No. 19-912

In The
Supreme Court of the United States

ALBERT T. ROBLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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REASONS FOR GRANTING THE WRIT

Contrary to much of the discussion in the BIO, the Question Presented and the split it implicates concern the *quid pro quo* element of 18 U.S.C. § 666, not whether the "*quo*" by the defendant constitutes an "official act." That different issue was raised on direct appeal, App. B31, but is no longer at issue here. Whether a bribery conviction requires proof of a *quid pro quo*, particularly where First-Amendment-protected campaign contributions constitute the supposed "*quid*," is an important issue that was never fully and fairly addressed on direct appeal and raises serious constitutional questions regarding both the statute and the conviction.

While the courts below may have considered themselves bound by circuit precedent or law of the case, and thus refused to fully consider such constitutional concerns on remand or collateral review, this Court is no so bound, has not considered such issues on the merits following direct appeal, and hence would now provide the first full and fair opportunity to litigate whether such constitutional concerns require § 666 to be interpreted to contain a *quid pro quo* element.[1] The government does not cite a single case suggesting that the power of this Court is limited by the earlier rulings in the lower courts, and the equities certainly favor consideration of this highly cert.-worthy issue here.

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[1] Though the government implies otherwise, BIO 7, it should go without saying that this Court's denial of cert. on direct appeal is not a merits determination and does not bar subsequent collateral review in this Court.

I. There Is a Substantial Split Over Whether a *Quid Pro Quo* Is Required To Convict a State Official of Bribery Under § 666.

As noted in the Petition, at 12-14, there is a substantial split on whether § 666 requires proof of a *quid pro quo* exchange for an alleged bribe. The government, at 12-13, attempts to distinguish the conflicting cases, but it seriously misreads those cases.

In its discussion, at 12, of *United States* v. *Ford*, 435 F.3d 204 (2d Cir. 2006), for example, the government quotes the wrong passage. Its quote from 435 F.3d at 212 merely repeats the statutory language before the court then compares the instruction given by the district court. But on the immediately following page the court explains its construction of that statutory language: "In short, the recipient must have accepted the thing of value while 'intending to be influenced.' Or, as the Supreme Court put it plainly in *Sun–Diamond Growers,* there must be a *quid-pro-quo*." *Id*. at 213. The government's further complaint that the (wrong) passage it quotes is related to intent rather than to "official acts" is even more curious given that the Question Presented in this case – whether a *quid pro quo* is required – does not concern the nature of any official acts, but whether the parties intended to *exchange* one thing for another. The nature of the "quo" is not the issue; it is the need to prove an agreement to exchange consideration given the nature of the "*quid*."

The government's attempt to distinguish *United States* v. *Redzic*, 627 F.3d 683, 692 (8th Cir. 2010), *cert. denied*, 563 U.S. 956 (2011), fares no better. It claims, at 12, that *Redzic* did not address the *quid*

pro quo question, but merely assumed such a requirement to avoid addressing whether § 666 also banned "gratuities." But the government seemingly fails to understand that § 666(a)(1)(B) covers *both* bribes and gratuities, and the holdings in *Redzic* and the question here concern the standard for proving a *bribe* regardless whether the government could alternatively prove an illegal gratuity.[2] In *Redzic* the court did not *assume* that bribery required a *quid pro quo*, it merely assumed that the government could not charge the separate crime of accepting an illegal gratuity and that only the bribery portion of § 666(a)(1) applied. It then squarely *held* that such portion of the statute required a *quid pro quo*. *Id*. at 692 ("To prove the payment of an illegal bribe, the government must present evidence of a *quid pro quo*"). Petitioner here was not charged with accepting a gratuity, he was charged with accepting a bribe, and the Question Presented concerns the standards for proving such a bribe, not whether or how an illegal gratuity might be charged and proven.

The government's further attempt to dismiss *United States* v. *Griffin*, 154 F.3d 762, 763-64 (8th Cir.

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[2] Cf. *United States* v. *Zimmermann*, 509 F.3d 920, 927 (8th Cir. 2007) ("Section 666(a)(1)(B) prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action. See 18 U.S.C. § 666(a)(1)(B) ('corruptly solicits or demands * * * intending to be influenced or rewarded'); see, e.g., *United States* v. *Griffin*, 154 F.3d 762, 763 (8th Cir.1998) (difference between bribe and gratuity is that a *quid pro quo* arrangement is required for a bribe but not for a gratuity). Zimmermann was indicted for, convicted of, and sentenced for accepting gratuities rather than bribes. *Compare* U.S.S.G. § 2C1.1 (bribes) with *id.* § 2C1.2 (gratuities).").

1998), as involving only the Sentencing Guidelines is similarly misconceived. That case also concerned the difference between the two different crimes under § 666, and in the course of affirming a longer sentence for accepting an illegal *bribe*, rather than applying the more lenient guidelines for an illegal gratuity, the court necessarily had to determine whether the evidence was sufficient to establish an illegal bribe.[3] In ruling on that prior question, the court squarely held that a *quid pro quo* was required and was established. *Id*. at 763-64. (under § 666, the "distinction between a bribe and an illegal gratuity is the corrupt intent of the person giving the bribe to receive a *quid pro quo* * * *. We agree with the District Court that the evidence established the necessary *quid pro quo*, or payment of money by Simmons in exchange for Griffin's official actions on her behalf"; "The core difference between a bribe and a gratuity is not the time the illegal payment is made, but the *quid pro quo*, or the agreement to exchange cash for official action.").

