendant transfers funds from a commingled account. The Government agrees that two courts of appeals require it to trace the funds to criminal proceeds, precluding a conviction where the account contains sufficient clean funds to cover the withdrawal. And it acknowledges that several other courts of appeals have taken the opposite view. Finally, the Government does not deny the importance of that issue: The Government charges § 1957 offenses hundreds of times per year, and those cases routinely involve commingled accounts no different from the one at issue here. The question presented is thus critical to the administration of a key federal criminal statute.

Against all that, the Government's only real response is that the case is interlocutory. But that is not grounds for denying review. This Court has made clear that a case may be reviewed despite its interlocutory posture where it presents a clear-cut question of law that is fundamental to the further conduct of the proceedings. That is the situation here: If the Court reverses the sufficiency ruling, double jeopardy would preclude the Government from retrying Mr. Silver on the money laundering count. In those circumstances, the interlocutory posture of the case is no barrier to review. The Court should address that important legal question, as well as the court of appeals' errors on the remaining counts.

I. THE GOVERNMENT DOES NOT DISPUTE THAT THIS CASE PRESENTS AN ACKNOWLEDGED AND LONG-STANDING CIRCUIT CONFLICT ON AN IMPORTANT QUESTION OF FEDERAL LAW

The Government concedes the existence of the circuit conflict that forms the basis for the petition on the money laundering charge. It acknowledges that "[t]wo 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.'" Br. in Opp. 18 (citing *United States* v. *Loe*, 248 F.3d 449 (5th Cir. 2001); and *United States* v. *Rutgard*, 116 F.3d 1270 (9th Cir. 1997)). The Government thus admits that "two circuits have previously agreed with [Mr. Silver's] view," while "seven have rejected it." *Id.* at 13. For that reason, "[p]etitioner 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." *Id.* at 15.

The Government, moreover, does not dispute the importance of that circuit conflict. As Mr. Silver explained, the Government charges money laundering offenses more than a thousand times per year, and a substantial portion of those cases are brought under § 1957. Pet. 19-20. Those cases routinely involve commingled accounts. As a result, courts of appeals and district courts regularly grapple with the precise question presented here. *Id.* at 14-19, 20-21 & nn.1-2 (collecting cases).

The Government's only response to the claim of circuit conflict is to quibble over the precise scope of the rule followed in the Fifth Circuit. Br. in Opp. 18-19. The Government admits that, in the Fifth Circuit no less than the Ninth Circuit, "'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.'" *Id.* at 18. But the Fifth Circuit has held that, where a defendant engages in a *series* of transfers, the Government need only prove insufficient clean funds to cover the withdrawals *in the aggregate* rather than on a transfer-by-transfer basis. *Id.* at 19 (citing *United States* v. *Fuchs*, 467 F.3d 889 (5th Cir. 2006); *United States* v. *Davis*, 226 F.3d 346 (5th Cir. 2000); and *United States* v. *Heath*, 970 F.2d 1397 (5th Cir. 1992)). Contrary to the Government's assertions, that clarification does nothing to undermine the existence or importance of the circuit conflict.

The Fifth Circuit's aggregation rule is not a rejection of the tracing requirement. It is merely a refinement of what that tracing requirement entails in a case involving multiple transfers. For example, if a defendant has an account containing $100,000 of clean funds and $900,000 of criminal proceeds, and he withdraws a total of $800,000 from the account by means of 16 transfers of $50,000

apiece, the Fifth Circuit would allow a conviction to stand even though it is impossible to say whether any individual $50,000 transfer includes criminal proceeds. The $800,000 *in the aggregate* obviously includes such proceeds, and that is sufficient in the Fifth Circuit.

Whatever the merits of that approach, it is irrelevant here. The Government nowhere claims that its evidence was sufficient under the Fifth Circuit's aggregation rule. Nor could it: The Government charged Mr. Silver with eight transfers ranging from $10,243.96 to $100,000, with an aggregate value of $287,191.93. Br. in Opp. 6; Dkt. 32 ¶45 (superseding indictment). Mr. Silver's account had more than enough clean funds to cover those transfers *even on an aggregate basis*. Bank statements showed more than $8.3 million deposited into the account, including salary, tax refunds, flex spending payments, health insurance, and other unchallenged receipts. Pet. 8. The Government's own trial exhibits showed more than $4 million in clean deposits. See Gov't Ex. 1507 (C.A. App. 953) ($1.57 million in legislative salary and $2.53 million in unchallenged law firm income). Those clean funds dwarfed the $287,191.93 in charged transfers. That evidence would not support a conviction under *any* variation of the Fifth and Ninth Circuits' tracing rule, with or without aggregation. The Government never claims otherwise.[1]

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[1] In its statement of facts, the Government contends that "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." Br. in Opp. 7. But that assertion is irrelevant under the Fifth and Ninth Circuits' rule. What matters under that rule is the amount of the charged transfer compared to the total amount of clean funds in the account—not the amount of the charged transfer compared to the amount of one particular deposit.

