Supreme Court, U.S.
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10-516 OCT 14 2010

In The
Supreme Court of the United States

OFFICE OF THE CLERK

BOBBY J. RAST, DANIEL B. (DANNY) RAST,
AND RAST CONSTRUCTION, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an essential element to be proven for a conviction for the offense of bribery of a State or local official under 18 U.S.C. §666(a)(2) is a specific and identifiable *quid pro quo* consisting of the specific thing of value given or promised by the alleged giver of the bribe in exchange for or intended to be in exchange for a specific action taken or promised by the alleged recipient of the bribe.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

United States of America

Plaintiff-Appellee

Jewell C. "Chris" McNair

Jack W. Swann

Bobby J. Rast

Daniel B. "Danny" Rast

Rast Construction, Inc.

Floyd W. "Pat" Dougherty

F.W. Dougherty Engineering & Associates, Inc.

Grady R. "Roland" Pugh, Sr.,

Roland Pugh Construction, Inc.

Defendants-Appellants

CORPORATE DISCLOSURE STATEMENT

The corporate Petitioner has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Bobby J. Rast, Daniel B. (Danny) Rast, and Rast Construction, Inc. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS OF REPORTS OF THE OPINIONS AND ORDERS ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The decision of the United States Court of Appeals for the Eleventh Circuit which this petition seeks to review was entered on May 12, 2010 and the decision and opinion is reported at 605 F.3d 1152 (11th Cir. 2010), and is reprinted as Appendix A hereto. App. 1-186. No opinion was entered by the United States Court of Appeals for the Eleventh Circuit when it denied a petition for rehearing on July 20, 2010. The order denying the petition for rehearing is reprinted as Appendix C hereto. App. 196-97. An unpublished opinion of the United States District Court for the Northern District of Alabama is reprinted as Appendix B hereto. App. 187-95.

BASIS FOR JURISDICTION

The jurisdiction of this Court for this petition for writ of certiorari is invoked pursuant to Section 1254(1) of Title 28, United States Code. This petition

seeks to review the decision of the United States Court of Appeals for the Eleventh Circuit entered on May 12, 2010, which is reprinted as Appendix A. An order of the United States Court of Appeals for the Eleventh Circuit denying rehearing of the May 12, 2010 decision was entered on July 20, 2010, and is reprinted as Appendix C hereto. App. 196-97.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

1. The Sixth Amendment to the Constitution of the United States, which reads in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

2. Section 666(a)(2) of Title 18, United States Code, which reads:

> § 666. Theft or bribery concerning programs receiving Federal funds
>
> (a) Whoever, if the circumstance described in subsection (b) of this section exists –
>
> * * *
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian

> tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.
>
> * * *

STATEMENT OF THE CASE

Jurisdiction of this case in the United States Court of Appeals for the Eleventh Circuit was based on 28 U.S.C. §1291. Jurisdiction in the trial court, the United States District Court for the Northern District of Alabama, was based on 18 U.S.C. §3231.

Petitioners were indicted, along with others, in the United States District Court for the Northern District of Alabama in two cases. In one case (Case Number 05-CR-061) Petitioners were charged in six counts with six discrete briberies (Counts 19 through 24) of Jewell C. "Chris" McNair, a county official, in violation of 18 U.S.C. §666(a)(2), and in one count with conspiracy among themselves and with others to

bribe McNair in violation of 18 U.S.C. §371. Additionally, this indictment charged Petitioners Bobby Rast and Rast Construction, Inc. in three other counts with discrete briberies of three other county officials (Counts 72, 87, 89). The indictment in Case Number 05-CR-061 is Appendix D hereto. App. 198-223.

The counts of the indictment charging bribery in Case Number 05-CR-061 did not allege a *quid pro quo* in that they did not allege a specific benefit given or promised or intended to be given or promised to Petitioners in exchange for their alleged giving of the things of value described in each bribery count to county officials as a part of each separately alleged bribery offense.

In a second case (Case Number 05-CR-544) Petitioners were charged in three counts with three discrete briberies (Counts 66 through 68) of Jack W. Swann, a county official and one count (Count 51) of conspiracy to bribe Swann, in violation of 18 U.S.C. §666(a)(2) and 18 U.S.C. §371. The indictment in Case Number 05-CR-544 is Appendix E hereto. App. 224-49. The indictment in Case Number 05-CR-544 did not allege a *quid pro quo* for the alleged briberies in that it did not allege a specific benefit given or promised or intended to be given or promised to Petitioners in exchange for the alleged giving of the things of value described in each bribery count to county officials as a part of each separately alleged bribery offense.

By motions to dismiss, objections to evidence, requests for jury instructions, objections to jury

instructions, and motions for judgment of acquittal; and post-trial motions for judgment of acquittal, in arrest of judgment, and for new trial; Petitioners raised in both cases the issue that a specific and identifiable *quid pro quo* passing or expected or intended to pass between the parties to each alleged bribery, which included the specific and identifiable benefit passing or expected to pass to Petitioners in exchange for the things of value allegedly given by Petitioners to the county officials, was an essential element of the bribery offense defined by 18 U.S.C. §666(a)(2) and charged against them in the separate counts of the indictments.

In a pre-trial memorandum opinion in Case Number 05-CR-061 the District Court ruled that no specifically defined act or acts of county officials need be alleged or proven as a *quid pro quo* in a prosecution for a violation of Section 18 U.S.C. §666(a). Appendix B, App. 187-95. All of Petitioners' motions, requests, and objections raising the *quid pro quo* issue were overruled or denied.

