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In the
Supreme Court of the United States

SHIRENE HERNANDEZ

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

The Court avoided a “vagueness shoal” in *Skilling* by holding that 18 U.S.C. § 1346’s prohibition on schemes targeting “the intangible right of honest services” forbids “only bribery and kickback schemes.” *Skilling v. United States*, 561 U.S. 358, 368 (2010). The statute does not prohibit “undisclosed self-dealing by a public official,” *id.* at 409, though Petitioner and many like her have been convicted on just such a theory. The question presented here is whether after *Skilling*, must the “right of honest services” described in 18 U.S.C. § 1346 be defined in relation to a specific fiduciary duty against bribes or kickbacks, rather than a fiduciary duty against self-dealing, as presently permitted by the Ninth Circuit?

RELATED PROCEEDINGS

1. *United States v. Shirene Hernandez*, Case No. 20-50012 (9th Circuit) (August 13, 2021)
2. *United States v. Shirene Hernandez*, Case No. 8:18-cr-00018-AG-1 (C.D. Cal) (January 14, 2020)

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OPINIONS BELOW

The unpublished opinion of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. Pet. App. 1a-6a.

The district court's oral order is reproduced in the appendix. Pet. App. 7a.

JURISDICTION

The court of appeals entered judgment on August 13, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1346

For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE**I. The Indictment Charged Two Honest Services Fraud Theories.**

Petitioner, Shirene Hernandez, was a property sales representative for Fannie Mae. The Government prosecuted Ms. Hernandez under two different theories of honest services fraud. The first theory was that Ms. Hernandez assigned Fannie Mae properties to real estate brokers who paid her kickbacks from their commissions. The second was that she defrauded Fannie Mae by secretly selling herself a Fannie Mae property below the market value.

Both permeated the indictment. The indictment alleged she engaged in “bribes and kickbacks that brokers paid, often in cash, to defendant for the performance of her official duties, including the assignment of real estate listings” to real estate agents willing to pay. ER 1372¹. It also alleged “that, in at least one instance, defendant purchased a property from herself for herself, at a price that was below market value for the property, and that she used intermediaries to hide her involvement in the transaction.” *Id.* Of the six manners and means alleged by the indictment, half

¹ Citations to “ER” refer to pages of the Excerpts of Record filed before the Ninth Circuit Court of Appeals.

described the Government's undisclosed self-dealing theory:

“Defendant HERNANDEZ also provided favorable official action at Fannie Mae to herself and other co-schemers by authorizing below market sales of Fannie Mae REO properties to herself, through intermediaries and alter egos, and to bribing brokers, including at least one property sold to a bribing broker in or about April 2011.” ER 1461.

“Defendant HERNANDEZ rented the properties that she purchased through intermediaries and alter egos and received the rent payments through those intermediaries and alter egos.” ER 1462.

“In at least one instance, defendant HERNANDEZ transferred the property that she purchased from Fannie Mae through intermediaries and alter egos to a company that she controlled and received rent payments directly, including rent payments made through at least July 2016.” *Id.*

None of the foregoing means complied with *Skilling*.

II. The Government Persisted in Its Self-Dealing Theory at Trial.

At trial, the Government pursued both bases for conviction. The Government presented evidence of kickbacks on some property sales. However, the Government also tirelessly asserted to the jury that it was a crime for Ms. Hernandez to conceal self-dealing in one of the sales and focused upon Ms. Hernandez's fiduciary duty against self-dealing. For example, the prosecutor asserted to the jury:

“As a Fannie Mae employee, defendant owed Fannie Mae a duty to act in a trustworthy and honest manner. And the charges related to defendant violating that trust by engaging in a scheme to take bribes and kickbacks *and to sell the property to herself*,” ER 1025 (emphasis added);

Ms. Hernandez “purchased a property from herself for herself at a price that was below market value for the property and that she used intermediaries to hide her involvement in the transaction,” ER 1263;

“she sold a property to herself as part of the bribery scheme.” ER 340-41;

“She approved below-market deals for herself” ER 361;

“She abused her position as a Fannie Mae sales rep when she decided to purchase a property for herself for less than it was worth and reject those offers by real investors who are trying to purchase the property for much more and then concealing the fact that it was really her who was buying the property,” ER 380;

“The evidence shows that defendant received training on Fannie Mae

policies. She knew she couldn’t sell properties to herself,” *id.*

To protect against conviction based upon the Government’s improper arguments, Ms. Hernandez sought an instruction stating plainly that self-dealing and undisclosed conflicts of interest are not honest services fraud. ER 314. But the district court rejected Mr. Hernandez’s proposed instruction in favor of the Ninth Circuit’s pattern instruction asking the jury to apply the phrase “right of honest services” without clarifying its meaning and without

requiring a specific intent to obtain kickbacks. The instructions asked the jury to determine whether Ms. Hernandez participated in a scheme to “deprive Fannie Mae of its right of honest services,” whether “the scheme or plan consists of a bribe or kickback in exchange for the defendant's services,” and whether she “acted with the intent to defraud by depriving Fannie Mae of its right of honest services.” ER 332.

