No. 16-152

IN THE

Supreme Court of the United States

GERARD DENAULT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government does not dispute that Petitioner has identified a deep split between the circuits regarding the "money or property" requirement of the mail and wire fraud statutes in the context of commercial transactions. It endorses the Second Circuit's rule extending liability where the defendant intended only to deprive a counterparty of potentially valuable economic information, and not a property right rooted in the essential elements of the parties' bargain. But it offers no reasoned justification for such a rule.

The principal argument in the government's opposition brief ("Opp.") is that this case does not implicate the circuit split because the City *was* deprived of an existing contractual right to a rebid of the Technodyne subcontract. But that argument is untenable and based on a misreading of the government's own brief below. The government below never argued, and the Second Circuit never found, that such a contractual right existed or was necessary for conviction. Instead, the court decided that the loss of a prospective economic benefit to which the City had no contractual or other legal entitlement (a potential price reduction resulting from a rebid) was enough to satisfy the wire fraud statute. That holding is in direct conflict with other circuits' interpretation of the "money or property" requirement.

The government is also in error when it argues that this Court's decision earlier this month in *Shaw v. United States*, 137 S. Ct. 462, No. 15-5991 (Dec. 12, 2016), has resolved the circuit split in the government's favor. That is so, the government

contends, because *Shaw* cites with approval Judge Hand's dictum in *United States v. Rowe*, 56 F.2d 747 (2d Cir. 1932). In fact, *Shaw* reaffirms that a defendant must have targeted traditional property rights. The government's over-reading of *Shaw* underscores why certiorari should be granted here. Left unchecked, the government's and the Second Circuit's elastic and atextual standard promises additional prosecutions untethered from the money-or-property requirement.

The Court should also address the procedural reasonableness of Petitioner's sentence. Contrary to the government's argument, the plain error standard does not apply to Petitioner's claim. Further, the government does not seriously dispute that the Second Circuit's "presumption" that sentencing courts properly discharge their obligations under *Rita v. United States*, 551 U.S. 338 (2007), conflicts with the law in other circuits. This Court should side with the Sixth Circuit and other courts that have held that the record must affirmatively reflect the judge's consideration of the defendant's sentencing arguments—a standard plainly not satisfied here.

I. This Court Should Resolve Whether Deprivation of a Potential Economic Benefit Is Sufficient to Prove Mail or Wire Fraud

A. This Case Directly Implicates the Circuit Split Over the Meaning of "Money or Property" in Commercial Transactions

As demonstrated in the Petition, the courts of appeals have reached irreconcilable conclusions about whether the deprivation of a mere potential

economic benefit is sufficient for liability under the mail and wire fraud statutes. Under current Second Circuit and Seventh Circuit law, a potential economic benefit is sufficient, whereas in the Third and Sixth Circuits (and under earlier Second Circuit decisions) such an intangible economic interest does not give rise to the requisite deprivation of a property right. (*See* Pet. 14-23.)

The government seeks to elide this circuit split by arguing that "[n]one of the decisions on which petitioner relies involved victims who were deprived of money or the services they contracted and paid for" (Opp. 15), while Petitioner's case purportedly *did* deprive the City of its contractual rights. According to the government, "[u]nder the amended contract" agreed to by SAIC and the City in 2006, SAIC set billing rates "using a formula that took into account the invoices submitted [to SAIC] by its subcontractors." (Opp. 3.) Thus, the government asserts, "SAIC would have been *required by the contract* to charge the City less if it had replaced Technodyne with a less expensive subcontractor." (Opp. 14 (emphasis added).)

