No. _____

In The

Supreme Court of the United States

ALLEN RAYMOND JOHNSON,

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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QUESTIONS PRESENTED FOR REVIEW

1. Whether honest-services fraud under 18 U.S.C. § 1346 requires acceptance of a bribe or kickback by the person owing the duty of honest services as set forth in *Skilling v. United States* and followed by the Second, Third, Sixth and Eleventh Circuits, or whether it also proscribes payment of a bribe or kickback by the person owing the duty of honest services as the Ninth Circuit held below.

2. Whether the "actual innocence" exception to the procedural default rule requires a petitioner to demonstrate actual innocence of a theory of the crime that was not charged.

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PETITION FOR WRIT OF CERTIORARI

Allen Raymond Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court order is unpublished but may be found at 588 Fed. Appx. 743. (App. 1). The order of the United States District Court for the Central District of California denying the motion to vacate the sentence is unpublished. (App. 5). The court of appeals' order denying the petition for rehearing and rehearing en banc is also unpublished. (App. 15).

JURISDICTION

On December 29, 2014, the court of appeals affirmed the district court's order denying Johnson's motion to vacate his sentence filed pursuant to 28 U.S.C. § 2255. (App. 1). On April 2, 2015, the court of appeals denied the timely-filed petition for rehearing and rehearing en banc. (App. 15). This petition for a writ of certiorari is timely filed within ninety days after entry of the order denying the petition for rehearing. Sup. Ct. R. 13. This Court has jurisdiction. 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1343

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

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.

28 U.S.C. § 2255

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

In 2005, Johnson pleaded guilty to six counts of honest services wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and one count of conspiracy to launder the proceeds of these crimes in violation of 18 U.S.C. § 1956(h). In pleading guilty, Johnson admitted the indictment's allegations that he owed a duty of honest services to lenders as the closing agent for mortgage loans; and that he participated in a scheme to defraud lenders of their right to his honest services by providing kickbacks to the loan originator in exchange for using him as the closing agent, concealing

these kickbacks through a series of bank transactions, and disbursing loan proceeds through the loan originator rather than directly to the borrower. The district court sentenced Johnson to twelve months and one day imprisonment and three years supervised release, and ordered him to pay approximately $2.5 million in restitution. The Court of Appeals affirmed the restitution order on appeal. *United States v. Johnson*, 338 Fed. Appx. 561 (9th Cir. 2009).

After Johnson's conviction was final, this Court held in *Skilling v. United States*, 561 U.S. 358 (2010), that § 1346 "criminalizes *only* the bribe-and-kickback core" of the honest-services fraud doctrine as reflected in lower court opinions prior to *McNally v. United States*, 483 U.S. 350 (1987). *Skilling*, 561 U.S. at 409. The "bribe-and-kickback core" is limited to "cases involv[ing] fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Id*. at 404. In other words, "scheme or artifice to deprive another of the intangible right to honest services" means "fraudulently depriving another of one's honest services by *accepting* bribes or kickbacks. . . ." *Id*. at 412 (emphasis added). By narrowly construing § 1346 in this manner, the Court avoided declaring the statute unconstitutionally vague. *Id*. at 404, 409, 411-12.

Johnson filed a timely motion to vacate his sentence pursuant to 28 U.S.C. § 2255 claiming that the conduct with which he had been charged and to which he had pleaded guilty was no longer criminal.

Agreeing with Johnson on the merits, the district court ruled that "Johnson has established that his convictions for honest services fraud and money laundering are no longer valid after *Skilling*." (App. 14). Nonetheless, the district court denied the § 2255 motion, finding that Johnson procedurally defaulted the claim by not raising it on direct appeal and "has not established his actual innocence under alternative theories for the honest services fraud and the wire fraud counts." (App. 14).

On appeal, the Ninth Circuit affirmed. (App. 4). The court of appeals held that Johnson was not actually innocent of honest-services fraud because he participated in a scheme to deprive the lenders of his honest services by *paying* kickbacks to the loan originator. (App. 3). The Ninth Circuit reasoned that "nothing in *Skilling* suggests the Supreme Court intended to draw a distinction between a fiduciary who deprives a victim of the right to honest services by receiving a bribe or kickback and a fiduciary who does the same by paying a bribe or kickback." (App. 3). The court of appeals emphasized *Skilling*'s use of the phrase "participated in" in describing the "core offense . . . to include 'offenders who, in violation of a fiduciary duty, *participated in* bribery or kickback schemes'" and in stating that "'[a] criminal defendant who *participated in* a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.'" (App. 3-4 (quoting *Skilling*, 561 U.S. at 407, 413)).

