No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DAVID JOHNSON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to consider a question of federal law of exceptional importance where the defendant was convicted of honest services fraud but the evidence failed to establish a quid pro quo, or the knowledge of the defendant that the co-defendant owed a fiduciary duty to the City.

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Petitioner David Johnson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 3, 2017.

OPINION BELOW

The opinion of the United States Court of Appeals appears as Appendix A to the Petition and is reported at *United States v. David Johnson and Reginald Walton*, 874 F.3d 990 (7th Cir. 2017).

JURISDICTION

The Seventh Circuit's opinion denying Petitioner's appeal was entered on

November 3, 2017. (Appendix A) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1346 of Title 18, United States Code, provides in relevant part:

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

STATEMENT OF THE CASE

Petitioner David Johnson ("Johnson") and co-defendant Reginald Walton ("Walton") were charged in a superseding indictment with honest services wire fraud, in violation of 18 U.S.C. §§1343, 1346, and 2 (Counts One through Five); and, conspiracy to engage in a monetary transaction in criminally derived property, in violation of 18 U.S.C. §1956(h) and 1957 (Count Eleven). (R. 62)

According to the indictment, Walton, as the assistant administrator of the City of Indianapolis's Department of Metropolitan Development ("DMD"), was responsible for overseeing the operation of the Land Bank – an agency authorized by Indiana law to acquire abandoned and tax delinquent properties, maintain them, and then resell them to nonprofit and for-profit purchasers in order to return the properties to the active tax roll. (R. 62; Tr. 56-57) Johnson was the Executive Director of the Indianapolis Minority AIDS Coalition ("IMAC"), a nonprofit entity that worked within the City. (R. 62)

The indictment alleged that Walton, an employee of the City of Indianapolis

("City"), and Johnson, along with co-defendants John Hawkins, Randall Sargent and Aaron Reed, participated in a scheme to deprive the City of Walton's honest services through bribery and kickbacks in the sale of Land Bank properties. (R. 62) Walton and Johnson were also alleged in the indictment to have participated in a separate scheme to defraud certain purchasers of Land Bank property by unjustly inflating the price. (R. 62) That scheme revolved around a woman named Shelia Amos who had defrauded several people in the sale of homes Amos did not own. (R. 62) The Land Bank was used to provide homes to fourteen of the Amos victims, all of whom bought their Land Bank home through IMAC. (R. 62) According to the indictment, Walton and Johnson unjustly inflated the price of the homes the Amos victims paid. (R. 62)

Johnson and Walton were tried together before a jury, and were convicted of engaging in the fraudulent conduct. Petitioner appealed his conviction and sentence, relying heavily on the proposition that the evidence failed to establish that he was aware of Walton's fiduciary duty to the City, or that Walton's involvement in the purchase of properties created a conflict of interest with his employment with the City.

The Seventh Circuit's opinion was issued on November 3, 2017, and affirmed the convictions and sentences on all counts. *United States v. Johnson*, 874 F.3d 990 (7th Cir. 2017). With regard to Petitioner's challenge to the sufficiency of the evidence of honest services fraud as it applied to Johnson, the Seventh Circuit ruled that, despite Johnson's commendable goal of participating in the Land Bank transactions to help raise funds to subsidize housing for individuals with HIV and AIDS, the evidence established Johnson's knowledge of Walton's fiduciary duty and conflict of interest. *United States v. Johnson*, 874 F.3d 990, 1000 (7th Cir. 2017).

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to consider a question of federal law of exceptional importance where the defendant was convicted of honest services fraud but the evidence failed to establish a quid pro quo, or the knowledge of the defendant that the co-defendant owed a fiduciary duty to his municipal employer. Honest services wire fraud is a crime of specific intent. An essential element of a wire fraud violation is the specific intent to defraud. *United States v. Feldman*, 711 F.2d 758, 765 (7th Cir. 1983). The specific intent to defraud means that the defendant acted "willfully with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for himself or causing financial loss to another." *United States v. Paneras*, 222 F.3d 406, 410 (7th Cir. 2000). An honest services bribery theory under §1346 requires a *quid pro quo*; that is, a specific intent to give or receive something of value in exchange for an official act. An honest services fraud prosecution for bribery requires the "Government to prove 1) the payor provided a benefit to a public official intending that he would thereby take favorable acts that he would not otherwise take, and 2) that the official accepted those benefits intending, in exchange for the benefits, to take official acts to benefit the payor." *United States v. Andrews*, 681 F.3d 509, 527 (3rd Cir. 2012). The wire fraud statute is not meant to "encompass every instance of official misconduct that results in the official's personal gain." *United States v.*

Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997). Moreover, "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to [ ] honest services, and it is not shown to intend that result." *Id*. at 1077.

Honest services fraud requires proof of a *quid pro quo*, that a public official demanded or took money in exchange for doing some official act. The actions of a defendant which create or constitute a conflict of interest are not, by themselves, sufficient to support an honest services fraud conviction. *Skilling v. United States*, 130 S.Ct. 2896, 2932 (2010). Accepting a reward for doing something the official would have done anyway does not violate §1346. *United States v. Hawkins*, 777 F.3d 880, 884 (7th Cir. 2015). Honest services wire fraud requires a specific intent to deprive the public of the honest services of public officials, use of a loophole is not fraud.

There was no evidence that Johnson intended to deprive the City of any money or even knew the City was being deprived of money, nor was there evidence that he intended to personally gain. Rather, Johnson was presented with a business relationship that could generate money for IMAC by acting as a pass-through entity for the sale of Land Bank properties. IMAC's role as a pass-through was not illegal, and IMAC's resale of the properties at a profit was not illegal. Absent evidence that Johnson intended to deprive the City of money, Johnson's conviction should have been vacated due to the lack of intent.

Additionally, there was no evidence admitted that Johnson knew Walton had any conflict of interest or was committing any ethical violation by engaging in these transactions. The most the government could point to was the testimony of Reed, who claimed the process was explained to Johnson in a meeting between Walton, Johnson and Reed. (Tr. 671) Despite Reed's claim, Johnson continued to act counter to what Reed claimed was necessary to make the transactions successful, including insisting on paying Reed his portion of the proceeds of the sale by check not cash, and undermining Reed and Walton by selling a property to a buyer that Reed and Walton were working with to sell a different property. But even accepting Reed's testimony, it still does not provide evidence of Johnson's specific intent to participate in a scheme to defraud the City of Walton's honest services.

Johnson operated a legitimate non-profit entity that sought to assist HIV and AIDS patients with housing expenses. IMAC's involvement in the charged transactions furthered that goal by generating money for the agency. The only intent Johnson had for participating in these transactions was to help as many AIDS and HIV afflicted people as possible by subsidizing their housing. There was no evidence that Johnson lined his own pockets with the proceeds of any of the transactions. Absent evidence of Johnson's intent to aid Walton in defrauding the City, as opposed to merely trying to generate resources for a legitimate non-profit entity, Johnson's conviction must be vacated. Johnson urges the Court to grant a writ of *certiorari* so that he may more fully demonstrate the impropriety of his conviction in this case, as well as to clarify the proof necessary to establish a *quid pro quo* and a fiduciary duty in the context of an honest services fraud prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A