The two indictments were tried in separate trials in the District Court. Petitioners Bobby J. Rast and Rast Construction, Inc. were convicted on certain counts in each case, and Petitioner Daniel B. (Danny) Rast was convicted on certain counts in one case (he was acquitted of all charges in the other case), of bribery in violation of 18 U.S.C. §666(a)(2) and conspiracy to commit bribery. Petitioners appealed their convictions to the United States Court of Appeals for the Eleventh Circuit. Petitioners' cases were consolidated on

appeal with co-defendants and with appeals of other defendants from other trials of related charges. The consolidated appeals resulted in the single decision of the Eleventh Circuit rendered on May 12, 2010 and reported at 605 F.3d 1132, which is the decision this petition seeks to review.

On appeal Petitioners raised the same issue raised in the District Court – that an identifiable and specific *quid pro quo* passing or intended to pass between the parties to each alleged bribery, including the specific and identifiable benefit passing or intended to pass from the county officials to Petitioners in exchange for their alleged gifts or payments, was an essential element of the offense of bribery charged in the bribery counts and in the conspiracy to commit bribery counts of the indictments. The Eleventh Circuit, in an opinion rendered on May 12, 2010, held that such a *quid pro quo* is not an essential element of the offense described by 18 U.S.C. §666(a)(2) and affirmed the Petitioners' multiple bribery and conspiracy to commit bribery convictions. App. 1-186. On July 20, 2010 the Eleventh Circuit denied Petitioners' petition for rehearing of the May 12, 2010 decision. App. 196-97.

ARGUMENT REGARDING REASONS FOR GRANTING THE WRIT

I. In its decision in the present case the United States Court of Appeals for the Eleventh Circuit decided an important Federal question in a way that conflicts with a relevant decision of this Court in that it decided that a *quid pro quo* is not an essential element of the offense of bribery defined by 18 U.S.C. §666(a)(2).

In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), in conflict with the Eleventh Circuit decision in the present case, in interpreting the Federal bribery statute applicable to Federal officials, 18 U.S.C. §201, this Court emphatically said bribery requires a *quid pro quo*. At the heart of the question presented by this petition is the term "*quid pro quo*". Its meaning and significance inculcate that the writ should be granted in this case.

The term "*quid pro quo*", though of Latin origin, is not an uncommon expression for those whose language is English. It is often used, especially in the legal field.

Webster defines *quid pro quo* as:

Something for something (else)

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1865 (G.&C. Merriam Co. 1971). *Black's*

Law Dictionary defines *quid pro quo* similarly and somewhat more expansively as:

> What for what; something for something. Used in the law for the giving one valuable thing for another.

BLACK'S LAW DICTIONARY 1415 (Rev. 4th Ed. 1968). Basically, the term *quid pro quo* equates to the subject matter or ingredients of an exchange or swap. The significance of the exchange concept and the quoted definitions is the thrust of this petition. It demonstrates the serious error of the Eleventh Circuit in deciding the present case in a way that conflicts with a decision of this Court on an important interpretation of a Federal criminal statute.

It is important to recognize that in the present case Petitioners were charged with multiple bribery offenses, not merely one bribery offense, in each case. In Case Number 05-CR-061 there are six discrete bribery accusations against Petitioners. App. 198-223. In Case Number 05-CR-544 there are nine discrete bribery accusations against one or more of the Petitioners. App. 224-49. Consequently, if a *quid pro quo* is an element of bribery it was an element requiring proof as to the separate bribery charged in each of the separate bribery counts in each case.

The Eleventh Circuit opinion in the present case explicitly holds that a *quid pro quo* is not an essential element of the offense of bribery defined by 18 U.S.C. §666(a)(2). The decision effectively holds that a bribery of a state, county or local official may be

proven, and a conviction for bribery sustained, without evidence identifying the "something for something (else)", i.e., without proving the specific benefit the defendant received, expected, or was promised from an official in exchange for the thing of value given or promised to the public official by the defendant.

The Eleventh Circuit opinion said:

> Thus, we readily determine the Indictment itself was not defective for failure to allege a specific *quid pro quo*.

605 F.3d at 1186 (App. 56).

* * *

> The requirement of a "corrupt" intent in §666 does narrow the conduct that violates §666 but does not impose a specific *quid pro quo* requirement.

* * *

> For all of these reasons, we now expressly hold there is no requirement in §666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*.

* * *

> To be sure, many §666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to

> a specific official act by that County employee. The intent that must be proven is an intent to corruptly influence or to be influenced "in connection with any business" or "transaction," not an intent to engage in any specific *quid pro quo*.

605 F.3d at 1188 (App. 59-61).

In contrast, the *Sun-Diamond* decision in interpreting the bribery statute applicable to Federal officials says:

> Initially, it will be helpful to place § 201(c)(1)(A) within the context of the statutory scheme. Subsection (a) of § 201 sets forth definitions applicable to the section – including a definition of "official act," § 201(a)(3). Subsections (b) and (c) then set forth, respectively, two separate crimes – or two pairs of crimes, if one counts the giving and receiving of unlawful gifts as separate crimes – with two different sets of elements and authorized punishments. *The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was corruptly given, offered, or promised* to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, *inter alia,* "to influence any official act" (giver) or in return for "being influenced in the performance of any official act" (recipient). The second crime, defined in

§ 201(c)(1)(A) as to the giver, and in § 201(c)(1)(B) as to the recipient, is illegal gratuity, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), "for or because of any official act performed or to be performed by such public official."