In a footnote, the Ninth Circuit "observe[d] that Johnson's conduct may be characterized as receiving a bribe in the form of referrals, particularly since the net result of the scheme was that Johnson received a portion of the closing fees without actually conducting the closings." (App. 3 n.3). The indictment did not allege that Johnson accepted a bribe in any form or that Johnson did not actually conduct the closings, nor did Johnson admit to any such conduct when he pleaded guilty.

REASONS FOR GRANTING THE PETITION

I. The petition should be granted because the Ninth Circuit decided an important question about the scope of honest-services fraud in a way that conflicts with the Court's decision in *Skilling v. United States*, as well as decisions from the Second, Third, Sixth and Eleventh Circuits.

In this case, the Ninth Circuit resurrected the "amorphous" conflict-of-interest theory of honest-services fraud that *Skilling* put to rest, *Skilling*, 561 U.S. at 410, by holding that § 1346 proscribes a scheme in which a person owing a duty of honest services pays a kickback to a third party and thereafter engages in undisclosed self-dealing. This interpretation of § 1346 conflicts with *Skilling* as well as opinions from the Second, Third, Sixth and Eleventh

Circuits on the important federal question of whether a bribery or kickback scheme proscribed by § 1346 requires acceptance of a bribe or kickback by the person owing the duty of honest services, and raises an important federal question as to whether § 1346, as interpreted by the Ninth Circuit, is unconstitutionally vague.

The Ninth Circuit's reasoning that "nothing in *Skilling* suggests the Supreme Court intended to draw a distinction between a fiduciary who deprives a victim of the right to honest services by receiving a bribe or kickback and a fiduciary who does the same by paying a bribe or kickback" (App. 3) misreads *Skilling*. In *Skilling*, this Court was presented with a constitutional vagueness challenge to § 1346. *Skilling*, 561 U.S. at 399. The Court noted that Congress enacted § 1346 in response to *McNally*, which had overruled lower-court decisions interpreting "scheme or artifice to defraud" as used in the federal mail and wire fraud statutes to include deprivations of intangible rights, as well as money or property. *Skilling*, 561 U.S. at 401-02 (citing *McNally*, 483 U.S. at 360). The petitioner in *Skilling* asserted that § 1346 is unconstitutionally vague because it "does not adequately define what behavior it bars" and its "'standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections,' thereby 'facilitat[ing] opportunistic and arbitrary prosecutions.'" *Id*. at 403 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

Although the Court in *Skilling* recognized that the "vagueness challenge has force," it opted to "construe[ ] rather than invalidate[ ]" the statute. *Id*. at 405-06. To do so, the Court "look[ed] to the doctrine developed in pre-*McNally* cases . . . to ascertain the meaning of the phrase 'the intangible right of honest services[,]'" and "to preserve what Congress certainly intended the statute to cover. . . ." *Id*. at 404. The Court "pare[d] that body of [pre-*McNally*] precedent down to its core," which it described as "cases involv[ing] fraudulent schemes to deprive another of honest services *through bribes or kickbacks supplied by a third party who had not been deceived*." *Id*. (emphasis added). The Court held that when "[c]onfined to these paramount applications, § 1346 presents no vagueness problem." *Id*.; *see also id*. at 409 (§ 1346 survives constitutional vagueness challenge because it "criminalizes only the bribe-and-kickback core of the pre-*McNally* case law").

After rejecting the petitioner's argument to invalidate the statute in its entirety, *id*. at 406-09, and the government's argument to interpret the statute to proscribe undisclosed self-dealing by a fiduciary, *id*. at 409-11, the Court interpreted § 1346 to reach only "bribery and kickback schemes" that involve the solicitation or acceptance of a bribe or kickback by the person owing the duty of honest services:

> Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague. Recall that the void-for-vagueness doctrine addresses concerns about

> (1) fair notice and (2) arbitrary and discriminatory prosecutions. *See Kolender*, 461 U.S. at 357. A prohibition on fraudulently depriving another of one's honest services by *accepting* bribes or kickbacks does not present a problem on either score.

Skilling, 561 U.S. at 412 (emphasis added).

The Court reiterated this point when it applied its narrowed construction of § 1346 to vacate the petitioner's conviction for conspiracy to commit honest-services fraud:

> The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the Government's theory at trial that Skilling "profited from the fraudulent scheme . . . through the receipt of salary and bonuses, . . . and through the sale of approximately $200 million in Enron stock, which netted him $89 million." [Citation]. [¶] *The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party for making these representations.* [Citation]. *It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud.*

Id. at 413 (emphasis added). In short, the Court's opinion in *Skilling* clearly and unequivocally limits the reach of § 1346 to schemes involving the solicitation or acceptance of a bribes or kickbacks by persons

owing a duty of honest services in order to overcome a constitutional vagueness challenge.

