

No. 22-320

In the Supreme Court of the United States

KENNETH R. SPIRITO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to sustain petitioner's convictions for federal-program fraud, in violation of 18 U.S.C. 666(a)(1)(A), where he caused the loss of millions of dollars of public airport funds that were committed exclusively to other purposes by misleading the airport's governing board and siphoning the relevant accounts to collateralize a private airline's bank loan.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

United States v. Spirito, No. 19-cr-43 (July 16, 2020)

United States v. Spirito, No. 19-cr-43 (Oct. 5, 2022)

United States Court of Appeals (4th Cir.):

United States v. Spirito, No. 20-4445 (Feb. 19, 2021)

United States v. Spirito, No. 20-4393 (May 31, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A46) is reported at 36 F.4th 191. The opinion and order of the district court (Pet. App. A47-A65) is not published in the Federal Supplement but is available at 2020 WL 3913470.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2022. A petition for rehearing was denied on June 28, 2022 (Pet. App. A66). The petition for a writ of certiorari was filed on September 26, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was found guilty of 11 counts of misapplying property

from an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A) and 2; six counts of engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. 1957 and 2; one count of falsifying records in a federal investigation, in violation of 18 U.S.C. 1519; one count of converting property from an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A); three counts of perjury, in violation of 18 U.S.C. 1623(a); and one count of obstructing justice, in violation of 18 U.S.C. 1503. Judgment 1-2; Pet. App. A63-A65. The court granted a judgment of acquittal on the obstruction-of-justice count and sentenced petitioner to 48 months of probation, a special condition of which included 30 months of home detention. Judgment 3; Pet. App. A63-A65. The court of appeals reversed petitioner's conviction for converting property from an organization receiving federal funds, affirmed his remaining convictions, and remanded for additional proceedings. Pet. App. A1-A46.

1. Petitioner served as Executive Director of the Newport News-Williamsburg International Airport and the Peninsula Airport Commission, the airport's governing body. Pet. App. A3. In that role, petitioner oversaw the airport's operations, supplied the commission with information about how its decisions would be implemented, and executed those decisions. *Id.* at A3, A6-A7.

The airport received funds from various state and federal government programs, including four funding programs overseen by the Federal Aviation Administration. Pet. App. A3-A4. Those state and federal funds were committed to specific purposes that did not

include use as subsidies or loan collateral for an airline company. *Id.* at A4. Petitioner understood the limited purposes of, and restrictions on, those funds. *Ibid.*

In 2012, an airline discontinued services at the airport. Pet. App. A4. Petitioner and another airport commission member recruited a new airline, People Express, to serve the airport. *Ibid.* At the time, People Express was not operational, but aspired to start flying later that year and to establish Newport News-Williamsburg as its headquarters. *Ibid.* The company was unable, however, to attract investors willing to commit funds to support that goal. *Ibid.*

In 2014, People Express applied for a \$10 million loan from a private bank, in order to carry out a deal that it had negotiated with another airline to lease planes and crew for use under the People Express name. Pet. App. A4. The bank denied the loan because People Express lacked profitability, had no history of tax returns, and already carried significant debts. *Ibid.* Eventually, however, the bank agreed to extend a \$5 million loan to People Express—but if and only if People Express procured a third-party guarantor as a source of cash collateral, who would transfer the cash into bank accounts that would require bank approval for any withdrawal. *Id.* at A4-A5.

Petitioner arranged to commit restricted airport commission funds to serve as the cash collateral, ultimately directing 11 transfers of state funds, federal funds, airport revenue, and facility charges into collateral accounts with the bank in 2014 and 2015. Pet. App. A5-A7; see *id.* at A3-A4. Petitioner confirmed the bank's creation of three collateral accounts and instructed the bank to use titles for the accounts that did not reflect their inclusion of airport commission funds.

Id. at A5-A6, A8. Petitioner then instructed the airport's finance director to fund those collateral accounts. *Id.* at A5. And he led the airport commission, whose members did not understand the source of the funding and who relied on petitioner's recommendations, to execute contracts to guarantee performance of a \$5 million line of credit issued by the bank to People Express. *Id.* at A5-A6. He then affirmatively concealed the true sources of the funding by delaying submission of audited financial statements, failing to inform the Virginia Department of Aviation that state funds were being used as loan collateral, and failing to identify the loan guaranty in the airport's annual reports. *Id.* at A8-A9.