[1] The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. *In other words, for bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act.* An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken. The punishments prescribed for the two offenses reflect their relative seriousness: Bribery may be punished by up to 15 years' imprisonment, a fine of $250,000 ($500,000 for organizations) or triple the value of the bribe, whichever is greater, and disqualification from holding government office. See 18 U.S.C. §§ 201(b) and 3571. Violation of the illegal gratuity statute, on the other hand, may be punished by up to two years' imprisonment

> and a fine of $250,000 ($500,000 for organizations). See §§ 201(c) and 3571.
>
> [2] The District Court's instructions in this case, in differentiating between a bribe and an illegal gratuity, correctly noted that only a bribe requires proof of a *quid pro quo*.

526 U.S. at 404-05 (Emphasis added).

While the *Sun-Diamond* case was not a bribery prosecution it expressly defined "bribery" for purposes of Federal criminal law. It was a prosecution for violation of 18 U.S.C. §201(c)(1)(A), the statute which criminalizes gratuities to Federal officials. But, as the *Sun-Diamond* decision makes clear, §201(c)(1)(A) is but "one element" of a "framework" and "one strand" of a "web" of Federal law defining and punishing impermissible gifts, which includes bribes. 526 U.S. at 400, 409. Another part of this framework and web is obviously §201(b)(1) and §201(b)(2), which the *Sun-Diamond* decision discusses and makes clear are bribery offenses, as distinguished from the less culpable impermissible gratuity offense that §201(c)(1)(A) defines.

The prosecution against Petitioners in the present case is for bribery under 18 U.S.C. §666(a)(2), not under §201. But, §666(a) is surely another element in the framework and strand in the web of Federal law referred to in *Sun-Diamond* as defining and punishing impermissible gifts, and, in particular, bribes, to public officials. See 526 U.S. at 400, 409. Both §201(b) and §666(a)(2) have been recognized by

this Court as bribery statutes which provide a definition of bribery for other Federal prosecutions. See *Skilling v. United States*, 561 U.S. ___, 130 S.Ct. 2896, 2933 (2010).

No valid reason exists to conclude that bribery under §201, as the *Sun-Diamond* case defines it, is different from bribery under §666. This is especially true since §666 was enacted by Congress for the express purpose of closing a potential gap left by §201 and making unlawful (under certain circumstances) the same type of conduct as to State or local government officials as that criminalized by §201 as to Federal officials. See S.REP. No. 98-225, as summarized at 1984 U.S.C.C.A.N. 3182, 3510; See also, *United States v. Jennings*, 160 F.3d 1006, 1012-13 (4th Cir. 1998). Moreover, the two statutes use practically identical words – "corruptly gives, offers or promises" (§201) or "corruptly gives, offers, or agrees to give" (§666) – to describe the criminal conduct of a violator.

Also persuasive to the determination that the Eleventh Circuit's interpretation and construction of §666(a)(2) conflicts with a relevant decision of this Court are certain supporting conclusions the Court reached in *Sun-Diamond*. First, as mentioned above, *Sun-Diamond* found §201(c)(1)(A) to be "one element" of the "framework" and "one strand of an intricate web" of laws and regulations governing impermissible gifts, including bribes, to public officials. 526 U.S. at 400, 409. Section 666(a)(2), being surely another "element" in that same framework and another

"strand" in that same web, was clearly not enacted by Congress to be interpreted and construed applying different reasoning and a different definition of a bribe from that used in *Sun-Diamond*.

In *Sun-Diamond* the Court observed that Congress knew how to prohibit absolutely any gift to a public official or employee and demonstrated this ability in such statutes as 18 U.S.C. §§203, 205, 207, 208, 209, and 212-13, 26 U.S.C. §7214, and 29 U.S.C. §186. See 526 U.S. at 408-09. In recognition of this fact, *Sun-Diamond* concluded a narrow, rather than a sweeping, interpretation of its prohibitions was appropriate for §201(c)(1)(A). Being a part of the same "framework" and "web", a like narrow interpretation is appropriate for §666(a)(2). The scalpel approach rather than the meat axe approach comparison made in *Sun-Diamond* (see 526 U.S. at 412) is appropriate for §666(a)(2). When applied to §666(a)(2) the scalpel approach instructs that §666(a)(2) be read to be an offense that must be "precisely targeted". See 526 U.S. at 412. This reasoning further instructs that a specific and identifiable *quid pro quo* is required for a §666(a)(2) violation.

The Government argued in *Sun-Diamond* that §201(c)(1)(A) required no nexus or link between a gift and a specific official act.[1] The Court's rejection of

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[1] From the concession the Government apparently made in *Sun-Diamond* with respect to the jury instructions given in that case being correct it seems that the Government acknowledged in *Sun-Diamond* that in a bribery case proof of a connection

(Continued on following page)

that argument provides further persuasion that a *quid pro quo* requirement is the proper view of §666(a)(2). In rejecting this argument, *Sun-Diamond* squarely held:

> [I]n order to establish a violation of 18 U.S.C. §201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given.

526 U.S. at 414. This rejection is especially significant in the context of the total "framework" or "web" of Federal laws relating to impermissible gifts.