The Ninth Circuit emphasized *Skilling*'s use of the phrase "'*participated in* bribery or kickback schemes'" to hold that a scheme involving a fiduciary's payment of bribes or kickbacks is within the core of the pre-*McNally* honest-services fraud doctrine. (App. 3-4 (quoting *Skilling*, 561 U.S. at 407, 413)). In rejecting the petitioner's argument opposing a limiting construction of § 1346 because "it is impossible to identify a salvageable honest-services core," the *Skilling* Court did state, that the "'vast majority' of the [pre-*McNally*] honest-services fraud cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Skilling*, 561 U.S. at 407 (citing *United States v. Runnels*, 833 F.2d 1183, 1187 (6th Cir. 1987)). Similarly, in concluding that § 1346 as limited by the Court's construction is not unconstitutionally vague, the Court also stated, that "[a] criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds." *Id*. at 413. Admittedly, *Skilling* repeatedly referred to "bribes or kickbacks" without qualification that they be supplied by a third party, or solicited or accepted by the fiduciary. *Id*. at 408-11.

But, *Skilling*'s reference to "bribery and kickback schemes" and use of the phrase "bribes and kickbacks" cannot be reasonably read to expand the reach of § 1346 to schemes involving the payment of a bribe or kickback by the person owing the duty of honest

services. To the contrary, this language refers to "schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived," *Skilling*, 561 U.S. at 404 (emphasis added) – particularly since the Court reiterated that § 1346 is limited to schemes "depriving another of one's honest services by *accepting* bribes or kickbacks," *id*. at 412 (emphasis added), and expressly relied on this more narrow construction to vacate the petitioner's conviction. *Id*. at 413. In other words, *Skilling*'s use of the phrase "participated in bribery and kickback schemes," on which the panel decision relies, refers to schemes in which a person who owes a duty of honest services solicits or accepts a bribe or kickback.

To be sure, every honest-services fraud case involving a "bribery or kickback scheme" on which *Skilling* relies as authority for the "core" of the pre-*McNally* honest services doctrine, *see Skilling*, 561 U.S. at 400-01, 407-08, involved a scheme in which the person who owed the duty of honest services (*i.e.*, public official, private fiduciary or employee) solicited or accepted a bribe or kickback. *See Runnels*, 833 F.2d at 1185 (union president accepted kickbacks in exchange for referring workers' compensation cases); *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980) (employee accepted kickbacks from insurance broker and consultant in exchange for maintaining and providing employer's business); *United States v. Mandel*, 591 F.2d 1347, 1362-63 (4th Cir. 1979) (governor accepted financial and other benefits in

return for taking certain positions on legislation); *Shushan v. United States*, 117 F.2d 110, 115-19 (5th Cir. 1941) (public official accepted bribes in exchange for urging city action); *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) (private employees accepted bribes in exchange for providing employer's trade secrets); *cf. United States v. McNeive*, 536 F.2d 1245, 1252-53 (8th Cir. 1976) (reversing conviction of city inspector who accepted gratuities from company to whom he issued permits due to insufficient evidence of quid pro quo). Similarly, the two post-*McNally* honest-services fraud cases that involved bribery or kickback schemes cited in *Skilling*, *see* 561 U.S. at 408, involved schemes in which a public official or a fiduciary in the private sector context accepted a bribe or kickback. *See United States v. DeVegter*, 198 F.3d 1324, 1326-31 (11th Cir. 1999) (financial advisor accepted kickback from investment banking firm in exchange for steering bond underwriting contract); *United States v. Paradies*, 98 F.3d 1266, 1282 (11th Cir. 1996) (city counsel member accepted payments in exchange for political influence).

Since *Skilling*, no other circuit has construed § 1346 to proscribe a scheme in which the person owing the duty of honest services pays a bribe or kickback, and every circuit to address the issue has properly limited § 1346's reach to schemes involving the solicitation or acceptance of a bribe or kickback by the person owing duty of honest services. *See, e.g.*, *United States v. Terry*, 707 F.3d 607, 612 (6th Cir.