The jury received a general verdict form which did not differentiate between the allegations of kickbacks and undisclosed self-dealing. ER 183. After the government’s arguments, and in absence of an instruction precluding conviction for self-dealing, the jury returned general verdict of guilty on both counts. *Id.*

III. The Ninth Circuit Affirmed

Ms. Hernandez appealed, arguing to the Court of Appeals for the Ninth Circuit that *Yates v. United States*, 354 U.S. 298 (1957), requires reversal because the jury might have convicted her based upon the Government’s undisclosed self-dealing theory, in violation of *Skilling v. United States*, 561 U.S. 358, 409 (2010). The Ninth Circuit affirmed, stating that its model instruction “maps on to *Skilling’s* holding” because it requires “conduct

involving ‘bribes or kickbacks.’” Pet. App. 3a (citing *Skilling*, 561 U.S. at 409-10).

REASONS FOR GRANTING THE PETITION

The majority in *Skilling* acknowledged that the “vagueness challenge has force,” *Skilling*, 561 U.S. at 405, but avoided vagueness concerns by limiting the protected “right of honest services” to “*only*” to bribes and kickbacks, *id.* at 409 (emphasis original). Justices Scalia, Thomas, and Kennedy, concurring, argued that the statute was unconstitutionally vague because “it provides no definition of the right of honest services whose deprivation it prohibits.” *Id.* at 416 (Scalia, J. concurring). Thus, although no opinion garnered all nine justices, this Court was unanimous in *Skilling* that 18 U.S.C. § 1346’s prohibition on schemes targeting “the intangible right of honest services” could raise vagueness concerns grounded in Due Process.

Now, though the meaning of the central phrase has vexed learned judges for decades, federal juries are still routinely asked whether the government proved intent to deprive the victim of their “right of honest services.” See e.g., *United States v. Rodrigues*, 678 F.3d 693, 696 (9th Cir. 2012) (approving the instruction given here). Thus, resolving whether jury instructions must tether the

“right of honest services” to a right against kickbacks rather than self-dealing presents an important federal question.

I. The Federal Circuits’ Varied Approaches to Honest Services Fraud Are Inconsistent with One Another and *Skilling*.

In response to *Skilling*, efforts to define the “right of honest services” have varied significantly. Some circuits have sought to limit it to the breach of a duty not to accept or solicit kickbacks or bribes. Meanwhile, trial courts in the Ninth Circuit ask jurors to determine whether *any* fiduciary duty has been proven and, if so, whether defendant intended to deprive the victim of their “right of honest services.” These varied approaches are inconsistent with one another and with *Skilling*.

A. Jury Instructions for Honest Services Fraud Require Different Proof in Different Circuits.

In contrast to the instruction given in this case and adopted as the model instruction for the Ninth Circuit, neither the Third nor Eleventh Circuit’s pattern instruction requires proof of a fiduciary duty. Instead, both the Third Circuit and Eleventh Circuit have adopted pattern jury instructions expressly linking the intent to deprive

of honest services with the breach of a public duty not to accept or solicit bribes or kickbacks.

In pertinent part, the Third Circuit instruction provides:

A public official who accepts a bribe or a kickback; i.e., something of value in exchange for or as a reward for favorable treatment breaches the duty of honest, faithful, and disinterested service. . . . If you find beyond a reasonable doubt that (name of defendant) has violated the duty to provide honest services as defined here, then you may find the first element of the particular mail (wire) fraud count satisfied.

Third Circuit Model Criminal Jury Instruction 6.18.1341-3 (rev. 2016) available at www.ca3.uscourts.gov. The Eleventh Circuit's pattern instruction similarly provides:

To 'deprive someone else of the right of honest services' is to violate a duty to provide honest services to an employer by participating in a bribery or kickback scheme.

Eleventh Circuit Criminal Pattern Jury
Instructions O50.2 & O50.3 (revised Jan. 2019)
available at www.ca11.uscourts.gov.

In contrast, the Ninth Circuit pattern instruction given here does not define a deprivation of the right of honest services and requires proof of a fiduciary duty (without regard to whether or how that duty is breached):

First, the defendant devised or knowingly participated in a scheme or plan to deprive [name of victim] of [his] [her] right of honest services;

Second, the scheme or plan consists of a [bribe] [kickback] in exchange for the defendant's services. . .

Third, the defendant owed a fiduciary duty to [name of victim];

Fourth, the defendant acted with the intent to defraud by depriving [name of victim] of [his] [her] right of honest services;

Ninth Circuit Model Criminal Jury Instructions
8.123 (approved June 2021) available at
www.ce9.uscourts.gov.

Thus, in the Ninth Circuit, Ms. Hernandez could be, and was, convicted based upon evidence she breached a fiduciary duty to avoid conflicts of interest and undisclosed self-dealing. *See e.g.*, ER 1074 (discussing Fannie Mae’s Training Manual “They’re not able to purchase Fannie Mae REO properties”). Whereas, in the Third or Eleventh Circuits, evidence of duties unrelated to bribes or kickbacks would not suffice. Thus, this case presents an issue that has thus far divided the federal circuits.