Section 201(c)(1)(A) is obviously considered by Congress to be an offense involving less reprehensible conduct than §201(b) and §666(a)(2). The maximum imprisonment for a §201(c)(1)(A) conviction is two years whereas for §201(b) it is fifteen years and for §666(a)(2) it is ten years. See 18 U.S.C. §§201(b), 201(c), and 666(a). Being a part of the same statutory "framework" or "web" designed to punish the giving or receiving of impermissible gifts, Congress surely did not intend, and this Court by its analysis of this statutory "framework" or "web" in *Sun-Diamond* surely did not mean to say, that the less serious §201(c) offense requires a higher degree of proof, i.e., a link between a gift and a specific official act, and that the more serious and more severely punishable

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between the defendant's intent and a specific official act, a *quid pro quo*, is required. 526 U.S. at 405.

§201(b) and §666(a) offenses can be established without proof of such a link and with no proof identifying the actual or intended benefit to be conferred on the bribe-giver or bribe-receiver in exchange for, or as the *quid pro quo* for, a bribe.

A lower standard of proof requirement for the more culpable offenses (§§201[b] and 666[a]) than for the less culpable offense (§201[c]) especially makes no sense for a statute like §666(a). Section 666(a) is in many respects a rather vague statute. It uses such generalized, unspecific, and obscure language as "influence or reward", "in connection with", and "any business, transaction," etc. Without requiring some specific identification by allegation and proof of the particular "influence or reward", "connection", or "business, transaction," etc. on which the prosecution is based leaves a defendant totally uninformed, in violation of the Sixth Amendment, as to the accusation to be defended against. Further, and equally or more egregious, it allows a conviction for bribery without the prosecution being required to prove the fundamental ingredient of a bribe – a *quid pro quo*, the "something" for "something (else)" exchange or swap that must occur for a bribery to exist. If the act of the public official the defendant is buying with a gift or promise need not be shown an essential element of bribery is obviously missing.

The *Sun-Diamond* case surely recognized the necessity of an exchange to have a bribery and the necessity for identifying the "something" exchanged for "something (else)" when it said:

> [F]or bribery there must be a *quid pro quo* – a specific intent to give or receive something of value in *exchange* for an official act.

526 U.S. 404-05 (Emphasis in original). The effect of the Eleventh Circuit decision is that a bribery conviction may stand even though the precise exchange and the actual or intended benefit for the alleged bribe-giver (or bribe-recipient) are a mystery – a mystery that the prosecution evidence need not resolve or even consider.

In the present case no evidence linked any gifts, etc., by Petitioners described in either count of the indictments to any specific favor or benefit they contemplated, requested, received, or were promised flowing from an act of a county official. The Eleventh Circuit opinion does not point to any trial evidence showing that Petitioners requested or were promised any benefits or favors from McNair, Swann, or any other county employee or to any agreement, understanding, or proposal that Petitioners were, would be, or had been favored with contracts because of any gifts they made to McNair, Swann or others. Abundant defense evidence explained that any gifts by Petitioners to county officials were not for corrupt purposes. Rather, they were prompted by long and close personal friendships between Petitioners and the county officials involved and the long tradition and practice of Petitioners in generously assisting friends with particular needs and in generally being charitable and generous to others in the community with no expectation of recompense. App. 343-486.

Further, abundant defense evidence (some from Government witnesses) showed that county contracts were awarded to Rast Construction, Inc. not because of corrupt gifts but because of competitive bids, a long history of outstanding performance of county contracts, and a proven ability and willingness to perform emergency work when the county needed it. App. 343-486. When the jury was instructed that proof of a *quid pro quo* was not required (Appendix F, App. 250-75) it effectively was told that this defense evidence was meaningless and should be ignored. Had the prosecution been required to prove a *quid pro quo* for each separate bribery accusation in each separate bribery count this defense evidence would have had enormously more probative value in countering the accusations against Petitioners.

In the *Sun-Diamond* case this Court decided that a *quid pro quo* is an essential element of the Federal offense of bribery of Federal officials. As discussed, there is no reasonable justification for reaching a different conclusion as to the Federal offense of bribery of state or local officials under §666(a)(2). In the present case the Eleventh Circuit decided that a *quid pro quo* is not a necessary element of bribery under §666. In doing so the Eleventh Circuit decided an important question of Federal law in a way that conflicts with the decision of this Court in *Sun-Diamond*. This conflict warrants granting the writ of certiorari in this case. See SUP. CT. R. 10(a).

II. The decision of the United States Court of Appeals for the Eleventh Circuit in the present case is in conflict with decisions of other United States Courts of Appeals on the matter of whether a specific and identifiable *quid pro quo* is an essential element of the bribery offense defined by 18 U.S.C. §666(a)(2).

In holding that a *quid pro quo* is not an essential element of an 18 U.S.C. §666(a)(2) bribery charge the Eleventh Circuit said in the present case:

> Thus, we readily determine the Indictment itself was not defective for failure to allege a specific *quid pro quo*.

605 F.3d at 1186 (App. 56).

* * *

> The requirement of a "corrupt" intent in §666 does narrow the conduct that violates §666 but does not impose a specific *quid pro quo* requirement.

* * *

> For all of these reasons, we now expressly hold there is no requirement in §666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*.

* * *

> To be sure, many §666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee. The intent that must be proven is an intent to corruptly influence or to be influenced "in connection with any business" or "transaction," not an intent to engage in any specific *quid pro quo*.