2013) ("public official can commit honest services fraud only by accepting a bribe or a kickback"), *cert. denied*, 134 S. Ct. 1490 (2014); *United States v. Wright*, 665 F.3d 560, 568 (3d Cir. 2012) (honest-services fraud prosecution for bribery after *Skilling* requires public official accepting benefit in exchange for taking official act to benefit payor); *United States v. Bruno*, 661 F.3d 733, 739-40 (2d Cir. 2011) (reversing honest-services fraud conviction because instruction "did not require the jury to find that [the fraud involved] accept[ance of] bribes or kickbacks to be convicted of honest services fraud"); *United States v. Langford*, 647 F.3d 1309, 1321 (11th Cir. 2011) ("in order to prove that [the defendant] defrauded the public of his honest services, the government had to prove beyond a reasonable doubt that [he] was in fact a public official and that he accepted bribes that he did not disclose to the public"), *cert. denied*, 132 S. Ct. 1121 (2012); *cf. United States v. Nouri*, 711 F.3d 129, 139 (2d Cir.) (instruction that did not require jury to find payment of bribe or kickback to person who owed duty of honest services to his employer was erroneous), *cert. denied sub nom. Martin v. United States*, 134 S. Ct. 309 (2013).

In summary, *Skilling* expressly limited the reach of § 1346 to "cases involv[ing] fraudulent schemes to deprive another of honest services *through bribes or kickbacks supplied by a third party who had not been deceived*." *Skilling*, 561 U.S. at 404 (emphasis added). In other words, a person can only "fraudulently depriv[e] another of one's honest services by *accepting*

bribes or kickbacks." *Id*. at 412 (emphasis added). This narrow construction of § 1346 was essential to the Court's rejection of the petitioner's argument that the statute is unconstitutionally vague. *Id*. at 404, 409. *Skilling* expressly relied on this narrow construction of § 1346 to vacate the petitioner's convictions because the government never alleged that he "solicited or accepted" bribes or kickbacks. *Id*. at 413. *Skilling*'s reference to defendants who "participate in bribery or kickback schemes" cannot reasonably be read to expand the reach of § 1346 beyond this definition in light of the Court's limitation on the reach of the statute expressed elsewhere in the opinion, the reasoning of the cases on which *Skilling* relies, and the fact that every bribery and kickback case cited involved the solicitation or acceptance of the bribe or kickback by the person owing the duty of honest services. Every other circuit to address this issue following *Skilling* has properly limited § 1346 to cases involving the solicitation or acceptance of a bribe or kickback by the person owing the duty of honest services.

Johnson owed a duty of honest services to the lenders. He paid kickbacks to the loan originator in exchange for using him as the closing agent, concealed this arrangement through a series of bank transactions, and disbursed loan proceeds through the loan originator rather than directly to the borrower. Johnson did not, however, solicit or accept a bribe or kickback. Therefore, he is actually innocent of honest-services fraud as defined by *Skilling* and as

followed by every other circuit to address the issue. This Court should grant certiorari and summarily reverse the Ninth Circuit's judgment so as to make clear that it is on the wrong side of this circuit split.

II. The petition should be granted because the Ninth Circuit decided an important question about the showing of actual innocence to excuse a procedural default in a way that conflicts with the Court's decision in *Bousley v. United States* and a decision by the Third Circuit.

In *Bousley v. United States*, 523 U.S. 614 (1998), the Court held that a federal court must review a procedurally defaulted claim if the petitioner establishes that the error "has probably resulted in the conviction of one who is actually innocent." *Id*. at 623 (quoting *Murray v. Carrier*, 477 U.S. 478, 485 (1986)). In this case, the Ninth Circuit "observe[d]" in a footnote "that Johnson's conduct may be characterized as receiving a bribe in the form of referrals, particularly since the net result of the scheme was that Johnson received a portion of the closing fees without actually conducting the closings." (App. 3 n.3). This observation provided an alternative basis for the court of appeals' decision which conflicts with *Bousley* and a decision from the Third Circuit.

In *Bousley*, the defendant had pleaded guilty to using a firearm in violation of 18 U.S.C. § 924(c)(1). *Bousley*, 523 U.S. at 616. Five years later, the Court

limited the reach of the statute so as to "require[ ] the Government to show 'active employment of the firearm.'" *Id*. (quoting *Bailey v. United States*, 516 U.S. 137, 144 (1995)). The defendant collaterally attacked his conviction under 28 U.S.C. § 2255 claiming that his guilty plea was not knowing and intelligent because the district court misinformed him about the nature of the crime. *Id*. The Court held that the claim was procedurally defaulted because the defendant failed to raise it on direct appeal, *id*. at 622, but could nonetheless be "reviewed in th[e] collateral proceeding if [the defendant] can establish that the constitutional error in his plea colloquy 'has probably resulted in the conviction of one who is actually innocent.'" *Id*. at 623 (quoting *Carrier*, 477 U.S. at 496).

