

No. 19-782

In the Supreme Court of the United States

VAHAN KELERCHIAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether sufficient evidence supports the jury's finding that petitioner committed wire fraud, the unlawful activity underlying his conviction for money laundering, when he made misrepresentations to induce a manufacturer to sell machineguns to an unlawful purchaser.

2. Whether sufficient evidence supports petitioner's conviction for conspiracy to defraud the Food and Drug Administration (FDA), in violation of 18 U.S.C. 371, when petitioner agreed to make material misrepresentations to induce the sale of laser sights restricted by the FDA to an unauthorized purchaser and to preclude accurate FDA-required recordkeeping of that sale.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 937 F.3d 895. The opinion and order of the district court (Pet. App. 62a-69a) is not published in the Federal Supplement but is available at 2015 WL 3832667.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2019. The petition for a writ of certiorari was filed on November 20, 2019. 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 Northern District of Indiana, petitioner was convicted on one count of conspiring to provide false information to a federal firearms licensee, in vio-

lation of 18 U.S.C. 371; one count of conspiring to defraud the Food and Drug Administration (FDA), in violation of 18 U.S.C. 371; one count of conspiring to make false statements requesting a firearms demonstration of machineguns, in violation of 18 U.S.C. 371; four counts of making false statements requesting a firearms demonstration of machineguns, in violation of 18 U.S.C. 1001; and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Am. Judgment 1. The district court sentenced petitioner to 100 months of imprisonment, to be followed by one year of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1a-43a.

1. Petitioner, a licensed firearms dealer in Pennsylvania, conspired with two officers at a local sheriff's department to import machineguns in violation of the National Firearms Act, 26 U.S.C. 5801 *et seq.* Pet. App. 4a. That statute generally prohibits the importation of machineguns, but makes an exception for guns imported for use by federal and state governmental agencies. See 26 U.S.C. 5844(1). In 2008, the conspirators ordered 50 machineguns using paperwork falsely stating that the purchase was for use by the sheriff's department. Pet. App. 4a-5a. After receiving the guns, the conspirators disassembled them, distributed the valuable parts among themselves, and sold the parts for a substantial profit. *Id.* at 5a. The conspirators followed the same procedure for nine more machineguns in February 2009 and 12 more machineguns in October 2009. *Id.* at 5a-6a.

Petitioner and his co-conspirators also exploited a separate statutory exception that allows the importation of machineguns "solely for use as a sample by a registered importer or registered dealer." 26 U.S.C. 5844(3). One of petitioner's co-conspirators wrote five

letters to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) falsely stating that the sheriff's department was interested in demonstrations of machineguns from petitioner. Pet. App. 6a. Those letters enabled petitioner to obtain nine machineguns from a seller. *Id.* at 6a-7a.

Petitioner and his co-conspirators also developed a scheme to purchase laser sights—devices that can be attached to firearms and that can project laser beams onto targets. Pet. App. 7a-8a. Because laser sights can cause eye damage, FDA regulations require them to be equipped with visible or audible warnings. See 21 U.S.C. 360ii; 21 C.F.R. 1040.10(f), (g)(2)(iii). Those regulations, however, exempt certain laser sights used by law-enforcement agencies. See 21 U.S.C. 360oo(b); 21 C.F.R. 1010.5(a). Dealers, distributors, and manufacturers of laser sights are also required to keep records of purchases, which the FDA may inspect. See 21 C.F.R. 1002.30, 1002.31, 1002.40, 1002.41. The conspirators ordered 75 laser sights from a company that held a variance allowing it to sell laser sights without the required warnings to law-enforcement agencies. Pet. App. 8a. The conspirators falsely stated that the laser sights were for use by the sheriff's department. *Ibid.*

2. A federal grand jury in the United States District Court for the Northern District of Indiana indicted petitioner on one count of conspiring to provide false information to a federal firearms licensee, in violation of 18 U.S.C. 371 and 924(a)(1)(A); one count of conspiring to defraud the FDA, in violation of 18 U.S.C. 371; one count of conspiring to make false statements requesting a firearms demonstration of machineguns, in violation of 18 U.S.C. 371 and 1001; four counts of making false

statements requesting a firearms demonstration of machineguns, in violation of 18 U.S.C. 1001; one count of bribery, in violation of 18 U.S.C. 666(a)(2); and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i), (h), and 1957. Indictment 1-24. The money-laundering charge alleged that petitioner and his co-conspirators had engaged in wire fraud to obtain machineguns and had then laundered the proceeds of that fraud. Pet. App. 9a.