The airport commission lost all of the funds that petitioner had steered it to use for the purpose of guaranteeing People Express's loan. Pet. App. A7. When People Express fell behind on its loan payments, petitioner authorized transfers from the collateral accounts to make interest and principal payments. *Ibid.* People Express ultimately drew down the entire credit line, suspended service, and defaulted on the loan. *Ibid.* The bank subsequently called in the loan and collected the funds in the collateral accounts to satisfy People Express's debt. *Ibid.*

The airport commission terminated petitioner's employment in May 2017 after learning that he had used an airport credit card for personal expenses. Pet. App. A9-A10. Petitioner subsequently filed a civil defamation suit against the commission. *Id.* at A10. In deposition testimony, petitioner denied using airport revenue as collateral for the loan; testified that he had in fact told the commission that airport revenue could not be used as collateral; claimed that he opposed the loan

guaranty; and denied his role in designing the collateralization schedule. *Ibid.*

2. A federal grand jury subsequently charged petitioner with 11 counts of misapplying property from an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A) and 2; six counts of engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. 1957 and 2; one count of falsifying records in a federal investigation, in violation of 18 U.S.C. 1519; one count of converting property from an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A); four counts of perjury, in violation of 18 U.S.C. 1623(a); and one count of obstructing justice, in violation of 18 U.S.C. 1503. Superseding Indictment 15-32.

The district court denied petitioner's pretrial motion to dismiss the charges for misapplying federal funds, rejecting petitioner's contention that Section 666(a)(1)(A) requires proof that a defendant obtained a personal benefit. D. Ct. Doc. 48, at 5-6 (Jan. 13, 2020). Petitioner proceeded to trial, where the jury acquitted him of one perjury charge and found him guilty on the remaining counts. Pet. App. A12.

3. The district court granted in part and denied in part petitioner's post-verdict motion for a judgment of acquittal. Pet. App. A47-A65. The court again found "[n]othing in the text of § 666 requir[ing] proof of a personal benefit to a defendant to sustain a conviction" for misapplication of funds and "no case law imposing such a broad limitation." *Id.* at A57. The court explained that "a conviction for a scheme wherein loss of public money or property was 'an object of the fraud' is * * * appropriate under § 666" and that therefore "an inten-

tional, unauthorized distribution of public funds to a private entity falls squarely within the meaning of misapplication as found in § 666(a)(1)(A).” *Ibid.* (quoting *Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020)).

The district court found “no doubt that money was both the motive and the object of [petitioner’s] misapplication of [airport commission] funds.” Pet. App. A58. The court explained that evidence at trial demonstrated that money “was the object of [petitioner’s] scheme”; that funds were “lost after [People Express] defaulted on the loan that [petitioner] ordered to be guaranteed”; and that petitioner “knew that the loan guarantee was not allowed under state and federal regulations and did it anyway.” *Ibid.* And the court classified “[t]his sort of intentional disregard for the restrictions attached to public funds” as “exactly the sort of wrongdoing that § 666(a)(1)(A) is meant to address.” *Ibid.*

While declining to disturb the other counts, the district court did find insufficient evidence supporting the jury’s guilty verdict for obstructing justice and entered a judgment of acquittal on that count. Pet. App. A51-A65. It sentenced petitioner to a below-guidelines sentence of 48 months of probation, a special condition of which included 30 months of home detention. Judgment 3; Pet. App. A12-A13.

4. The court of appeals reversed petitioner’s conviction for converting property from an organization receiving federal funds, affirmed his remaining convictions, and remanded for additional proceedings. Pet. App. A1-A46.

