

No. _____

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

v.

JOSETTE BUENDIA,

Petitioner.

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

PETITION FOR WRIT OF CERTIORARI

Josette Buendia #54831-039
Alderson FPC
Glen Ray Rd., Box A
Alderson, WV 24910

Petitioner

Kimberly W. Stout (P38588)
370 E. Maple Rd.
Third Floor
Birmingham, Michigan 48009
(248) 258 – 3181
kstoutdefense@gmail.com

Assisting Petitioner

ORIGINAL

QUESTIONS PRESENTED

In *Arthur Anderson LLP v. United States*, this Court held that only people with immoral, depraved, wrongful, or evil motive, only people conscious of their wrongdoing, can be said to act corruptly. 544 U.S. 696 (2005). In *United States v. Rooney*, the Second Circuit held that in the context of the federal bribery statute, it is relevant to the question of whether one acts corruptly to consider evidence of the purpose of their actions. 37 F.3d 847 (2d Cir. 1994). Did the Sixth Circuit depart from this Court's decision in *Arthur Anderson*, and conflict with the decision of the Second Circuit in *Rooney*, when it held that Buendia's spending the funds she received from a school vendor exclusively to benefit her students and the school was irrelevant to the question of whether she acted corruptly?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Josette Buendia ("Buendia") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's published opinion is attached as **Appendix A**. App at. 1a-6a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 15, 2018. App. At 1a-6a. The court's denial of Buendia's petition for rehearing en banc was entered on June 18, 2018. **Appendix B**, App. at 1b-2b. This Court has jurisdiction to consider this Petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 666 of the United States Criminal Code, 18 U.S.C. § 666, states, in pertinent part:

- (a) Whoever, if the circumstance described in subsection (b) of this section exists—

- (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

* * *

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, **intending to be influenced or rewarded** 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;

[is guilty of a felony].

INTRODUCTION

Buendia, a principal at an impoverished elementary school in the Detroit Public Schools, was accused of making deals with a school supply vendor where Buendia would order school supplies and disperse school funds to the vendor and the vendor would deliver *some* of the supplies to the school, but also provide gift cards and cash to Buendia. Buendia sought to show that she did not act corruptly in this arrangement because she used all the gift cards and cash, and more, for the school's, students' and Government's benefit. Buendia paid to have graffiti removed, replace the school roof, provide winter gloves and coats to children, among other things. The Sixth Circuit held that Defendant's conduct was not relevant to whether she acted corruptly.

The Sixth Circuit failed to follow the controlling standard established by this Court in *Arthur Anderson LLP v. United States* for determining whether a person acts "corruptly" within the meaning of the United States criminal code. 544 U.S. 696 (2005). In addition, the Sixth Circuit's opinion is in direct contradiction with the Second Circuit's decision in *United States v. Rooney*, 37 F.3d 847 (2d Cir 1994). In resolving these

conflicts, this Court would consider what it means to act “corruptly” under the federal program bribery statute. 18 U.S.C. §666. The importance of the word corruptly in our federal code cannot be overstated, especially considering the President of the United States is being investigated for “corruptly” obstructing justice. *See* 18 U.S.C. § 1505.

STATEMENT OF THE CASE

A. Procedural Posture

In an Indictment returned March 29, 2016, and a Superseding Indictment returned June 28, 2016 in the United States District Court for the Eastern District of Michigan, Buendia was charged with three counts Federal Program Bribery, contrary to 18 U.S.C. §666(a)(1)(B). Defendant proceeded to trial on December 6, 2016. On December 9, 2016, Defendant was found guilty by a jury.

On June 1, 2017, Defendant was sentenced to 24 months in custody to run concurrent on Counts 2 and 3, while Count 1 was dismissed on motion of the United States. The term of imprisonment is to be followed by 1 year of supervised release, as well as payment of restitution in the amount of \$45,775.00 and a special assessment of \$300.00. Defendant’s appeal of right was denied by the Sixth Circuit on May 15, 2018 and a Petition for Re-Hearing En Banc was denied on June 18, 2018.

B. Factual Background

Buendia was the principal of a Detroit elementary school. The Government alleged Buendia, as principal of Bennett, agreed with a school supply vendor for the Detroit Public Schools (“DPS”), Norman Shy (“Shy”), to submit false invoices in exchange for Shy giving Buendia prepaid gift cards and cash. The “Government”

characterized these payments as illegal “kickbacks” from Shy to Buendia. Buendia conceded receiving gift cards and cash in exchange for submitting incorrect invoices to DPS, but, Buendia maintained that she did not do so with corrupt intent, a required element of §666. Buendia maintained that she spent the funds on Bennett and therefore her conduct was not corrupt, but rather beneficial to the school and purpose of the Title I funds. Buendia spent money on items such as a new roofing, graffiti removal services, school supplies, and equipment and games to keep kids off the streets and in school. Every dollar received by way of gift card or cash was to be accounted for with receipts from Buendia.