This is simply not so. The amended CityTime contract was a *fixed-price*-level-of-effort contract. (C.A.App.295; C.A.Br.13-14.) The unambiguous terms required SAIC to provide the City with consultants for an agreed-upon number of labor hours at an agreed-upon rate for those hours. (C.A.App.252-53, 321-22; Pet. i, 6, 6 n.2, 9.) The City negotiated the hourly rates for consultants without reference to SAIC's underlying cost of labor, and nothing in the amended contract gave the City any right to require that SAIC pass on any cost savings

gained from replacing a subcontractor. (C.A.App.321-22, 377-78, 601-02.) Any such cost savings would have resulted solely from SAIC's own internal policies, not the CityTime contract. (Tr. 290-93; C.A.Br.14-15.)

All this was undisputed below. In support of its erroneous characterization of the CityTime contract, the government cites only to its own brief in the Second Circuit, but that brief flatly contradicts its claim. As a review of the cited pages readily demonstrates, the government's Second Circuit brief did not argue that the *contract* required SAIC to set billing rates taking into account its subcontractor costs or to pass on any cost savings to the City. To the contrary, the brief expressly stated that any such effects would occur only as a result of "SAIC's pricing policies." (Govt.C.A.Br.7-8.)

The government similarly misreads the record—and ignores its previous representations in this case—when it tries to tie Petitioner to alleged overbilling by Mark Mazer, his co-defendant. The government notes that Mazer "signed a series of timesheets that authorized payments for consultants for hours never worked." (Opp. 9.) But this has nothing to do with Petitioner and the government acknowledged as much below: when language relating to Mazer's scheme was included in Petitioner's PSR, the government consented to its deletion. (PSR Addendum at 51.) That is why, in discussing Petitioner's wire fraud liability, the Second Circuit limited itself to the letter that Petitioner caused SAIC to send to the City in May 2009, without suggesting that Petitioner was responsible for Mazer's overbilling. (*See* Pet.App.7.)

The issue raised by the Petition is thus squarely presented. Consistent with the government's position before it, the Second Circuit held that the City was deprived of money or property only because a rebid of the Technodyne subcontract "in all likelihood[] *would have resulted* in lower subcontracting prices" (*id.*) (emphasis added)—not that the City had any *right* under the CityTime contract to lower subcontracting prices. Thus, if there were a misrepresentation in the May 2009 letter it still would not have deprived the City of cost savings to which it was legally or contractually entitled.

But under the Second Circuit's current, mistaken view of the wire fraud statute's "money or property" requirement, the mere possibility of cost savings, or potentially valuable economic information, or information that could affect economic decisions, are all "property." *See United States v. Wallach*, 935 F.2d 445, 462-63 (2d Cir. 1991) (property interests include "potentially valuable economic information" and "information that could impact on economic decisions"); *United States v. Binday*, 804 F.3d 558, 576-77 (2d Cir. 2015) ("it suffices to prove that the defendants' misrepresentations deprived the insurers of economically valuable information that bears on their decision-making"), *cert. denied*, 136 S. Ct. 2487 (2016); Pet.App.6-7 (requisite deprivation of money or property where purported victim is deprived of "the full economic benefit of its bargain" because it was deprived of information that might have generated cost savings) (quotations omitted).

The government tacitly acknowledges, and approves of, the current state of Second Circuit law. This is the import of the government's argument that

Petitioner was properly convicted of wire fraud for "us[ing] deceptive means to deprive the City of *economic value*." (Opp. 11 (emphasis added).) Indeed, the government specifically argues that it *does not matter* if Petitioner had no intent to "deprive [the City] of the essential elements of its bargain," so long as he provided false information that deprived the City of its "chance to bargain with the facts before it." (Opp. 12 (citations and alterations omitted).)

In stark contrast, the Third, Sixth, and Ninth Circuits—and, most recently, the Eleventh Circuit—have recognized that a defendant cannot be convicted of fraud for depriving a counterparty of "the right to accurate information before making an otherwise fair exchange." *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014); *see also United States v. Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016) ("even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims received exactly what they paid for") (quotations omitted); *United States v. Bruchhausen*, 977 F.2d 464, 467 (9th Cir. 1992) (dismissing indictment charging defendant with defrauding manufacturers of their "right to make business decisions based on truthful information and representations"); *United States v. Zauber*, 857 F.2d 137, 146 (3d Cir. 1988) (no fraud where alleged victim received "exactly what the investment agreement called for").