The district court denied petitioner's motion to dismiss certain counts of the indictment. Pet. App. 64a-69a. As relevant here, the court rejected petitioner's contention that he could not be convicted of the Section 371 count that alleged fraud on the FDA, explaining that petitioner had obstructed the FDA's legitimate oversight of the sale of dangerous devices by lying to the seller about the identity of the true purchaser of the laser sights. *Id.* at 68a-69a.

A jury found petitioner guilty on all counts except for the bribery charge. Pet. App. 10a. The district court sentenced petitioner to 100 months of imprisonment, to be followed by one year of supervised release. Am. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-43a.

As relevant here, the court of appeals found sufficient evidence for petitioner's conviction for conspiring to commit money laundering. Pet. App. 19a-32a. The court observed that, in order to establish money laundering, the government must show that an underlying "unlawful activity" generated the proceeds that were then laundered. *Id.* at 20a. The court further observed that the underlying unlawful activity here was wire fraud in violation of 18 U.S.C. 1343, and explained that the conspirators had engaged in that activity when they

had falsely stated to the machinegun seller that the machineguns were being purchased for use by the local sheriff's department. Pet. App. 20a-21a.

The court of appeals rejected petitioner's contention that, because the conspirators paid full price for the machineguns, the submission of false statements about their eligibility to buy those machineguns did not deprive the importer of a property interest and thus did not constitute wire fraud. Pet. App. 22a. The court stated that it would not "establish a comprehensive guide on the scope of the mail and wire fraud statutes," but would instead focus on the particular facts of this case. *Id.* at 30a. The court explained that, in this case, "the destination of the machineguns—a law enforcement agency—was an 'essential element of the bargain.'" *Id.* at 31a. The court observed that, as a result of the conspirators' false statements, the gun importer "opened itself up to risks it did not bargain for: risks of liability, of increased government scrutiny, and negative publicity, all of which in turn could jeopardize future sales." *Ibid.* In those circumstances, the court determined, "the fact that the seller was paid full price does not mean it received all it bargained for and is not decisive." *Id.* at 30a.

The court of appeals also affirmed petitioner's conviction for defrauding the FDA in violation of 18 U.S.C. 371, which prohibits conspiracy to "defraud the United States, or any agency thereof in any manner or for any purpose." See Pet. App. 14a-17a. The court rejected the contention that, because petitioner had violated only an FDA policy rather than a statute or regulation with the force of law, petitioner's conduct did not violate Section 371. *Id.* at 14a. The court observed that Section

371 prohibits “any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.” *Ibid.* (quoting *Tanner v. United States*, 483 U.S. 107, 128 (1987)). The court further observed that federal law authorizes the FDA to regulate laser devices, 21 U.S.C. 360ii; that the FDA has promulgated safety regulations pursuant to that authority, 21 C.F.R. 1040.10; and that a manufacturer violates federal law by selling restricted devices without first obtaining a variance, 21 U.S.C. 360oo(a)-(b). Pet. App. 15a. The court also explained that petitioner’s conduct—deceiving a seller of laser sights into violating federal law and causing the seller to create a false paper trail that would prevent the FDA from tracking the true owners of the devices—violated Section 371. *Id.* at 16a-17a.

ARGUMENT

Petitioner contends that insufficient evidence supports the wire-fraud predicate for his conviction for money laundering (Pet. 12-27), and that his misrepresentations to a regulated private seller of laser sights cannot be a fraud against a government agency in violation of Section 371 (Pet. 27-35). The court of appeals affirmed petitioner’s convictions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner’s challenge (Pet. 12-27) to his conviction for conspiring to launder the proceeds of wire fraud does not warrant this Court’s review.

a. The wire-fraud statute prohibits schemes for “obtaining money or property” through deceit. 18 U.S.C. 1343. The market for machineguns is “highly regulated,” and if a person who is “not legally entitled” to buy a machinegun uses falsehoods to induce a seller to

sell him such a gun, the buyer has obtained property through deceit. Pet. App. 29a-30a.