605 F.3d at 1188 (App. 59-61).

* * *

> In concluding §666 does not require a specific *quid pro quo*, we align ourselves with the Sixth and Seventh Circuit.

605 F.3d at 1189 (App. 62)[2]

The decision of the Eleventh Circuit in the present case conflicts with decisions of other United States Courts of Appeals, namely the First, Second, Fourth, and Eighth Circuits, which have held that a *quid pro quo* is an essential element of the offense described by 18 U.S.C. §666(a)(2).

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[2] By this statement the Eleventh Circuit tacitly acknowledges a conflict among the Circuits on this issue.

Second Circuit

In *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007), a prosecution for, *inter alia*, violating 18 U.S.C. §666(a)(1)(B), the Second Circuit held:

> Like extortion, the crime of bribery requires a *quid pro quo*. *See, e.g., Alfisi,* 308 F.3d at 148 ("[B]ribery . . . requires a *quid pro quo* element."); *see also Sun-Diamond,* 526 U.S. at 405, 119 S.Ct. 1402 (distinguishing an illegal gratuity from a bribe which "requires proof of a *quid pro quo*").

510 F.3d at 148.

* * *

> The term "bribe" means a corrupt payment that a public official accepted or agreed to accept with the intent to be influenced in the performance of his or her public duties. *A bribe requires some specific quid pro quo, a Latin phrase meaning this for that or these for those, that is, a specific official action in return for the payment or benefit. If the public official knows that he or she is expected as a result of the payment to exercise particular kinds of influence or decision making to the benefit of the payor, and, at the time the payment is accepted, intended to do so as specific opportunities arose, that is bribery.*

* * *

> [B]ribery is not proved if the benefit is intended to be, and accepted as simply an effort to buy favor or generalized goodwill from

> a public official who either has been, is, or may be at some unknown, unspecified later time, be in a position to act favorably on the giver's interests – favorably to the giver's interest. That describes legal lobbying.
>
> * * *

510 F.3d at 149.

> * * *
>
> The third element that the government must prove is that the defendant acted with the corrupt intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the City of Bridgeport itself or one of its agencies. *A "corrupt intent" means the intent to engage in some specific quid pro quo* . . . or the intent to give some advantage inconsistent with official duty and the rights of others. "Corruptly" means having an improper motive or purpose.

510 F.3d at 151.

Fourth Circuit

In *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), a prosecution for violating 18 U.S.C. §666(a)(2), the Fourth Circuit held:

> By enacting § 666 Congress supplemented § 201 to make clear that federal law prohibits "significant acts of . . . bribery involving

> Federal monies. . . . " *Id.* at 369, 1984 U.S.C.C.A.N. at 3510.
>
> * * *
>
> Whether a payment is a bribe or an illegal gratuity under § 201 depends on the intent of the payor. A bribe requires that the payment be made or promised "corruptly," that is, with "corrupt intent." Under § 201 "corrupt intent" is the intent to receive a specific benefit in return for the payment. [citations omitted]. In other words, the payor of a bribe must intend to engage in "'some more or less specific *quid pro quo*'" with the official who receives the payment.

160 F.3d at 1013.

> * * *
>
> One has the intent to corrupt an official only if he makes a payment or promise with the intent to engage in a fairly specific *quid pro quo* with that official. Of course, a court need not resort to Latin to make this point. It simply may explain that the defendant must have intended for the official to engage in some specific act (or omission) or course of action (or inaction) in return for the charged payment.
>
> Even if a court does not properly define "corrupt intent," it can adequately convey that concept to the jury by describing the exact *quid pro quo* that the defendant is charged with intending to accomplish. For example, a court may inform the jury that it may find

> the defendant guilty only if it determines "that *(defendant's name)* gave *(the charged payment)* corruptly, that is, with the intent to induce *(official's name)* to commit *(the specific official act or omission that defendant is charged with intending to induce).*" *See, e.g.,* Committee on Model Criminal Jury Instructions Within the Eighth Circuit, *Manual of Model Jury Instructions for the District Courts of the Eighth Circuit,* § 6.18.201A (1996) (instruction for § 201(b)(1)). Such an instruction can satisfactorily convey to the jury the concept of *quid pro quo* (even absent a proper definition of "corrupt intent")if it requires the jury to find that the defendant made or promised a specific payment in exchange for a specific official act or omission. Even so, this type of instruction is best used to amplify, rather than define, the concept of *quid pro quo.*

160 F.3d at 1018-19.

* * *

> On our assumption that § 666 makes the same bribe/gratuity distinction as § 201, a court instructing a jury on § 666(a)(2) must define the "corrupt intent" element in the same way as it would if instructing on § 201(b). Thus (we assume) a court must instruct the jury that it may convict a defendant for violating § 666(a)(2) only if it finds that the defendant intended to exchange a

> payment for some specific official act or course of action.

160 F.3d at 1019.

* * *

> In sum, unless the district court defined "corrupt intent" to include the *quid pro quo* requirement, it gave an erroneous instruction on an essential element of bribery.

160 F.3d at 1021.

* * *

> In defining "corrupt intent" the trial court told the jury that "[a]n act is done with a corrupt intent if it is performed voluntarily and intentionally . . . and with the purpose . . . of either accomplishing an unlawful end or result or accomplishing some otherwise lawful end or result by an unlawful manner or means." This was error. The definition fails to explain that "corrupt intent" is the intent to induce a specific act. Therefore, the district court's instruction on § 666(a)(2) left out the *quid pro quo* requirement. Standing alone, this instruction was plainly erroneous.