With respect to the 11 counts of conviction under Section 666(a)(1)(A) for misapplying property from an organization receiving federal funds, the court of appeals observed that “Section 666 prohibits an agent of

an organization receiving in any one-year period federal benefits in excess of \$10,000 from * * * ‘intentionally misapplying’ property owned or controlled by that organization and carrying a value of \$5000 or more.” Pet. App. A14 (quoting 18 U.S.C. 666(a)(1)(A)) (brackets omitted). And the court found “adequate evidence to support the jury’s conclusion that [petitioner]—not the Airport Commission, its employees, or its counsel—was responsible for allocating restricted funds for a loan guarantee to People Express.” *Id.* at A14-A15 (brackets and citation omitted). It observed that petitioner “single-handedly decided how to fund the collateral accounts that were pledged in support of the loan.” *Id.* at A15. And it emphasized evidence showing that petitioner “knew that his actions were unauthorized and illegal”—in part because he “concealed use of the [commission’s] funds” and “lied” about the funds’ use and related issues to the Federal Aviation Administration and during his civil deposition. *Ibid.*

The court of appeals also found “nothing in [Section 666(a)(1)(A)] suggest[ing] that a bribe, kickback, or personal benefit must flow from the intentional misapplication of property.” Pet. App. A16. The court observed that Section 666(a)(1)(A) not only prohibits intentionally misapplying funds, but also “prohibits embezzling, stealing, obtaining by fraud, [and] converting” funds, which together “cover any possible taking of money for [the defendant’s] own use or benefit.” *Ibid.* (citation omitted). And the court explained that interpreting the statute to also require that the defendant obtain a personal benefit in misapplying the victim’s property would result in “redundancy” because that circumstance is already “covered by the prohibitions against embezzlement, stealing, obtaining by fraud, or conversion.” *Ibid.*

(citation omitted). The court added that other courts of appeals had likewise “refused to limit intentional misapplication * * * by applying a personal benefit or illegitimate purpose requirement.” *Ibid.*

The court of appeals similarly rejected petitioner’s claim that his Section 666(a)(1)(A) convictions were invalid because he “did not obtain the property of another or deprive another of their property.” Pet. App. A17 (brackets and internal quotation marks omitted). The court observed that Section 666(a)(1)(A) “requires the ‘misapplication’ of property owned by, or under the care, custody, or control of another”—and “does not require the defendant to ‘obtain’ the property or ‘deprive’ the owner of the property.” *Ibid.* And it explained that the case was distinct from this Court’s decision in *Kelly v. United States*, in which this Court had reversed the Section 666(a)(1)(A) convictions of two defendants who “never sought ‘to take the government’s property.’” *Id.* at A18 (quoting *Kelly*, 140 S. Ct. at 1572).

The court of appeals observed that while the defendants in *Kelly* “sought only to divert the State’s regulatory power to injure a political adversary,” petitioner here “did not use his regulatory power to allocate airport funds ‘among airport uses,’” but instead “pledge[d] airport funds to a private entity ([a bank]) for the exclusive benefit of another private entity (People Express).” Pet. App. A18. “Unlike *Kelly*,” the court found, “the object of the crime here was property and the goal was to misapply property owned by the airport” for the purpose of “a loan to a private company.” *Ibid.*

5. On remand, the district court issued an amended judgment reimposing the same sentence. Am. Judgment 2.

ARGUMENT

Petitioner contends (Pet. i) that his 11 convictions for intentional misapplication under 18 U.S.C. 666(a)(1)(A) are infirm, on the theory that insufficient evidence showed that he sought to deprive the airport commission of its money or property. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. To the extent that petitioner continues to claim (Pet. 4-5, 18, 22) that proof of a personal benefit was a prerequisite for his convictions under Section 666(a)(1)(A), that claim is mistaken. Section 666(a)(1)(A) prohibits, *inter alia*, the “intentional[] misappl[ication]” of at least \$5000 worth of property of an organization that receives over \$10,000 in federal benefits over a one-year period. 18 U.S.C. 666(a)(1)(A). The term “misapplication” means “[t]he improper or illegal use of funds or property lawfully held.” *Black’s Law Dictionary* 1194 (11th ed. 2019) (emphasis omitted). That definition does not include a requirement of a bribe, kickback, or other personal benefit. Cf. *United States v. Green*, 350 U.S. 415, 420 (1956) (rejecting requirement of a “personal benefit” to “obtain” property for purposes of extortion under the Hobbs Act, 18 U.S.C. 1951).