Petitioner errs in claiming (Pet. 12-27) that his conviction depends on a “right to control” theory, under which the right to control the use of one’s property itself constitutes a property interest within the meaning of the fraud statutes. The phrase “right to control” does not appear anywhere in the indictment. And the jury was not instructed on a “right to control” theory. Instead, the jury received a standard instruction that a “scheme to defraud involves a materially false or fraudulent pretense, representation, or promise” that is devised to obtain money or property. D. Ct. Doc. 178, at 63 (Oct. 19, 2015).

The court of appeals, in turn, stated that “the ‘right to control one’s assets’ does *not* render every transaction induced by deceit actionable under the mail and wire fraud statutes.” Pet. App. 28a (emphasis added; brackets and citation omitted). And although the court at points framed its reasoning in terms of the fraud victim’s “property interest,” *e.g.*, *id.* at 32a, in substance its rationale focused on the materiality of petitioner’s deceit. The court drew a distinction between “schemes that do no more than cause their victims to enter into transactions they would otherwise avoid,” which the court stated would not violate the mail and wire fraud statutes, and “schemes that depend for their completion on a misrepresentation of an essential element of the bargain,” such as a buyer’s legal eligibility to make the purchase. *Id.* at 29a (citation omitted). This Court’s decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), supports a conviction for fraud in such circumstances. In *Bridge*, this Court explained that a person may commit mail fraud by using false

statements to obtain “the opportunity to participate in [an] auction” even though he is not legally eligible to do so. *Id.* at 644; see *id.* at 648. *Bridge* confirms that the fraud statutes cover schemes—such as the one at issue here—to use deceit to obtain money or property for which the fraudsters are legally ineligible.

The court of appeals made clear that it was not attempting to establish any “comprehensive” test regarding “the scope of the mail and wire fraud statutes.” Pet. App. 30a. The court instead “concentrate[d] on the case before [it]” and “focused on illegal imports of highly regulated and dangerous machineguns.” *Ibid.* In doing so, the court also emphasized that, as a result of petitioner’s misrepresentations about that element, the seller “opened itself up to risks it did not bargain for: risks of liability, of increased government scrutiny, and negative publicity, all of which in turn could jeopardize future sales.” *Id.* at 31a. Petitioner’s misrepresentations thus caused the seller to receive less value than it expected from a transaction that it believed to be fully legal.

b. Petitioner fails to identify a decision of any other court of appeals reversing a conviction involving materially identical facts.

Petitioner primarily asserts (Pet. 19, 21) that the decision below conflicts with *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014), and *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). But those decisions involved customers who lied to sellers about what they planned to do with the products they purchased. *Sadler*, 750 F.3d at 590-591 (false assurances that purchased opiates would be used for poor patients); *Bruchhausen*, 977 F.2d at 466-468 (false assurances that purchased equipment would not be sent to certain foreign

countries). The Sixth and Ninth Circuits found that the deception in those cases did not constitute fraud because the seller had no property interest in “accurate information” about the intended use of its products, *Sadler*, 750 F.3d at 591, or “in the disposition of goods it no longer owns,” *Bruchhausen*, 977 F.2d at 468.

Although the decision below in this case criticized the reasoning of *Bruchhausen*, see Pet. App. 31a, the factual scenarios are distinct. The seller in this case had more than a “right to refuse” to make the sales, *Bruchhausen*, 977 F.2d at 467; it had a legal obligation, backed by criminal penalties, not to sell machineguns to petitioner unless they were for use by the sheriff’s department. The decisions that petitioner cites do not hold that a scheme such as this one, in which a buyer lies about the lawfulness of the transaction itself, lies outside the scope of the fraud statutes.*

c. Contrary to petitioner’s contention (Pet. 27), this Court also should not hold this petition for a writ of certiorari for *Kelly v. United States*, No. 18-1059 (argued Jan. 14, 2020).

The petitioner in *Kelly* argues that the fraud statutes draw a distinction between “falsehoods that merely induce ‘victims to enter into transactions that they would otherwise avoid’” (which, she states, do not violate the fraud statutes) and “lies that concern the transaction’s

* Petitioner also contends (Pet. 13) that the Third Circuit’s decades-old decision in *United States v. Zauber*, 857 F.2d 137 (1988), cert. denied, 489 U.S. 1066 (1989), rejects a “right to control” theory of property. But even assuming his conviction depended on such a theory, the Third Circuit’s more recent cases explain that *Zauber* did not “categorically reject[] the contention that the ‘right to control’ one’s property is itself a property interest,” *United States v. Al Hedaithy*, 392 F.3d 580, 601 (2004), cert. denied, 544 U.S. 978 (2005); see *id.* at 603.

essential terms” (which, she acknowledges, do violate those statutes). Pet. Br. at 50, *Kelly, supra* (No. 18-1059) (citation omitted); see *ibid.* (distinguishing deception about “‘preferences’” from “deception about the *terms of the exchange*”) (citation omitted). As discussed, the conviction below is valid under that theory, because the lies in this case did concern “an ‘essential element of the bargain.’” Pet. App. 31a.