The government's attempt to minimize the split between the Second Circuit and these other Circuits therefore fails. Under the Second Circuit's current interpretation of the wire fraud statute, it would not

matter that the victims in *Sadler*, *Takhalov*, *Bruchhausen*, and *Zauber* were not "deprived of money or the services they contracted and paid for." (Opp. 15.) Each of those cases would have come out differently in the Second Circuit because it would have been enough that each purported victim had been deprived of "potentially valuable economic information."[1] The result would also be different in the Second Circuit's own earlier decision in *United States v. Starr*, 816 F.2d 94, 100 (2d Cir. 1987) (deception that deprived customers of potential refunds did not give rise to fraud liability because customers "received the service for which they had paid" and could not "legally claim a right" to the unspent fees).

This Court should grant certiorari to clear up the doctrinal disarray in the lower courts on an issue of central importance in the application of the mail and wire fraud statutes.

B. The Government Cannot Reconcile the Potential Economic Benefit Theory with this Court's Precedents

The government's effort to distinguish, on their facts, this Court's decisions construing the money-or-property requirement misses the broader point of those cases. (*See* Opp. 14-15.) Those decisions all require that a prosecution for mail or wire fraud be anchored to an intended deprivation of a traditional property right. The property can be intangible, such

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[1] Indeed, as noted in the Petition (but ignored by the government), the Second and Ninth Circuits *did* come out differently when faced with the same issue presented in *Bruchhausen*. (Pet. 21 n.8.)

as a company's right to the exclusive use of its confidential business information, *Carpenter v. United States*, 484 U.S. 19, 25-27 (1987), but it still must be *property*, something that constitutes "property in the victim's hands," *Cleveland v. United States*, 531 U.S. 12, 26 (2000), and to which the victim is "entitled by law." *Id.* at 22; *accord Pasquantino v. United States*, 544 U.S. 349, 357 (2005).

Information that "in all likelihood[] would have resulted in [cost savings]" (Pet.App.7)—or, to use the government's formulation, is of "economic value" (Opp. 11)—does not fit that definition.

This Court's recent decision in *Shaw v. United States*, 137 S. Ct. 462, No. 15-5991 (Dec. 12, 2016), does nothing to change its prior decisions. In *Shaw*, this Court held that the bank fraud statute reaches schemes to deprive banks out of funds deposited in customer accounts because banks have a *property right* in those funds. Slip op. at 2 ("the bank, too, had property rights in Hsu's bank account"); *id.* at 3 (bank's possessory interest in deposited funds "is a property right"). *Shaw* therefore follows the rule that the mail and wire fraud statutes are "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987).

The government seizes on the Court's quotation of Judge Hand's statement in *Rowe*: "'[a] man is none the less cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value,'" because he has "'lost …his chance to bargain with the facts before him.'" *Shaw*, Slip op. 3-4 (quoting *Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)). The government argues that *Shaw*'s

quotation means that it does not matter if the defendant intended to deprive his counterparty of the essential elements of its bargain. (Opp. 12.)

Shaw's quotation cannot bear such weight. By the time that the Court quoted *Rowe* it had already found that the victim bank was deprived of its property rights in the depositor's account, and thus it was irrelevant whether the bank was also deprived of a chance to bargain with the facts before it. The quotation was therefore (like Judge Hand's original statement, *see* Pet. 13-15) "pure dictum," *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013), neither necessary to the Court's actual holding nor argued by the parties, who did not even cite *Rowe* in their briefs. *Shaw* did not address the issue of whether fraud may exist where a counterparty receives the essential elements of its bargain, as the defendant there did not bargain for the bank's release of funds and provided nothing in exchange.