It is thus no surprise that the Second Circuit's decision below had nothing to do with aggregation. Rather, the court "adopt[ed] the majority view of our 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 (emphasis added). The finer points of whether tracing should be done on a transfer-by-transfer or aggregate basis are academic if the Government need not trace funds at all.

The Second Circuit's approach is no anomaly. Courts following the so-called "majority rule" regularly sustain convictions under § 1957 even where the evidence would not satisfy the Fifth Circuit's aggregation rule. See, *e.g.*, *United States* v. *Moore*, 27 F.3d 969, 976-977 (4th Cir. 1994) (upholding conviction based on a single $37,000 transaction from assets comprising $100,000 of clean funds and $926,000 of criminal proceeds). The Fifth Circuit's aggregation rule thus does nothing to obscure or diminish the importance of the more basic conflict over whether § 1957 requires tracing at all.

The circuit conflict presented by this petition is whether § 1957 imposes a tracing requirement. That there may be some room for debate over how precisely that requirement should be applied is beside the point when many circuits do not require tracing at all. The Fifth and Ninth Circuits have planted themselves firmly on one side of that conflict, and the Second Circuit has now planted itself on the other. That threshold issue warrants this Court's review.

II. THE GOVERNMENT'S MERITS ARGUMENTS ARE NO BASIS TO DENY THE PETITION

The Government's arguments on the merits also fail. The Government asserts that, because a "strict tracing requirement * * * would frustrate any prosecution under

Section 1957 where an account contains sufficient 'clean' funds to cover a withdrawal," "the only reasonable interpretation of Section 1957 * * * is one that does not require each dollar to be traced to a specific criminal source." Br. in Opp. 17. That results-oriented argument is no justification for the Government's position.

That a particular interpretation of a criminal statute would "frustrate * * * prosecution" in cases falling outside its scope is not a reason to reject the interpretation. The Government does not claim that the Fifth and Ninth Circuits' approach would frustrate prosecutions under §1957 generally. Nor could it: The Government continues to obtain convictions in the Fifth and Ninth Circuits with some frequency despite the rule those circuits apply. See Pet. 27 (collecting cases); Br. in Opp. 19 (additional cases). The Government's argument effectively amounts to a claim that this Court should adopt the broader of two interpretations because otherwise it would frustrate prosecution in cases where the Government can satisfy one standard but not the other. That is not a legitimate method of statutory construction. Indeed, that is precisely the approach this Court rejected in *Santos* when it refused to "resolve [a] statutory ambiguity in light of Congress's presumptive intent to facilitate money-laundering prosecutions." *United States* v. *Santos*, 553 U.S. 507, 519 (2008) (plurality). As the Court explained, "[w]e interpret ambiguous criminal statutes in favor of defendants, not prosecutors." *Ibid.*

The scope of §1957 depends, not on its tendency to facilitate prosecutions, but on the statutory text. And while the Government quotes the statute, it makes no attempt to analyze that text or connect the text to its preferred rule. Section 1957 requires a transaction "*in* criminally derived property." 18 U.S.C. §1957(a) (emphasis

added). That language plainly requires the Government to prove that the "property" at issue—the specific funds transferred—*is* "criminally derived." The only way to satisfy that requirement is to trace the funds to a criminal source. The Government offers no plausible textual basis—or indeed any textual analysis whatsoever—for its contrary rule.

The Government claims that its construction of § 1957 is "consistent with the surrounding statutory scheme" because some courts have adopted its preferred view of the other money laundering statute, 18 U.S.C. § 1956. Br. in Opp. 15, 17-18. That is bootstrapping. All but one of the cases the Government cites are from the same circuits that have adopted its construction of § 1957. That those circuits have made the same mistake with respect to both statutes does not show that the Government's construction is supported by statutory context.

The Government urges that, "[a]t a minimum, a jury could be instructed as to potential accounting techniques under which the evidence here could suffice for conviction." Br. in Opp. 18 & n.*. But the Government never explains why "accounting techniques" are relevant to a criminal case, where the standard is proof beyond a reasonable doubt. The Government cites no case that has ever applied its accounting techniques to a § 1957 prosecution. One of the two cases it cites *rejected* the accounting technique as foreclosed by circuit precedent. See *Loe*, 248 F.3d at 467 n.81. And the other case did not involve § 1957 at all: It involved a forfeiture statute that the court construed to permit accounting techniques only because of the reduced standard of proof applicable to forfeiture cases. See *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1159-1160 (2d Cir. 1986) ("Congress's allocation of the burden of proof in drug proceeds

forfeiture cases persuades us that the Government is correct * * * .").