160 F.3d at 1021.

* * *

First Circuit

In *United States v. Mariano*, 983 F.2d 1150 (1st Cir. 1993), a case in which it was necessary to

determine whether the conduct of the defendant was bribery in order to properly apply the Sentencing Guidelines, the First Circuit held:

> The essential difference between a bribe and an illegal gratuity is the intention of the bribe-giver to effect a *quid pro quo. See United States v. Muldoon,* 931 F.2d 282, 287 (4th Cir. 1991). Hence, a bribery guideline, section 2C1.1, applies when a transfer of money has "a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions." U.S.S.G. § 2C1.1, comment. (backg'd). The gratuity provision, on the other hand, does not include a corrupt purpose as an element of the offense. *See* U.S.S.G. § 2C1.2, comment. (backg'd).
>
> * * *
>
> Since Mariano and Butterworth each sought to receive a *quid pro quo,* in the form of future (favorable) treatment, and since the offenses to which they pleaded guilty involved corrupt intent, the district court's determination that their actions were more akin to bribe-giving than to gift-giving was not clearly erroneous.

983 F.3d at 1159.

Eighth Circuit

In *United States v. Griffin*, 154 F.3d 762 (8th Cir. 1998), a case in which the elements of bribery under 18 U.S.C. §666(a) were relevant to a proper

application of the Sentencing Guidelines, the Eighth Circuit held:

> The statutory index of the Sentencing Guidelines, which specifies which Guidelines apply to various criminal statutes, lists both U.S.S.G. § 2C1.1 (bribes) and § 2C1.2 (gratuities) as applicable to violations of 18 U.S.C. § 666(a)(1)(B), the statute Griffin has admitted violating. See U.S.S.G. App. A, at 421. In this case, we agree with the District Court that § 2C1.1 was the applicable Guideline. 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,* something that the recipient would not otherwise have done. See *United States v. Mariano,* 983 F.2d 1150, 1159 (1st Cir. 1993); *United States v. Muldoon,* 931 F.2d 282, 287 (4th Cir. 1991). 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.

154 F.3d at 763.

The quoted excerpts set out above demonstrate a conflict between decisions of the Second, Fourth, First and Eighth Circuits and the decision of the Eleventh Circuit in the present case.

Reason, logic, and legislative history favor the views taken by the First, Second, Fourth and Eighth Circuit in the cases cited above with respect to a *quid pro quo* being an essential element of a §666(a)(2)

violation. A brief review of the soundness of the principles underlying the decisions of these Circuits confirm this conclusion.[3]

As this Court noted in *Sun-Diamond*, "the distinguishing feature" of bribery's intent element is that "there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act". *Sun-Diamond*, *supra* at 405. As discussed above under Part I, an "exchange" is fundamental and a prerequisite to the existence of a bribe – usually a payment as consideration for the specific influenced conduct. It is the exchange or swap that creates the *quid pro quo* concept in a bribery. Some cases have referred to this necessary exchange in a bribery by translation of the Latin phrase "*quid pro quo*" into simple language not unlike that used by Webster and Black's Law Dictionary: "this for that" or "these for those". See *United States v. Ganim*, *supra* at 149.

An exchange necessarily requires (at least) two phenomena or realities – the "this" and the "that". An exchange or swap is inherently a two-sided event. Consequently, to identify an exchange there must be a full identification of both of its sides. The effect of

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[3] No contention was made in the present case that the conduct of Petitioners was an illegal gratuity rather than a bribe, so there is no reason to consider the question raised in some cases of whether §666 criminalizes both a bribe and an illegal gratuity. See, e.g., *United States v. Bonita*, 53 F.3d 167 (2d Cir. 1995).

the Eleventh Circuit decision is to permit a conviction for bribery even though the Government does not specifically and comprehensively prove an exchange or the specific intent of the accused briber to enter into an exchange whereby the accused briber gives something to an official to influence the official to give the accused briber some specific benefit by an official act.

The definition of bribery, as well as common sense, tells us an exchange occurs in a bribery only when there is a passing or intended passing of a benefit ("this") from the bribe-giver to the bribe-recipient and a passing or the intended passing of a benefit ("that") from the bribe-recipient to the bribe-giver. Unless there is a benefit, or promise or anticipated benefit, for both the bribe-giver and the bribe-recipient, there is no way to have an exchange, and therefore, no bribery exists. Unless there is a fully proven identifiable exchange or intent to enter into such an exchange there is no basis for concluding that a bribery has actually occurred.

The Government argued in the District Court that Petitioners made gifts to County officials and later they were awarded contracts; therefore the contracts must have been because of the gifts, hence a bribe. The Eleventh Circuit decision effectively endorsed the philosophy of this argument. This reasoning process is captured in the Latin phrase: *post hoc ergo propter hoc*, "after this because of this". Courts have consistently rejected *post hoc ergo propter hoc*, in fact have denounced it as a fallacy, as a rationale

for concluding that a temporal relationship equates to proof of a causal relationship. See, e.g., *Ohio v. U.S. Department of Interior*, 880 F.2d 432, 473 (D.C. Cir. 1989); *McClain v. Metabolite International, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005). Just because one event comes after another does not mean that the first event was the cause of the second. What is missing in this reasoning, and in the Latin phrase, in the bribery context is the "exchange", the essence of a *quid pro quo*.