The government's position is, moreover, inconsistent with this Court's insistence that common-law principles limit the scope of the federal fraud statutes. *See*, *e.g.*, *Neder v. United States*, 527 U.S. 1, 21-25 (1999). As noted in the Petition, and contrary to Judge Hand's dictum, there is no common law action in fraud for a party who, like the City here, "receives all the value that he has been promised and has paid for." *Prosser and Keeton on Torts* § 110 (5th ed. 1984). Judge Hand was a judicial innovator who adapted and expanded statutes to meet perceived modern-day needs. Just as this Court in *McNally* refused to extend 18 U.S.C. §§ 1341 and 1343 to protect the asserted "right to honest services"

(an assertion also inspired by the *Rowe* dictum, *see* Pet. 14 n.6), so too should it decline to read into these statutes a "right to bargain" unknown to the common law or traditional property law.

The government's enthusiasm for the dictum in *Rowe*, and the fact that it has now been elevated into a Supreme Court dictum, lends even greater urgency to this petition. Applying the "bargain with the facts before it" standard of *Rowe* could swallow the "money or property" requirement. If this Court's discussion of *Rowe* is not clarified, the government will seek to exploit *Shaw* to cast an even wider net of federal criminal liability over commercial transactions. This Court should grant certiorari and make clear that the government's misguided interpretation of *Shaw* is not the law.

II. The Court Should Resolve What a Sentencing Judge Must Address in the Statement of Reasons

Nearly ten years ago, this Court held that to satisfy 18 U.S.C. § 3553(c) a sentencing judge must create a "clear…record" showing that he "considered the evidence and the arguments" set forth by a defendant at sentencing. *Rita v. United States*, 551 U.S. 338, 359 (2007). But the Second Circuit, contrary to a number of its sister circuits, including the Sixth Circuit, applies a "strong presumption" that judges have considered the statutory factors "unless the record clearly suggests otherwise." *United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006), *abrogated on other grounds by Rita v. United States*, 551 U.S. 338 (2007). Sentencing judges in the Second Circuit therefore do not need to create an

affirmative record that they considered the § 3553(a) factors, as they do elsewhere. (*See* Pet. 31-33.)

Without once mentioning *Fernandez* or the Second Circuit's post-*Rita* cases following *Fernandez* (*see* Pet. 32), the government argues that Petitioner "misstates the governing law of the Second Circuit." (Opp. 22.) In support, the government cites cases that stand for the unremarkable proposition that the Second Circuit requires sentencing courts to address the § 3553(a) sentencing factors and make an independent determination of appropriate punishment. (*Id.*) But those cases do not undermine the critical importance of the *Fernandez* "strong presumption," which is how the Second Circuit—unlike other Circuits—determines *whether* a sentencing judge has complied with § 3553. Notably, the government makes no effort to square the Second Circuit's presumption with this Court's holding in *Rita*, or to deny the existence of a circuit split on the issue.

The government also seeks shelter in plain error review. (Opp. 18-20.) But a number of circuits have recognized that, when a sentencing court fails to fulfill its § 3553(c) duty to address a defendant's sentencing arguments, there is no point in requiring the defendant to re-assert those arguments at sentencing in order to preserve a § 3553(c) claim for appeal. Accordingly, plain error review does not apply to a claim of procedural unreasonableness based on this ground. *See United States v. Dale*, 498 F.3d 604, 610 n.5 (7th Cir. 2007); *United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006); *United States v. Swehla*, 442 F.3d 1143, 1145 (8th Cir. 2006). *But see United States v. Flores-Mejia*, 759

F.3d 253, 256-57, 259-66 (3d Cir. 2014) (en banc) (9-5 majority holding that plain error does apply to such a claim and citing decisions from seven other circuits reaching the same conclusion). Far from militating against the need for certiorari, the government's plain-error argument only implicates an additional circuit split warranting this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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