No. 97-1892

In the Supreme Court of the United States

OCTOBER TERM, 1997

PAUL A. BILZERIAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether *United States* v. *Gaudin*, 515 U.S. 506 (1995), which held that the jury must determine the issue of the materiality of false statements under 18 U.S.C. 1001, established a new rule that is not retroactive on collateral review.

2. Whether it was harmless error for the district court to fail to instruct the jury on the element of the materiality of false statements under 18 U.S.C. 1001, where the jury found the same false statements to be material in finding petitioner guilty of securities fraud under 15 U.S.C. 78j(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A11) is reported at 127 F.3d 237. The opinion of the district court (Pet. App. A12-A33) is unreported. A previous opinion of the court of appeals, on petitioner's direct appeal, is reported at 926 F.2d 1285.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1997. A petition for rehearing was denied on February 25, 1998 (Pet. App. A2). The petition for a writ of certiorari was filed on May 26, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty on two counts of securities fraud (15 U.S.C. 78j(b)); five counts of making false statements to the Securities and Exchange Commission (SEC) (18 U.S.C. 1001); and two counts of conspiring to defraud the SEC and the Internal Revenue Service, and to commit various other offenses (18 U.S.C. 371). He was sentenced to four years' imprisonment, to be followed by two years' probation, and was fined $1.5 million. Gov't C.A. Br. 1-3. The court of appeals affirmed. *United States* v. *Bilzerian*, 926 F.2d 1285 (2d Cir.), cert. denied, 502 U.S. 813 (1991).[1]

In 1995, petitioner filed a motion pursuant to 28 U.S.C. 2255 to set aside his convictions on several grounds, including that the jury should have been instructed that materiality was an element of the false statements counts. The district court denied the motion (Pet. App. A12-A33), and the court of appeals affirmed. Pet. App. A3-A11.

1. The evidence at trial showed that petitioner engaged in two forms of securities fraud: he "parked" stock at a brokerage firm to create the impression that the stock had been sold, and he had a broker accumulate stock on investors' behalf to delay disclosure of purchases. His first set of illegal transactions involved stock in Cluett, Peabody and Company, Inc. In April and May 1985, petitioner raised $9 million from various investors through profit-sharing and guarantee-against-loss agreements. He used those funds to buy

[1] In September 1992, the district court reduced the custodial portion of petitioner's sentence to 20 months' imprisonment. Gov't C.A. Br. 3.

Cluett stock, but, contrary to SEC requirements, he falsely stated that the funds were personal and did not disclose that the funds came from other investors with whom he had profit-sharing and loss-guarantee arrangements. Petitioner also had a broker-dealer accumulate Cluett stock on his behalf. When petitioner purchased the block of accumulated stock, he did not reveal the accumulation arrangement to the SEC. Petitioner also agreed to buy 347,567 shares of Cluett stock from a group of shareholders. He subsequently filed forms with the SEC claiming that those shares were purchased in an "open market transaction," when in fact he had privately negotiated to pay between $38 and $40 per share in contemplation of a tender offer for the company. *Bilzerian*, 926 F.2d at 1289-1290.

In June 1986, petitioner raised $8 million from an individual investor to buy Hammermill Paper Company stock. He again falsely claimed that the funds were personal, and he again had a broker-dealer accumulate stock on his behalf in order to delay the report of his acquisition. When petitioner did file a report with the SEC, he again failed to disclose the accumulation agreement. *Bilzerian*, 926 F.2d at 1290.

Petitioner also "parked" shares of H. H. Robertson Company stock and Armco Steel stock. "Parking" occurs when a broker-dealer buys stock from a customer with the understanding that the customer will buy the stock back at a later date for the purchase price plus interest and commissions. In this way, there is no market risk to the broker-dealer. Petitioner parked 58,000 shares of Robertson stock with a broker-dealer for 30 days. Although petitioner said he would repurchase the stock, he subsequently reneged when the stock price fell substantially. As a result, the broker-dealer suffered a $250,000 loss. Petitioner compensated

the broker-dealer by generating some $125,000 in commissions and by paying the broker-dealer the other $125,000, with the understanding that the latter amount would be refunded when an additional $125,000 in commissions was generated. The broker-dealer sent petitioner a false invoice for $125,000 for fictitious "financial services"; petitioner deducted that amount on his 1985 tax return. *Bilzerian*, 926 F.2d at 1290-1291.