The Court in *Bousley* explained that, for a § 2255 petitioner to show actual innocence to overcome procedural default, he "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id*. (internal quotation marks and citation omitted). Given the emphasis on what a juror would have found, the Court explained that, to make this showing, the petitioner is required to show factual innocence, not mere legal insufficiency. *Id*. (internal citation omitted). Thus, the Government would be permitted to present any admissible evidence of the petitioner's guilt of the charged offense or of any more serious charges the government forewent in the course of plea bargaining. *Id*. at 624.

But the Court expressly rejected the Government's argument that the petitioner must demonstrate his innocence of crimes that were neither charged nor foregone in exchange for a plea. In *Bousley*, the Government argued that the petitioner must demonstrate that he is actually innocent of both "using" and "carrying" a firearm in violation of § 924(c)(1). The Court rejected that argument because the indictment charged only "using" firearms, and there was no record evidence that the government elected not to charge petitioner with "carrying" a firearm in exchange for his plea of guilty. *Id*. at 624. "Accordingly, petitioner need demonstrate no more than that he did not 'use' a firearm as that term is defined in *Bailey*." *Id*.

Following *Bousley*, the Third Circuit has confirmed that, to invoke the actual innocence exception, a petitioner need establish his actual innocence only of the crime as charged in the indictment. *See United States v. Davies*, 394 F.3d 182, 194 n.9 (3d Cir. 2005) (although federal arson statute included "both interstate and foreign commerce within its reach," petitioner "need only show that the building he destroyed was not used in interstate commerce, as charged by his indictment").

The Ninth Circuit's characterization of Johnson's conduct as "receiving a bribe in the form of referrals" cannot be squared with this Court's decision in *Bousley* or the Third Circuit's decision in *Davies*. The indictment did not charge Johnson with participating in a scheme to deprive the lenders of their right to his

honest services by accepting bribes from the loan originator. Johnson did not admit to accepting bribes in either the plea agreement or plea colloquy. The government did not offer any evidence in the post-conviction proceedings to support the court of appeals' characterization of Johnson's conduct. Accordingly, Johnson need not demonstrate that he is actually innocent of honest-services fraud under a bribery theory.

CONCLUSION

Certiorari should be granted and the Ninth Circuit's decision should be summarily reversed because it conflicts with this Court's opinion in *Skilling* as well as decisions from the Second, Third, Sixth and Eleventh Circuits on the important federal question of whether a bribery or kickback scheme within the meaning of § 1346 can be predicated on the payment of a kickback by the person owing the duty of honest services, and raises an important federal question as to whether the Ninth Circuit's expanded interpretation of § 1346 renders the statute unconstitutionally vague. Allowing the Ninth Circuit's decision to stand will embolden federal prosecutors to continue using § 1346 to prosecute people who, like Johnson, engaged in conduct which this Court has held is not a crime.

Additionally, certiorari should be granted and the Ninth Circuit's decision should be summarily reversed

because it conflicts with this Court's decision in *Bousley* and a decision from the Third Circuit. Allowing the Ninth Circuit decision to stand will create an unwarranted barrier to collateral relief for persons who, like Johnson, have been convicted of a federal crime of which they are actually innocent.

Respectfully submitted,

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June 29, 2015

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLEN RAYMOND JOHNSON, AKA Seal B, Defendant-Appellant.	No. 13-56635 D.C. Nos. 8:10-cv-01641-JVS 8:05-cr-00036-JVS-2 MEMORANDUM* (Filed Dec. 29, 2014)

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted December 10, 2014
Pasadena, California

Before: SILVERMAN, BEA, and CHRISTEN, Circuit Judges.

In 2005, Allen Johnson pleaded guilty to six counts of honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346, and conspiracy to launder the proceeds of the honest services wire fraud, in

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

violation of 18 U.S.C. § 1956(h).[1] He appealed, but only as to the district court's restitution order. *See United States v. Johnson,* 338 F. App'x 561, 562 (9th Cir. 2009) (affirming restitution order). In 2010, Johnson filed a motion to vacate his sentence under 28 U.S.C. § 2255, arguing that the conduct to which he pleaded guilty no longer constitutes honest services fraud based on the Supreme Court's decision in *Skilling v. United States,* 561 U.S. 358 (2010). The district court determined that Johnson's *Skilling* claim was procedurally defaulted and denied the motion. We have jurisdiction under 28 U.S.C. § 1291 and 2253, and we affirm.