The irrationality of a specific bribery[4] for which a person can be convicted and imprisoned, as §666 contemplates, without a specific and identifiable *quid pro quo* is illustrated by the jury instructions given by the District Court in the present case (Appendix F, App. 250-75) which the Eleventh Circuit decision approved. The instructions describe in considerable detail the "this" part of a bribery transaction, describing at length the allegations of the indictments regarding payments made by Petitioners along with the admonition that the prosecution must prove the "this". However, for the "that" part of the transaction the instructions were totally uninformative, merely reciting the generalized and unspecific language of

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[4] In addition to the general principle that bribery requires a *quid pro quo*, it is important in the present case to recognize that each bribery charge required proof of a *quid pro quo*. In this case the Government chose to charge Petitioners in multiple counts with several, discrete briberies. This being true a *quid pro quo*, an exchange of benefits – one for the other – must be proven separately for each count.

§666(a)(2) – "in connection with a transaction or series of transactions" with the county. App. 268, 272. These instructions left the jury totally uninformed about the "that" which must be exchanged or intended to be exchanged for the "this" as to each bribery count in order to have a bribery. It left the jury free to find Petitioners guilty based on proof of only one-half of the exchange required for bribery. Surely our Constitution demands that more than half the elements of a crime be proven in order to sustain a conviction.

The views of the First, Second, Fourth, and Eighth Circuits that a *quid pro quo* is an essential element of bribery are, as discussed above, consistent with the decision of this Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999), where the Court said:

> In other words, for bribery there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act. (Emphasis in original).

The *Sun-Diamond* case, of course (as noted above), dealt with a different bribery statute, 18 U.S.C. §201. However, as noted previously, there is no reason to make a distinction between the bribery described in §201 and the bribery described in §666(a). Section 666(a) was enacted by Congress to ensure that the type of conduct made illegal by §201 as to Federal officials was made illegal as to State officials and others under certain circumstances

involving Federal funds. See 1984 U.S.C.C.A.N. 3182, 3510. Further, the operative language describing conduct in both statutes – "corruptly gives, offers or agrees to give anything of value" (§666) and "corruptly gives, offers, or promises anything of value" (§201) – is identical in meaning and effect.

The conflict between the Circuits should be resolved and the law respecting bribery and §666(a) made uniform by granting this petition. See SUP. CT. R. 10(a).

III. In its decision in the present case the United States Court of Appeals for the Eleventh Circuit departed from the accepted and usual course of judicial proceedings and introduced confusion and uncertainty as to the meaning of 18 U.S.C. §666(a)(2) and the requirements for a conviction for bribery under this section, and created a lack of uniformity in Federal law as to the meaning of bribery; which departure calls for an exercise of this Court's supervisory power to insure uniformity and consistency of Federal laws.

The Eleventh Circuit decision which this petition seeks to review, and the decisions from the Sixth and Seventh Circuits on which it relies for support, fly in the face of the ideal of a uniform national standard for Federal criminal laws. See *Skilling v. United States*, 561 U.S. ___, 130 S.Ct. 2896, 2933 (2010). They create and foster confusion and uncertainty as

to the definition of bribery and as to the meaning of the term *quid pro quo* in a bribery context and to the issue of whether a *quid pro quo* is a necessary element for a bribery conviction under §666(a)(2). They collapse the "frame work" and dismantle the "web" (See *Sun-Diamond*, *supra*) of Federal law relating to illegal gifts to public officials. A uniform national standard for the offense of bribery becomes even more important in view of the *Skilling* decision which now makes bribery a matter of primary consideration in mail fraud honest-services prosecutions. See 130 S.Ct. at 2933.

This unsettling feature from these cases readily appears from the language of the opinions. In the present case the Eleventh Circuit's opinion said:

> We begin with the statutory language itself. Importantly, §666(a)(1)(B) and (a)(2) do not contain the Latin phrase quid pro quo. Nor do those sections contain language such as "in exchange for an official act" or "in return for an official act." In short, nothing in the plain language of §666(a)(1)(B) nor §666(a)(2) requires that a specific payment be solicited, received or given in exchange for a specific official act. To accept the defendant's argument would permit a person to pay a significant sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating §666.

* * *

> For all of the reasons, we now expressly hold there is no requirement in §666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a quid pro quo.
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> * * *
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> To be sure, many §666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee. The intent that must be proven is an intent to corruptly influence or to be influenced "in connection with any business" or "transaction," not an intent to engage in any specific quid pro quo.

605 F.3d at 1187-88 (App. 59-61).

The Eleventh Circuit opinion states that the word "corrupt" in §666(a)(2) narrows the conduct which violates the section. See 605 F.3d at 1188. But, the court then inconsistently proceeds to broaden the reach of the section by saying there is no *quid pro quo* requirement. The court reaches this conclusion in spite of the fact that: (1) the term *quid pro quo* also does not appear in §201; (2) §666(a)(2) is a bribery statute (see *Skilling*, *supra* at 2933) and (3) its language requires that the corrupt giving, etc., be with the intent to influence or reward – obviously contemplating an exchange to accomplish this – in

connection with (as applied to the present case) county business.