In September 1986, petitioner parked 306,600 shares of Armco stock with a broker-dealer, who also agreed to accumulate Armco stock on petitioner's behalf and to sell petitioner the accumulated stock when petitioner repurchased the 306,600 shares. In October 1986, petitioner purchased 818,900 Armco shares from the broker-dealer at the current market price. Although the broker realized a $575,000 profit on the sale, the profits belonged to petitioner under the stock parking and accumulation agreements. Petitioner sent the broker an invoice for fictitious consulting services to account for his profits. *Bilzerian*, 926 F.2d at 1291.

2. At petitioner's 1989 trial, the district court treated the issue of the materiality of petitioner's false statements under 18 U.S.C. 1001 as a matter for the court rather than the jury to determine. Gov't C.A. Br. 22.[2] The jury was instructed, however, that it had to

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[2] The district court found that petitioner's false statements were material. Gov't C.A. Br. 21 n.*. The district court's treatment of the materiality issue comported with Second Circuit law at the time. Petitioner was charged with violating Section 1001 in two distinct ways: by "falsif[ying], conceal[ing] or cover[ing] up by [a] trick, scheme or device a material fact," and by "mak[ing a] false, fictitious, or fraudulent statement[] or representation[]." *Id.* at 22. Under then-current law in the Second Circuit, proof of materiality was not required to establish that a defendant violated Section 1001 in the latter way. See, *e.g.*,

find materiality in order to find petitioner guilty of securities fraud under 15 U.S.C. 78j(b). *Id.* at 24. The securities fraud counts involved the same misrepresentations that were charged in the false statements counts. Pet. App. A10. The jury found petitioner guilty on all counts, and the district court sentenced petitioner to four years' imprisonment, to be followed by two years' probation, and imposed a fine of $1.5 million. Gov't C.A. Br. 1-3.

Petitioner challenged his convictions on direct appeal on numerous grounds, but did not raise any claim of error concerning the absence of a jury finding as to the materiality of his false statements under Section 1001. Gov't C.A. Br. 22. Petitioner did contend, however, that the evidence was insufficient to support the jury's finding of materiality as to the securities fraud counts. The court of appeals rejected that claim, as well as the other claims advanced by petitioner, and affirmed petitioner's convictions. *Bilzerian*, 926 F.2d at 1296-1299, 1302.

3. More than three years later, in February 1995, petitioner filed a motion pursuant to 28 U.S.C. 2255 to set aside his convictions. After this Court's decision in

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Bilzerian, 926 F.2d at 1299. Although proof of materiality was required as to the first means of violating Section 1001, materiality was treated as a matter for the judge rather than the jury to decide. See, *e.g.*, *United States* v. *Gribben*, 984 F.2d 47, 50 (2d Cir. 1993). This Court subsequently held in *United States* v. *Gaudin*, 515 U.S. 506 (1995), that the issue of materiality under Section 1001 is for the jury rather than the judge to decide. And in *United States* v. *Ali*, 68 F.3d 1468, 1474-1475 (1995), the Second Circuit interpreted *Gaudin* to hold by implication that proof of materiality was required to establish that a defendant had violated Section 1001 by means of a false, fictitious, or fraudulent statement or representation.

United States v. *Gaudin*, 515 U.S. 506 (1995), petitioner amended his motion to add the claim that the issue of the materiality of his false statements under Section 1001 should have been submitted to the jury. The district court denied petitioner's Section 2255 motion. Pet. App. A12-A33. With respect to petitioner's materiality claim, the court held that petitioner could not rely on *Gaudin* to mount a collateral attack on his conviction, because *Gaudin* stated a new rule that was not retroactively applicable on collateral review. Pet. App. A30-A32 (citing *Teague* v. *Lane*, 489 U.S. 288 (1989) (opinion of O'Connor, J.), and *Penry* v. *Lynaugh*, 492 U.S. 302 (1989)).