Johnson maintains that resolution of this appeal turns on whether he is "actually innocent" of honest services wire fraud. *See Bousley v. United States,* 523 U.S. 614, 622 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." (citations and internal quotation marks omitted)).[2]

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[1] The parties are familiar with the facts of the conviction, so we will not recount them here.

[2] In his briefing, Johnson argued that his *Skilling* claim is not subject to the procedural default bar because it implicates the district court's subject matter jurisdiction. But even if Johnson were correct that a claim that an indictment fails to charge a valid federal offense is jurisdictional, in this case we have jurisdiction and Johnson is not entitled to relief because the

(Continued on following page)

In *Skilling,* the Supreme Court limited the scope of the honest services fraud statute, 18 U.S.C. § 1346, to "bribery and kickback schemes." 561 U.S. at 404-09. There is no question that Johnson pleaded guilty to depriving a lender of its right to honest services by participating in a kickback scheme. Nonetheless, Johnson contends that he did not commit honest services fraud because he paid, as opposed to received, the kickbacks. But nothing in *Skilling* suggests the Supreme Court intended to draw a distinction between a fiduciary who deprives a victim of the right to honest services by receiving a bribe or kickback and a fiduciary who does the same by paying a bribe or kickback.[3]

Johnson points to a sentence in *Skilling* where the Supreme Court described the core honest services fraud offense as involving "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Id.* at 404. He overlooks that elsewhere the Court described the core offense much more broadly, to include "offenders who, in violation of a fiduciary duty, *participated in* bribery or kickback schemes." *Id.*

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indictment states and Johnson pleaded guilty to a valid honest services fraud offense.

[3] Also, we observe that Johnson's conduct may be characterized as receiving a bribe in the form of referrals, particularly since the net result of the scheme was that Johnson received a portion of the closing fees without actually conducting the closings.

at 407 (emphasis added); *see also id.* at 413 ("A criminal defendant who *participated in* a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds." (emphasis added)). Because Johnson pleaded guilty to participating in a kickback scheme in violation of his fiduciary duty, he is not actually innocent of honest services fraud.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 10-01641-JVS (SACR 05-00036-JVS)
Date August 7, 2013

Title USA v. Allen Johnson

Present: The Honorable James V. Selna

Ellen Matheson for Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order Denying Defendant's Motion Pursuant to 28 USC 2255

Petitioner Allen Johnson ("Johnson") moves pursuant to 28 U.S.C. § 2255 for an order vacating the Judgment of Conviction entered in SACR 05-36 on June 5, 2008. (Docket No. 246.) On March 18, 2005, Johnson pled to Counts 2 through 7 of the Indictment, violation of 18 U.S.C. §§ 1343, 1346, honest services fraud, and Count 15, violation of 18 U.S.C. § 1956(h), money laundering. (Docket No. 29.) He was sentenced to 12 months and 1 day. (Docket No. 246.)

Section 2255 provides in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

The present petition is sparked by the United State Supreme Court's decision in *Skilling v. United States,* 130 S.Ct. 2896 (2010), which was handed down after entry of Judgment and after the Ninth Circuit had affirmed the present Judgment. *United States v. Johnson,* 338 Fed. Appx. 561 (9th Cir. 2009).[1] *Skilling* substantially limited the scope of the honest services fraud statute, 18 U.S.C. § 1346.

The petition and the Government's opposition raise the following issues:

- Is the present petition procedurally defaulted because the arguments validated in *Skilling* were not raised on direct appeal?

[1] The appeal related to issues not relevant here.

- Assuming no procedural default, does the conduct which Johnson admitted in pleading to the honest services fraud counts (Counts 2-7) fall within the narrowed scope of Section 1346 after *Skilling*?

- Assuming that *Skilling* entitles Johnson to relief, has he established his actual innocence with respect to the remaining counts in which he is named?

- Is there a basis for upholding the money laundering conviction apart from the wire transfers made as part of the honest services fraud count?

Because the scope of *Skilling* is at the heart of the petition, the Court begins with a discussion of the case, and then turns to the issues set forth above.

I. *Skilling* and the Honest Services Fraud Statute.

Section 1346 arose out of the Supreme Court's rejection of loss of intangible rights as a basis for liability under the federal wire fraud statute in *McNally v. United States,* 483 U.S. 350, 360 (1987). *Skilling,* 130 S.Ct. at 2927. Prior to *McNally,* the intangible rights cases had mostly been limited to receipt of bribes or kickbacks. The Court noted the historical emphasis on receipt of a bribe or kickback: "In the main, the *pre-McNally* cases involved fraudulent schemes to deprive another of honest services through *bribes or kickbacks supplied by a third party who had not been deceived*." (*Id*. at 2928.) The Court's discussion of the *pre-McNally* cases points out the

historical limitation to receipt of bribes and kickbacks. (*Id.* at 2926-27.)