There can be no doubt that the words of §666 were intended by Congress, as in §201, to describe an exchange, i.e., a gift, etc., in exchange for a specific benefit from influenced conduct in connection with state or local government. An exchange is the very essence of the occurrence the statute describes. Further, an exchange is the essence and substance of a *quid pro quo*, or as simply expressed, "this" for "that" or "something" for "something (else)".

The Eleventh Circuit attempted to avoid the requirement of a *quid pro quo* by relying upon the concept of "corrupt intent". However, the definition of "corruptly" given by the District Court and approved by the Eleventh Circuit only adds to the confusion:

> An act is done corruptly if it is performed voluntarily and deliberately for the purpose of either accomplishing an unlawful end or result or accomplishing some otherwise lawful end or lawful result by any unlawful method or means.

(App. 254). The instruction employs circular reasoning and leaves jurors still confused about exactly how one finds "corrupt intent". It is not unlawful, per se, for one to give a gift or provide a service to a state or county official, or for the official to receive it. See *Sun-Diamond*, *supra* at 408-12; *United States v. Ganim*, *supra* at 149. What is missing from the District Court's and the Eleventh Circuit's definitions

is the requirement for a *quid pro quo* or an intended *quid pro quo*.

The Sixth Circuit's decision in *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009) is equally circular and confusing in its explanation that in spite of the fact that a bribery is innately an exchange, a *quid pro quo* is not required for a §666(a)(2) violation. The *Abbey* opinion says:

> By its terms, the statute does not require the government to prove that Abbey contemplated a specific act when he received the bribe; the text says nothing of a *quid pro quo* requirement to sustain a conviction, express or otherwise: while a "*quid pro quo* of money for a specific . . . act is sufficient to violate the statute", it is "not necessary" *United States v. Gee*, 432 Fed. 2d 713-714 (7th Cir. 2005). Rather, it is enough if a defendant "corruptly solicits" "anything of value" with the "intent to be influenced or rewarded in connection" with some transaction involving property or services worth $5,000 or more.

560 F.3d at 520.

This quotation from the Sixth Circuit opinion indicates that it, like the Eleventh Circuit in the present case, ignores the inherent nature of the event the statute describes – a bribery – and the innate requirement of a bribery for an exchange, a swapping of "this" for "that", or the specific intent to do so. Again, unless there is a full identification of the "this" and the "that", the existence of an exchange becomes

amorphous and not within the realm of certainty that must be a characteristic of all criminal laws. See *Kolender v. Lawson*, 461 U.S. 352, 357-58, 361 (1983); *McNally v. United States*, 483 U.S. 330, 359-60 (1987).

The above quotation from the *Abbey* case is largely a quotation of the language of the Seventh Circuit in *United States v. Gee*, 432 F.3d 713 (7th Cir. 2005). In the *Gee* case, as in the *Abbey* case and the present case, the court ignored the essential occurrence of an exchange, a "this" for "that", or *quid pro quo*, as the core element of a bribery and the offense described by §666(a)(2).

As noted earlier, §201(b) does not contain the words "*quid pro quo*". Yet in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999), where the direct reference to bribery was to §201(b), this Court emphatically held that for bribery "there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act". Further, it should be noted, this Court has recently described both §201(b) and §666(a)(2) as bribery statutes. See *Skilling v. United States*, *supra* at 2933.

The Eleventh, Sixth and Seventh Circuit decisions have ignored the clear intent of the words of §666(a)(2), a bribery statute, to describe and require an exchange. The Eleventh Circuit's holding that it is not necessary to identify and specify by proof what is exchanged or intended to be exchanged between the

bribe-giver and the bribe-receiver makes identifying and proving an exchange, or intended exchange, which is the clear focus of §666(a)(2), an illusion and an impossibility.

The Eleventh Circuit's approach to defining bribery impacts another area of Federal criminal law. This Court in *Skilling* said in future 18 U.S.C. §1346 mail fraud honest-services prosecutions there must be proof of a bribery or kickback. The Court further stated in *Skilling* that the meaning of the term "bribery" for purposes of such 18 U.S.C. §1346 prosecutions could be derived from the "content" of 18 U.S.C. §201(b) and 18 U.S.C. §666(a)(2). The Eleventh Circuit's opinion makes it difficult or impossible to know what will be necessary to prove bribery under the honest-services statute, i.e., is a *quid pro quo* required or not?

With no requirement for proof of a completed or intended exchange of a "this" for a "that", a completed or intended bribery can exist only in supposition and not in fact. A supposition should not be, and cannot be, the evidentiary basis for a criminal conviction. See *Moore v. United States*, 429 U.S. 20, 22 (1978).

Ignoring the essential nature and components of a bribery and recognizing an illusionary and illogical broad standard for determining what conduct constitutes bribery surely is a departure from the accepted and usual course of judicial proceedings. To allow supposition to substitute for facts as the basis for a

criminal conviction is likewise a radical departure from the accepted and usual course of judicial proceedings. Formulating illogical and unsound definitions that impact other areas of Federal criminal law is also a departure from the accepted and usual course of judicial proceedings.

The Eleventh Circuit in this case; and the Sixth Circuit and the Seventh Circuit in the cited cases; have made such departures. This Court should exercise its supervisory power and correct these departures and clarify the meaning of §666(a)(2) and eliminate as authority in any Circuit the reasoning and determinations asserted by the Eleventh, Sixth, and Seventh Circuits in the cited cases as permissible in the interpretation, construction and application of Federal criminal law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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