Finally, the government's attempt to distinguish *United States* v. *Jennings*, 160 F.3d 1006, 1014, 1020-21 (4th Cir. 1998), suffers from the same misunderstanding of the separate crimes of accepting illegal bribes or illegal gratuities under § 666. The debate in that case was whether § 666 covered both gratuities and bribes, or *only* bribes. The only assumption the court made was that gratuities were not covered, but

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[3] Contrary to the government's claim, at 12, the defendant in *Griffin* argued that he did *not* admit to violating § 666 by accepting a bribe, but that the facts he admitted only established the separate and distinct crime of accepting of an illegal gratuity under that section.

bribes were. *Id*. at 1015. Having made that assumption, the court proceeded to *hold* that a bribe under § 666 could only be proven by showing a *quid pro quo*. *Id*. at 1020-21 ((instruction using "intent to influence" language without including a *quid pro quo* requirement was plain error; instruction gave false impression that the law "prohibits *any* payment made with a generalized desire to influence or reward (such as a goodwill gift), no matter how indefinite or uncertain the payor's hope of future benefit.").

The question here concerns the standards for bribery under § 666, and that is the split discussed in the Petition. Whether illegal gratuities are also separately covered by § 666 need not be decided here anymore than in *Jennings* given that Petitioner was neither charged with nor sentenced for accepting illegal gratuities. App. B21 n. 10, B26; *United States* v. *Robles*, 2015 WL 1383756, *3 (C.D. Cal. 2015) (resentencing under U.S.S.G. § 2C1.1); compare U.S.S.G. § 2C1.1 (bribes) with *id.* § 2C1.2 (gratuities).

Given the broad split presented by this Petition, recognized by both courts and commentators alike, Pet. 14-15, the Question Presented is important, worthy of this Court's time and resources, and more than sufficiently "debatable" to have warranted a certificate of appealability. Regardless whether the lower courts might have viewed themselves constrained by their own prior decisions and precedent, the legal correctness of those decisions nonetheless remained and remains debatable in *this* Court.

II. A *Quid Pro Quo* Should Be a Required Element for Conviction Under § 666 in Order To Avoid Serious Constitutional Concerns.

The government offers no substantive defense of the Ninth Circuit's precedent rejecting a *quid pro quo* requirement for a bribery conviction under § 666. Nor does it offer any opposition to the argument that this Court's decisions in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), and *United States* v. *McCormick,* 500 U.S. 257 (1991), conflict with the Ninth Circuit's refusal to require proof of a *quid pro quo*, particularly where First Amendment interests are involved. Pet. 16-22; see also *McCutcheon* v. *FEC*, 134 S. Ct. 1434 (2014) (invalidating certain limits on campaign contributions).

Petitioner will not repeat those earlier arguments here, but simply emphasizes that failure to require proof of a *quid pro quo* raises serious First Amendment and federalism concerns warranting habeas review and presenting an important question for this Court. Indeed, the Ninth Circuit's construction of § 666 is so wildly overbroad as applied to First Amendment "*quids*" that the constitutionality of the statute as a whole is deeply suspect. *Cf. McDonnell*, 136 S. Ct. at 2372-73 (looking beyond conduct in the case before it to overbroad applications when deciding to narrowly construe statute). Such issues provide independent justification for allowing a § 2255 motion to proceed to the one Court that can address those issues in this case and resolve the split more broadly.

This Court thus should grant the Petition to bring the requirements of prosecution for bribery under

§ 666 into line with the requirements established by this Court for other federal bribery statutes and to avoid the constitutional infirmities that arise from the Ninth Circuit's broader reading of the statute.

III. This Case Is a Good Vehicle for Addressing the *Quid Pro Quo* Question.

The bulk of the BIO is an attempt to avoid the substantive issue by claiming the partial consideration of the *quid pro quo* issues on direct appeal were sufficient grounds to deny relief under § 2255. But this case raises serious constitutional concerns with Petitioner's conviction, and the equally serious concern that he was convicted for conduct that is not in fact a crime under a proper reading of the statute. Given the powerful arguments for requiring proof of a *quid pro quo* under § 666, the failure of trial counsel to seek such an instruction, even if only to preserve the issue, is likewise enough to raise "debatable" inadequate assistance claims.[4]

The government, at 8, claims that it was proper to deny habeas review under § 2255 where the grounds for relief were rejected on direct review. But the

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[4] The government's citation, at 11, to *Kimmelman* v. *Morrison*, 477 U.S. 365, 383-84 (1986), for the proposition that failure to raise a meritorious claim is not "*per se*" ineffective is misleading at best. That case recognized the possibility that claims might sometimes not be raised as a matter of affirmative strategy, but did not suggest that failure to adequately raise or preserve a potentially dispositive legal issue, particularly one subject to a circuit split, would generally constitute adequate assistance of counsel. While choosing to forego some arguments may not *always* be inadequate, it often is, it is always *debatable*, and hence sufficient to support a certificate of appealability.