Skilling reduced the scope of Section 1346 to the core conduct prior to *McNally*: "[W]e now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." (*Id*. at 2931; italics in original.) Skilling had not been charged with taking either bribes or kickbacks. Rather,

> The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the Government's theory at trial that Skilling "profited from the fraudulent scheme . . . through the receipt of salary and bonuses, . . . and through the sale of approximately $200 million in Enron stock, which netted him $89 million."

(*Id.* at 2934; ellipses in original.) Accordingly, the Court overturned Skilling's honest services fraud conviction.

Little discussion is required to conclude that Johnson's honest services fraud convictions where not based on bribery or kickbacks cannot withstand *Skilling*. *Id.* at 2391; *United States v. Garrido,* 713 F.3d 995, 998 (9th Cir. 2013). But that is just the first step in determining whether Johnson is entitled to relief.

II. The Honest Services Fraud Counts.

The Court considers whether Johnson is procedurally barred from proceeding here, whether the nature of the claim excuses the bar, and whether assuming his substantive argument prevails, he is otherwise factually innocent.

A. The Bar.

There is no dispute that Johnson did not present his attack on Section 1346 on his direct appeal. In most circumstances, that would amount to a procedural default and waiver of the claim in collateral proceedings. *United States v. Frady,* 456 U.S. 154, 165 (1982). To avoid the bar, a defendant must establishes [sic] cause for failing to raise the argument and prejudice. *Bousley v. United States,* 523 U.S. 614, 622-23 (1998); *United States v. Ratigan,* 351 F.3d 957, 964 (9th Cir. 2003). For present purposes, the Court assumes that the prejudice element is satisfied.

The Supreme Court has established a high standard where a defendant argues that his claim is novel: "a constitutional claim [must be] so novel that its legal basis is not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 16 (1084 [sic]). Vagueness challenges to Section 1346 had been made prior to *Skilling*. Indeed, the Supreme Court observed "there was considerable disarray over the statute's application to conduct outside that core category." *Skilling*, 130 S.Ct. at 2929. The fact that those arguments were not accepted at the time did not render them

futile. *Bousley,* 523 U.S. at 623. Moreover, there is no ineffective assistance of counsel where counsel fails to anticipate new developments in the law. *United States v. Fields,* 565 F.3d 290, 294 (5th Cir. [sic] 5th Cir. 2009).[2]

Although not determinative for reasons discussed in the next section, the Court finds a bar.

B. Relief from the Bar on a Constitutional Claim.

However, as Johnson points out, *Frady* does not come into play "when a defendant raises a *jurisdictional* claim, such as the invalidity of the statute under which the defendant was convicted." *Chambers v. United States,* 22 F.3d 939, 945 (9th Cir. 1994) (italics in original), vacated on other grounds, 47 F.3d 1015 (9th Cir. 1995); *United States v. Mitchell,* 867 F.2d 1232, 1233 n. 2. (9th Cir. 1989). *Skilling* is plainly a constitutional holding on vagueness grounds.

C. Actual Innocence.

Even if relieved from establishing cause and prejudice, Johnson still bears the burden of establishing actual innocence:

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[2] More broadly, the Ninth Circuit has held the mere fact that an argument is not raised does not constitute cause for a procedural default. *Cockett v. Ray,* 333 F.3d 938, 943 (9th Cir. 2003).

> It is important to note in this regard that "actual innocence" means factual innocence, not mere legal insufficiency. In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make . . . In cases *where the Government has forgone more serious charges in the course* of *plea bargaining, petitioner's showing* of *actual innocence must also extend to those charges*.[3]

Bousely, 523 U.S. at 623-24 (citation omitted; emphasis supplied). Johnson cannot satisfy this requirement.

In Counts 2-7, the Indictment alleges that Johnson paid a kick back to Ketner in the form of a share of his closing fee. (Indictment, ¶ 16.) In *Skilling,* the Supreme Court described this as the "core [criminal conduct] of the *pre-McNally* case law." *Skilling,* 130 S.Ct. at 2931.[4] As discussed in more detail below in connection with the money laundering count, Johnson admitted to fee splitting.[5]

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[3] Case law extends the analysis to dismissed crimes of greater or equal seriousness. (*Lewis v. Peterson,* 329 F.3d 934, 937 (2003). Based on the statutory maximum penalties, wire fraud under Section 1343 and honest services fraud under Section 1346 are of equal seriousness: 20 years for each.