The court of appeals affirmed. Pet. App. A3-A11. The court held that *Gaudin* announced a "new rule," and rejected petitioner's claim that *Gaudin* should nevertheless be given retroactive application to cases arising on collateral review because it represented a "watershed" rule of criminal procedure. Pet. App. A6-A9. The court of appeals did give retroactive application, however, to its holding in *United States* v. *Ali*, 68 F.3d 1468 (2d Cir. 1995), that materiality is an element of a prosecution for violating 18 U.S.C. 1001 by making false, fictitious, or fraudulent statements or representations, and that therefore the jury should have been instructed on that element. Pet. App. A9. Nonetheless, the court concluded that the failure to instruct the jury on the element of materiality with respect to that means of violating Section 1001 was harmless, because the jury had returned special verdicts finding that petitioner had made material misrepresentations with respect to the securities fraud counts, and the "underlying facts in the securities fraud counts are identical to the underlying facts in the § 1001 counts." *Id.* at A10. Thus, the court of appeals

concluded, no rational juror could have found that petitioner's misrepresentations were material on the securities fraud counts but were not material on the false statement counts. *Ibid.*

ARGUMENT

Petitioner argues (Pet. 5-7) that the Court should grant review in this case to resolve a conflict among the courts of appeals on the question whether it can ever be harmless error for a trial judge to direct a verdict, or to fail to instruct the jury, on an essential element of the offense. There is no conflict, however, on the questions decided by the court of appeals in this case, and review by this Court is not warranted.

1. The court of appeals correctly concluded that *Gaudin* announced a new rule that does not apply retroactively on collateral review. As this Court has explained, *Gaudin* overturned "near-uniform precedent both from this Court and from the Courts of Appeals" holding that the issue of materiality was properly decided by the judge rather than the jury. *Johnson* v. *United States*, 117 S. Ct. 1544, 1549 (1997). *Gaudin* clearly was not "compelled by existing precedent." *O'Dell* v. *Netherland*, 117 S. Ct. 1969, 1973 (1997).

Nor did *Gaudin* establish a "watershed rule[] of criminal procedure that [is] necessary to the fundamental fairness of the criminal proceeding." *Sawyer* v. *Smith*, 497 U.S. 227, 241-242 (1990) (quotation marks omitted). See *United States* v. *Shunk*, 113 F.3d 31, 37 (5th Cir. 1997); *United States* v. *Swindall*, 107 F.3d 831, 836 (11th Cir. 1997) (*Gaudin* simply "reallocates fact-finding from judge to jury on the single issue of materiality"); cf. *Johnson*, 117 S. Ct. at 1550 (decision of materiality by judge rather than jury did not "seriously affect the fairness, integrity or public reputation of

judicial proceedings") (quoting *United States* v. *Olano*, 507 U.S. 725, 736 (1993)).

The other courts of appeals that have addressed the issue have agreed with the court below that defendants are not entitled to rely on *Gaudin* as a basis for collaterally attacking their convictions. See *Shunk*, 113 F.3d at 34-37; *Swindall*, 107 F.3d at 834-836; see also *United States* v. *Dale*, 140 F.3d 1054, 1057-1060 (D.C. Cir. 1998) (Henderson, J., concurring). Further review by this Court is not warranted.

2. Petitioner correctly notes (Pet. 5-7) that the courts of appeals have reached conflicting conclusions about whether and in what circumstances it can be harmless error for a trial judge to direct a verdict, or to fail to instruct the jury, on an element of the offense. For several reasons, however, this case would not be a suitable one in which to address that conflict.[3]

First, petitioner's claim of error is that the jury rather than the judge should have decided whether petitioner's false statements were material under Section 1001. That claim, however, rests entirely on this Court's decision in *Gaudin*, and petitioner may not rely on *Gaudin* to collaterally attack his convictions. See pp. 7-8, *supra*. Because petitioner's claim of error is barred, there is no need to consider whether the error is also harmless.[4] Put differently, petitioner would not be

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[3] There is a petition for writ of certiorari pending before the Court that does appropriately present that conflict. See *Neder* v. *United States*, No. 97-1985. We have acquiesced in the petition in *Neder*. For the reasons stated in text, however, there is no reason to hold this petition pending the disposition of the petition in *Neder*. (We have provided petitioner in this case with a copy of our brief in *Neder*.)