First Amendment limitations on the scope of § 666 were neither raised nor resolved in the initial appeal from conviction – hence the ineffective assistance of counsel claim – and on appeal after remand such arguments were deemed foreclosed by precedent and law of the case without full or fair substantive consideration whether First Amendment concerns required the more narrow construction in the context of calling campaign contributions a bribe. Pet. 6-10.

The government's reliance on *Kaufman* v. *United States*, 394 U.S. 217 (1969), does little to help its opposition. Indeed, *Kaufman* held that a Fourth Amendment challenge to an illegal search *could* be raised on collateral review under § 2255, not only on direct appeal. *Id*. at 221-22. The government relies on footnote 8 of that opinion for the notion that where a claim has previously been determined by the trial or appellate court, the subsequent court has discretion to deny a § 2255 hearing and to determine the motion on the files and the records without a hearing. *Id*. at 227 & n. 8. But that discussion was in the context of determining factual disputes, as the surrounding text makes clear, and does not suggest courts have discretion simply to ignore the legal claims involved. Indeed, it suggest much the opposite, describing the discretion involved as permitting the § 2255 court "to *determine* that on the basis of the motion, files, and records" no relief is warranted. But that would still be a substantive determination, not a procedural refusal even to make such a determination.

In this case any such discretion to avoid a hearing is irrelevant given that the issue is purely legal and does not require a factual hearing. And the issue

falls squarely within the plain language of § 2255 because the failure to instruct the jury on the *quid pro quo* element of the crime, if required by the statute and/or the Constitution, would result in a sentence "imposed in violation of the Constitution or laws of the United States." *Cf.* App. B15 (misstatement or omission of an element of an offense in jury instructions is constitutional error unless harmless).[5] Nothing in *Kaufman* suggests that collateral examination of the proper construction of a criminal statute, particularly one raising substantive constitutional concerns, can be precluded by prior consideration of the issue on direct appeal. Rather, the government erroneously "exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief. *Kaufman*, 394 U.S. at 228.

Justice Scalia's concurring and dissenting opinion in *Withrow* v. *Williams*, 507 U.S. 680, 718, 720 (1993)

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[5] The government, at 13-14, seems to argue that there was no prejudice because there was sufficient evidence to convict under Petitioner's interpretation of the statute. But its argument focuses on whether an "official act" was involved, not whether there was a *quid pro quo*. The government's argument is particularly disingenuous given that the Ninth Circuit effectively rejected it when finding that the § 666 conviction could not sustain the honest services fraud convictions after *Skilling* v. *United States*, 561 U.S. 358 (2010), precisely because the § 666 conviction did not require a *quid pro quo*. App. B20-22 & nn. 9-10; see also Pet. 6 (discussing testimony of government witness that there was no agreement or promises exchanged for the campaign contributions, only the hope of gaining favor generally).

(Scalia, J., concurring in part and dissenting in part), likewise offers little help to the government. That case, like *Kaufman*, involved a Fourth Amendment claim, regarding which different precedent applied given the skepticism of *Miranda* as judicially created rather than constitutionally required. In the portion cited by the government, Justice Scalia was dissenting from the Court's *willingness* to entertain the habeas arguments, but even so noted that there was no bar to such review, merely a question of discretion and equity. And even so, he would consider whether the issue raised by a habeas petitioner had been fully and fairly litigated at trial.

As in *Kaufman*, Justice Scalia's concerns seems to be with relitigating an inevitably fact-bound *Miranda* or similar claim that was already litigated before. *Id.* at 714. Again, that is not this case. There is no factual dispute involved here, and no question that the court did not give a *quid pro quo* instruction and thus the jury failed to find any *quid pro quo*.

If the correct reading of the statute requires the government to prove such a *quid pro quo*, then trial counsel was ineffective for not seeking such an instruction, the district and circuit courts committed legal error in not requiring such an instruction, and Petitioner's conviction is unconstitutional and not authorized by the statute in question. It is a fundamental constitutional problem to convict and jail a person based on proof of conduct that does not constitute a crime and absent a verdict finding, and evidence supporting, beyond a reasonable doubt *all* the actual elements of a crime. Whatever equities are involved,

they support habeas review in this Court to correct the misconstruction of § 666 by the Ninth Circuit.

At the end of the day, the government's procedural arguments all rise or fall on the merits of the Question Presented. That the Ninth Circuit relied on its own legally erroneous but binding prior decisions and precedent to dismiss Petitioner's claims on habeas and deny a certificate of appealability may explain its unwillingness to consider the argument further, but it is hardly a procedural reason independent of the underlying legal error and no reason at all for this Court to reject the Petition. Indeed, it suggests that this is the *only* court in a position to provide Petitioner a full and fair consideration of the important underlying legal issue on which the circuits are divided and on which the Ninth Circuit is wrong.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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