[4] The Government contends alternately that the transactions could also be characterized as a bribe from Ketner to Johnson which would also be viable *post-Skilling.* (Government's Opposition, pp .9-10.)

[5] *United States v. Garrido,* 713 F.3d 985, 995 (9th Cir. 2013), is of no help to Johnson on this point. There the Ninth

(Continued on following page)

Moreover, in Counts 8-14, Johnson was charged with aiding and abetting in wire fraud in violation of 18 U.S.C. § 1343, but these charges were dropped. It is clear that Johnson has not established his actual innocence for these charges, and indeed he admitted conduct which served to assist co-defendant Kenneth Ketner ("Ketner) in the overall scheme to defraud the warehouse lenders. Instead of disbursing funds at closing to the borrowers, Johnson and Ketner agreed that Johnson would send the funds to Ketner's Mortgage Capital Resources, and Johnson continued to do so even when he was aware that Ketner was misappropriating the funds. (Plea Agreement, p. 5-6.)

Johnson's contention[6] that he was not named in these counts ignores the plain language of the Indictment: "defendants KETNER and JOHNSON, for the purpose of executing and attempting to execute the above described scheme to defraud, caused and aided and abetted the transmission of, the following [seven wire transfers] by means of wire communication in interstate commerce." (Indictment, ¶ 35.) Moreover, the incorporation paragraph for Counts 8-14 specifically includes Johnson. (Indictment, ¶ 30, incorporating, among others, ¶ 2.) Moreover, the Government's

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Circuit disregarded to presence of bribery and kickback allegations because there was plain error in "the district court's instructions which permitted the jury to convict Robles and Garrido on *Skilling*'s now unconstitutional failure to disclose theory." No such problem of jury confusion arises in the Court's present analysis.

[6] Johnson Reply, p. 15.

obligation under the Plea Agreement to dismiss "the remaining counts" would have been unnecessary if Johnson were simply named in Count 2 through 7 and 15. (*See* Plea Agreement, ¶ 17(b) (emphasis supplied); Docket No. 246, p. 2; Docket No. 256, Tr. Sept. 7, 2008, p. 38.)

Johnson's failure to establish actual innocence necessarily forecloses relief. *Bousely,* 523 U.S. at 623-24.

V. Money Laundering.

The Government contends that the conviction for money laundering under Section 1956(h) must be sustained because there are transfers unconnected to the transfer of funds which Johnson funneled to Ketner as part of his fee splitting. (Opposition, pp. 10-11.) This position is not supported by the record.

All of the transfers alleged in Count 15 of the indictment relate to fee splitting transfers. (Indictment, ¶¶ 38, 45.) This is in part seen in the incorporation of paragraphs 21(b)-(d) from the honest services fraud counts which discuss setting up the domestic and foreign accounts through which Ketner's share of the closing fees was laundered. The Government could have incorporated, but did not incorporate the transfers alleged as part of the basic wire fraud scheme to defraud the lenders. (*E.g., id.*, ¶¶ 29, 35.)

More to the point is the fact that the fee-splitting transfers were the only transfers to which Johnson

admitted in the Plea Agreement. Paragraph 9 of the Plea Agreement sets out the admitted factual basis for the plea. (Docket No. 26, ¶ 9; *see also* Tr. Mar. 18, 2005, pp. 22-28.) He admitted to fee splitting, setting up shell accounts, and making transfers of fee money. There is no reference to any transfers of loan proceeds. During the plea colloquy, he similarly admitted only to fee splitting. (Tr. Mar. 18, 2005, pp. 28-29.)

Because the honest services fraud claim fails here, the transfers made were necessarily not part of a statutorily "specified unlawful activity" under the statute.

VI. Conclusion.

Johnson has established that his conviction for honest services fraud and money laundering are no longer valid after *Skilling*. However, he has not established his actual innocence under alternative theories for the honest services fraud and the wire fraud counts.

For all the foregoing reasons, the petition is denied.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLEN RAYMOND JOHNSON, AKA Seal B, Defendant-Appellant.	No. 13-56635 D.C. Nos. 8:10-cv-01641-JVS 8:05-cr-00036-JVS-2 Central District of California, Santa Ana ORDER (Filed Apr. 2, 2015)

Before: SILVERMAN, BEA, and CHRISTEN, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition is DENIED.