[4] Although the court of appeals did go on to consider the question whether the failure to submit an essential element to the

entitled to relief even if he were able to obtain a ruling from this Court that the failure to submit an element to the jury can never be harmless.

Second, unlike virtually all of the cases cited by petitioner (Pet. 5-6), this case arises on collateral review. That fact alters the applicable harmless-error test, see *Brecht* v. *Abrahamson*, 507 U.S. 619, 629-638 (1993),[5]

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jury can be harmless error, Pet. App. A10, it did not need to do so. The court of appeals concluded that petitioner was entitled to retroactive application of the substantive holding of *United States* v. *Ali*, 68 F.3d 1468, 1474-1475 (2d Cir. 1995), that proof of materiality is necessary to establish a violation of Section 1001 by means of a false, fictitious, or fraudulent statement or representation. Pet. App. A9. Retroactive application of that substantive holding, however, establishes only that petitioner was entitled to a finding of materiality; it is the procedural holding of *Gaudin*—on which petitioner may not rely in this collateral context—that established that the jury rather than the judge must make that finding. Because the district court in this case made a finding of materiality, Gov't C.A. Br. 21 n.*, there was no error in this case under the substantive holding of *Ali*. Even if there had been no materiality finding by the judge, moreover, the error under *Ali* would have been the failure of the judge to make a required finding, not the failure to submit an element to the jury. And the corresponding harmless-error question would be whether the absence of a finding of materiality by the judge was harmless, not whether the failure to instruct the jury on the element of materiality was harmless. Thus, there was no need for the court of appeals to address the question whether the latter type of error can be harmless.

[5] Constitutional errors generally require reversal unless the government can establish that the error "was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Non-constitutional errors require reversal only if they had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 631 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). In *Brecht*, the Court held that constitutional errors considered on collateral review are

and raises additional issues as to the proper harmless-error analysis to be applied to erroneous instructions defining the elements of an offense, see *California* v. *Roy*, 519 U.S. 2, 4-6 (1996) (per curiam). This case therefore would not be an appropriate vehicle to consider the question of the proper harmless-error analysis to apply in the more typical situation in which the claim of error is being raised on direct appeal.

Finally, the court of appeals in this case applied a special type of harmless-error analysis, holding that the absence of a jury verdict on the materiality of petitioner's misrepresentations under Section 1001 was harmless because the jury had deemed the same misrepresentations to be material in finding petitioner guilty of securities fraud under 15 U.S.C. 78j(b). Pet. App. 10. There is no conflict on the question whether that particular type of harmless-error analysis is permissible. To the contrary, this Court has expressly approved the approach taken by the court of appeals in the present case. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (absence of proper jury finding on essential element is harmless where jury has made other findings that are "functionally equivalent to finding the element" at issue) (quoting *Carella* v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in the judgment)). So too has every court of appeals to have considered the issue. See, *e.g.*, *Waldemer* v. *United States*, 106 F.3d 729, 732 (7th Cir. 1996) ("If the circumstances of the case were such that the jury, in rendering its verdict as to another count or offense, had by that very decision necessarily also found the existence of the element in question beyond a reasonable

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properly subject to the less stringent harmless-error standard articulated in *Kotteakos*. *Brecht*, 507 U.S. at 629-638.

doubt, the failure to submit that element to the jury would be harmless because the jury would have already decided that issue."); *United States* v. *Edmonds*, 80 F.3d 810, 824-825 (3d Cir.) (en banc), cert. denied, 117 S. Ct. 295 (1996); *United States* v. *Winstead*, 74 F.3d 1313, 1320-1321 (D.C. Cir. 1996) (failure to instruct on materiality as to false statements under Section 1001 was harmless in light of jury's finding that same statements were material for purposes of mail fraud under 18 U.S.C. 1341); *United States* v. *Johnson*, 71 F.3d 139, 144-145 (4th Cir. 1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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