III. THE CASE'S INTERLOCUTORY POSTURE DOES NOT WARRANT DENIAL OF REVIEW

Having conceded the existence of the circuit conflict and made no serious attempt to derive its preferred construction from the statutory text, the Government's opposition comes down to a single argument: that the Court should deny review because the case is interlocutory. Br. in Opp. 14-15. Whatever relevance that factor may have in other cases, it is no basis for denying review here.

It is well-settled that a case may be "reviewed despite its interlocutory status" where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stephen M. Shapiro *et al.*, *Supreme Court Practice* §4.18, at 283 (10th ed. 2013) (collecting cases); see, *e.g.*, *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947) ("Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.'"); *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) (ruling was "fundamental to the further conduct of the case"). The reasons for that rule are obvious. As the Government notes, "judicial efficiency" often favors awaiting final judgment because "the issues raised in the petition may be rendered moot by further proceedings on remand." Br. in Opp. 14. But where an interlocutory ruling is fundamental to the further conduct of the case, there are judicial efficiency considerations pointing the other way too. It is a waste of resources to conduct proceedings on remand under standards that may be fundamentally altered by this Court's eventual decision in the case.

It is hard to imagine a more suitable case for that principle. The question on which Mr. Silver seeks review would not just fundamentally alter the further conduct of the case. It would determine whether the Government may prosecute this charge at all. The Government does not dispute that, if this Court reverses the sufficiency ruling, double jeopardy would prevent it from retrying the charge. Pet. 28. It is a waste of resources—and a needless infringement of Mr. Silver's double jeopardy rights—to compel a retrial before addressing a legal issue already squarely presented by the judgment below.

Notwithstanding the general preference for reviewing final judgments, this Court routinely reviews interlocutory rulings in criminal cases, whether or not relief could also be granted on appeal from a later conviction. See, *e.g.*, *Kaley* v. *United States*, 134 S. Ct. 1090 (2014) (asset restraints); *Sell* v. *United States*, 539 U.S. 166 (2003) (forced medication); *Lewis* v. *United States*, 518 U.S. 322 (1996) (denial of jury trial for petty offense); *United States* v. *Monsanto*, 491 U.S. 600 (1989) (asset restraints); *United States* v. *Karo*, 468 U.S. 705 (1984) (motion to suppress); *Oliver* v. *United States*, 466 U.S. 170 (1984); *United States* v. *Donovan*, 429 U.S. 413 (1977); *United States* v. *Giordano*, 416 U.S. 505 (1974). The same approach is warranted here. The Second Circuit decided an important question of federal law on which there is an intractable circuit conflict implicating offenses the Government charges more than a thousand times per year. This Court can and should settle that conflict. Its ability to do so will not be aided in the slightest by waiting to see what rulings may emerge from Mr. Silver's retrial.

IV. THE COURT OF APPEALS' RULINGS ON THE REMAINING ISSUES WARRANT REVIEW

This Court should also review the court of appeals' holdings on the remaining counts.

This Court made clear in *Sekhar* v. *United States*, 133 S. Ct. 2720 (2013), that extortion under the Hobbs Act requires not only an "acquisition" but a "deprivation" of property. *Id.* at 2725. Mr. Silver never "deprived" anyone of property here. The Government claims that a deprivation must have occurred because the mesothelioma leads and tax certiorari business had "inherent value to the law firms" that received them. Br. in Opp. 21. But that proves at most that the law firms *acquired* valuable property. It does not show that Mr. Silver *deprived* anyone of property. *Sekhar* requires both. 133 S. Ct. at 2725. The Government's refusal to take that distinction seriously only underscores the need for review.

Nor was there any "paradigmatic" bribe or kickback as required for honest services fraud under *Skilling* v. *United States*, 561 U.S. 358 (2010). The Government claims that the case involves "classic kickback schemes" because "Dr. Taub and the developers * * * gave kickbacks to petitioner in the form of referrals to his law firms, which resulted in the payment of money to petitioner." Br. in Opp. 21. But the Government elides the fact that the "payment of money to petitioner" was the same ordinary-course compensation that *any* attorney received for bringing in new business. If a public official steers state business to a company in which he holds an ownership stake and from which he receives dividend payments, that is at most self-dealing, not a bribe or kickback. Referral fees are no different. Once again, the lower courts have expanded the honest services statute

beyond the narrow range of conduct this Court recognized in *Skilling*. That error likewise warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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