The petitioner in *Kelly* also draws a distinction between the government’s regulatory and proprietary interests, and argues that a scheme that “deprive[s] the State” of its “sovereign right to control” the use of a public bridge does not constitute a scheme to deprive a person of money or property. Pet. Br. at 37-38, *Kelly, supra* (No. 18-1059). As just explained, however, the conviction in this case does not rest on a “right to control” theory at all, much less a theory involving the government’s right to control the use of a public asset such as a bridge. This Court’s resolution of *Kelly* thus would not affect the proper disposition of petitioner’s case.

2. A writ of certiorari also is not warranted to review petitioner’s contention (Pet. 27-35) that his false statements in connection with his purchase of laser sights did not violate 18 U.S.C. 371.

Section 371 prohibits conspiracy “to defraud the United States, or any agency thereof in any manner or for any purpose.” 18 U.S.C. 371. This Court has long held that Section 371 “reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.” *Tanner v. United States*, 483 U.S. 107, 128 (1987) (quoting *Dennis v. United States*, 384 U.S. 855, 861 (1966)); see, e.g., *Hammerschmidt v. United States*, 265 U.S. 182, 185 (1924). Here, the FDA both restricts the sale of laser

sights that lack safety mechanisms and tracks the purchases of laser sights. Pet. App. 15a. Petitioner and his co-conspirators accordingly violated Section 371 by conspiring to make misrepresentations that would “allow[] them to possess devices that federal law prohibits” and by conspiring to cause the seller “to create a false paper trail for these devices that would make it impossible for the FDA to keep track of the true owners of these dangerous products.” *Id.* at 16a.

Petitioner errs in contending (Pet. 30-32) that misrepresentations to a regulated private seller cannot violate Section 371. This Court has explained that “a fraud [under Section 371] may be established when the defendant has made use of a third party to reach the target of the fraud.” *Tanner*, 483 U.S. at 129. Petitioner conspired to do just that here by conspiring to use the seller to impair, obstruct, and defeat the FDA’s regulation of the sale of laser sights and by conspiring to induce the seller of the laser sights “to create a false paper trail for these devices that would make it impossible for the FDA to keep track of the true owners.” Pet. App. 16a; see, e.g., *United States v. Rodman*, 776 F.3d 638, 642-643 (9th Cir. 2015) (defendants impeded lawful functions of ATF by submitting fraudulent registration and transfer forms); *United States v. Barker Steel Co.*, 985 F.2d 1123, 1133-1136 (1st Cir. 1993) (defendants’ fraud that caused middleman to record false information impeded the government’s ability to regulate certification process).

Petitioner also errs in contending (Pet. 29, 32-33) that he cannot be criminally liable for conspiring to obstruct FDA regulations because the FDA regulates sellers rather than purchasers, no statutory provision

makes it illegal to receive laser sights, and a manufacturer's failure to obtain accurate records of laser sights is subject only to a civil penalty. Congress authorized the FDA to regulate laser devices, see 21 U.S.C. 360ii; the FDA exercised that authority to promulgate regulations requiring laser sights to be equipped with visible or audible warnings, see 21 C.F.R. 1040.10(f), (g)(2)(iii); and Congress has barred manufacturers from selling products that do not comply with those standards unless a variance is granted, see 21 U.S.C. 360oo(a)-(b). Pet. App. 15a. Congress has not separately made it a crime to receive illegal laser sights, but it *has* made it a crime to conspire to impair, obstruct, or defeat the lawful functions of any federal agency. See 18 U.S.C. 371; *Tanner*, 483 U.S. at 128. For the reasons just explained, petitioner conspired to do so here. See pp. 10-11, *supra*.

Petitioner identifies no conflict in the courts of appeals regarding any of his arguments about Section 371. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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