Petitioner likewise errs in asserting (Pet. 17-20) that the decision below conflicts with *Kelly v. United States*, 140 S. Ct. 1565 (2020). In *Kelly*, the Court held that Section 666(a)(1)(A)’s prohibition against “‘obtaining by fraud’ the ‘property’ (including money) of a federally funded program or entity” requires proof “that an ‘object of [the defendant’s] fraud was ‘property.’” *Id.* at 1571 (quoting *Cleveland v. United States*, 531 U.S. 12,

26 (2000)) (brackets omitted). Here, the court of appeals did not question the application of such a requirement to Section 666(a)(1)(A)'s separate prohibition of "misapplication," but instead simply found that the facts satisfied it. See Pet. App. A18. "Unlike *Kelly*, which involved the use of regulatory power for political retribution, the object of the crime here *was* property" —"the goal was to misapply property owned by the airport." *Ibid.* (emphasis added); see *id.* at A58 (district court's finding of "no doubt that money was both the motive and the object" of petitioner's scheme).

Petitioner briefly suggests (Pet. 19-20) that the district court's instructions may have invited the jury to find him guilty under Section 666(a)(1)(A) based solely on the violation of a regulation. That fact-bound suggestion is not part of the question presented (see Pet. i) and was rejected by both lower courts. See Pet. App. A38-A39 (court of appeals' finding that the jury instructions "would not permit the jury to convict [petitioner] had the government's proof shown no more than a civil or administrative law violation"); *id.* at A34-A38; 3/9/20 Tr. 1592, 1594-1596. Their uniform assessment of the record does not warrant this Court's review. See Sup. Ct. R. 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); see also *Kyles v. Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

2. Petitioner errs in contending (Pet. 13-16) that the decision below conflicts with decisions from the Seventh and Eleventh Circuits.

In *United States v. Thompson*, 484 F.3d 877 (2007), the Seventh Circuit found no misapplication of funds in violation of Section 666(a)(1)(A) in the steering of a particular state contract to a local travel agency. *Id.* at 878-882. The court noted that the conduct had actually “saved” the government money by selecting the lowest bidder and reasoned that because “the state g[ot] what it contract[ed] for[] at the market price,” “no funds ha[d] been misapplied [under Section 666(a)(1)(A)], even if the state’s rules should have led it to buy something more expensive.” *Id.* at 881. The court made clear, however, that had the defendant believed that the local travel agency “provided less value for money than its competitors,” that “might support an inference that funds had been misapplied.” *Id.* at 882. Here, petitioner did not “save” the airport commission money, *id.* at 881; instead, he intentionally took airport funds away from their required public uses and placed them with a private bank to support a loan to a private company—ultimately resulting in the permanent loss of millions of dollars of airport funds.

The Eleventh Circuit’s decision in *United States v. Jimenez*, 705 F.3d 1305 (2013), is likewise consistent with the decision below. The court there “dea[lt] with a different question” than the meaning of “the ‘mis’ in ‘misapply’”; it instead considered whether the trial evidence demonstrated that the defendant “‘applied’ or directed” the disputed funds. *Id.* at 1309-1310. In contrast to the record there, which showed that a different official “directed the application of funds,” *id.* at 1311,

the court of appeals in this case found “adequate evidence to support the jury’s conclusion that” petitioner himself “was responsible for allocating restricted funds for a loan guarantee to People Express,” Pet. App. A14-A15 (brackets and citation omitted). Petitioner has not sought further review of that factbound determination, see Pet. i, nor would such review be warranted.

The Eleventh Circuit’s passing suggestion in *Jimenez* that “minor deviations of state or local law are not always sufficient to establish an ‘intentional misapplication’” in a Section 666(a)(1)(A) prosecution, “especially when the record evinces neither a bribe nor a kickback,” 705 F.3d at 1309, does not show that it would have disturbed petitioner’s convictions here. As noted above, the court of appeals found that the jury instructions here did not allow for conviction based solely on a rules-based violation. See Pet. App. A34-A39. And *Jimenez* itself approvingly cited cases analogous to this one, in which courts had affirmed convictions of individuals who diverted public funds earmarked for one purpose to a different, unauthorized purpose, without requiring proof of a bribe or kickback. 705 F.3d at 1310; see, e.g., *United States v. Frazier*, 53 F.3d 1105, 1110-1111 (10th Cir. 1995) (upholding a Section 666(a)(1)(A) conviction of a non-profit president who intentionally misapplied federal job-training funds to purchase computers).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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