**B. This Court Should Intervene Because
Neither Approach Comports with
Skilling.**

This Court should intervene now because none of these example jury instructions comport with this Court’s conception of core honest services cases before *McNally*, the “vast majority” of which involved offenders who violated a fiduciary duty not to accept kickbacks or bribes. *Skilling*, 561 U.S. at 407.

By using the phrase without defining it, the Ninth Circuit has punted the interpretive challenge posed by the phrase “right of honest services” to jurors so long as they can identify evidence of a bribe or kickback in any form. But for defendants like Ms. Hernandez, evidence of a kickback may be

untethered from her fiduciary duties. In such cases, the Ninth Circuit’s pattern instruction permits argument and conviction where the breach of fiduciary duty was self-dealing without any bribe or kickback. But this Court has prohibited application of 18 U.S.C. § 1346 beyond “paradigmatic cases of bribes and kickbacks.” *Id.* at 411. Thus, the instructions given below, and consistently by trial courts in the Ninth Circuit, do not comport with this Court’s holding that the honest services fraud statute condemns bribes, kickbacks, “and nothing more.” *Id.* at 410.

But the Third and Eleventh Circuits’ approaches fare no better. In contrast to the Ninth Circuit’s free-form examination of fiduciary duties, the Third and Eleventh Circuits have invented “a duty to provide honest services,” defined with reference to accepting kickbacks and bribes. Thus, neither circuit requires the jury to determine first whether such a duty exists, presuming instead that a duty was owed if the defendant accepted a bribe or kickback. But *Skilling* requires more. In *Skilling*, this Court described the “solid core” of pre-*McNally* honest-services cases to which section 1346 still applies as cases involving a “violation of a fiduciary duty.” *Id.* at 407.

As Justice Scalia warned in *Skilling*, there is no “universal agreement concerning the *source* of

the fiduciary obligation.” *Id.* at 417 (Scalia, J. concurring) (emphasis original). But this case presents a narrower question that has divided courts after *Skilling* – whether the phrase “right of honest services” adequately apprises jurors that the government must prove *both* the existence of a fiduciary duty not to accept bribes or kickbacks and a breach of that specific fiduciary duty rather than mere undisclosed self-dealing or conflicts of interest. The Third and Eleventh Circuits have responded by defining the phrase without reference to any fiduciary duty. The Ninth Circuit has responded by passing the interpretive task to jurors and allowing conviction based upon any fiduciary duty. This Court should intervene to settle the split.

II. This Case Is an Ideal Vehicle to Enforce *Skilling* and Prevent Further Divergence Among the Circuits.

In *Skilling*, this Court was not called upon to evaluate appropriate jury instructions because it was clear *Skilling* neither solicited nor accepted side payments from third parties in exchange for any illicit act. *Id.* at 413. Since then, the Government has continued to pursue honest services fraud cases involving evidence of *both* (1) bribes or kickbacks and (2) a breach of other fiduciary duties. See e.g., *United States v. Tanner*, 942 F.3d 60, 65 (2d Cir. 2019) (self-dealing where defendant had ownership

interest in company to which he steered business); *United States v. Ciavarella*, 716 F.3d 705, 729 (3d Cir. 2013) (evidence of undisclosed conflict of interests offered to prove intent); *United States v. Aunspaugh*, 792 F.3d 1302, 1308 (11th Cir. 2015) (jury could have impermissibly treated self-dealing as kickbacks). In *Skilling*, even the litigants incorrectly conflated undisclosed financial interests with a scheme to accept or solicit bribes or kickbacks. 561 U.S. at 409. Where both are present, the challenge for juries is untangling the two concepts with the aid of clear instructions. This case presents an ideal vehicle to enforce and clarify *Skilling*'s requirement of a bribe or kickback because there was evidence of *both* kickbacks *and* the breach of a fiduciary duty through undisclosed self-dealing.

Most importantly, the two legal theories underlying the case against Ms. Hernandez – that she received kickbacks and that she concealed her sale of a property to herself – were readily distinguished from one another. Ms. Hernandez did not receive a bribe or kickback from the sales commission on the property she sold herself – she received the property. ER 345 (“The evidence shows the defendant purchased this property for herself from herself while she was a sales representative at Fannie Mae”). Thus, although self-dealing, conflict of interests, kickbacks, and bribery are often

conceptually and factually intertwined, this case presents a clean opportunity to identify a set of facts and duties related to kickbacks that may support conviction after *Skilling* and a self-dealing fact pattern that cannot. If this Court resolves that issue in Ms. Hernandez’s favor, it will require reversal of her conviction, thereby correcting the error in her case. *Yates v. United States*, 354 U.S. 298 (1957). But it will simultaneously resolve the circuits’ competing applications of *Skilling*.

* * *

For these reasons, this Court should grant review here and resolve whether honest services fraud requires the “right of honest services” be defined in relation to a fiduciary duty against bribes or kickbacks rather than a fiduciary duty against self-dealing.

CONCLUSION

The petition for a writ of certiorari should be granted.

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