The Government maintained otherwise, alleging that Buendia used funds corruptly by spending on herself. In the Government’s case-in-chief, a massage therapist testified that Buendia used gift cards that were connected with Shy to buy massages for herself and her staff. The Government thought it relevant to show that Buendia was using these alleged kickbacks on herself. Defense counsel argued that because that the cash rebates and gift cards given to her in exchange for Shy’s business constituted smart business, benefitting her poverty-stricken elementary school.

The district court held that the defense’s evidence of the way Buendia spent the cash and gifts cards was irrelevant, stating that “whether the defendant intended to use some portion of this money or all of it in purchasing goods and services for students is immaterial to her guilt or innocence of having had a corrupt state of mind . . .” The Government, knowing Buendia could not combat the allegations that she spent the funds on herself then used this evidentiary ruling as a sword at closing argument, stating that

Buendia spent money for “personal gain” and “personal reward” and that proved she “acted corruptly.” The Government used defense counsel’s opening statement against her, arguing “She got massages, you know, Ms. Stout said . . . there’s no evidence that Ms. Buendia lived large. It’s all relative, isn’t it?”

In a published opinion, the Sixth Circuit agreed that the way Buendia spent gift cards and cash received from Shy was not relevant to whether she acted corruptly. App. at 1a. The Court stated that “even if a defendant spent ill-gotten funds for commendable purposes, that is simply not a defense to [a Section 666] bribery offense.” App. at 1a. The Court relied upon Justice Scalia’s concurrence in *United States v. Aguilar*, 515 U.S. 593 (1995), stating that the “term corruptly in criminal laws has a longstanding and well-accepted meaning. It denotes an act done with an intent to give some advantage inconsistent with official duty and the rights of others.” *Id* at 616. The Sixth Circuit did not cite *Arthur Anderson*, nor did it address the conflict its opinion creating with *United States v. Rooney*, *supra*, in the Second Circuit.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT’S OPINION IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *ARTHUR ANDERSON*.

Buendia was denied her right to present a defense under the Sixth Amendment when the district court ruled irrelevant Buendia’s proffered evidence of how she spent the alleged kickback funds and evidence to demonstrate that she did not intend to receive a benefit or be influenced. The proffered evidence was directly relevant to whether the Defendant acted with corrupt intent.

Ms. Buendia was charged and found guilty of a violation of 18 U.S.C. 666

(a)(1)(B). 18 U.S.C. 666(a)(1)(B) provides that it is a felony where one:

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, **intending to be influenced or rewarded** 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

The fourth element of the offense is at issue. The Government must prove that the defendant **acted corruptly**, with the intent to be influenced or rewarded for a transaction or series of transactions of the Detroit Public Schools.

§666 does not define the word corruptly, but is patterned on the general federal bribery and gratuity statute (18 U.S.C. §201(b)(1)(C)). This Court explained the *mens rea* element required to "act corruptly":

The parties have not pointed us to another interpretation of "knowingly . . . corruptly" to guide us here. In any event, the natural meaning of these terms provides a clear answer. See *Bailey v. United States*, 516 U.S. 137, 144-145, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995). "Knowledge" and "knowingly" are normally associated with awareness, understanding, or consciousness. See Black's Law Dictionary 888 (8th ed. 2004) (hereinafter Black's); Webster's Third New International Dictionary 1252-1253 (1993) (hereinafter Webster's 3d); American Heritage Dictionary of the English Language 725 (1981) (hereinafter Am. Hert.). **"Corrupt" and "corruptly" are normally associated with wrongful, immoral, depraved, or evil. See Black's 371; Webster's 3d 512; Am. Hert. 299-300.** Joining these meanings together here makes sense both linguistically and in the statutory scheme. **Only persons conscious of wrongdoing can be said to "knowingly . . . corruptly persuade."** And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level

of "culpability . . . we usually require in order to impose criminal liability."

Arthur Anderson LLP v. United States, 544 U.S. 696 (2005) (emphasis added).¹ While the *Arthur Anderson* Court dealt with "knowingly . . . corruptly," the result remains the same: §666, by using the term "corruptly," requires a very specific mental state be proven beyond a reasonable doubt: acting corruptly requires proof of conscious wrongdoing with a "wrongful, immoral, depraved, or evil" state of mind. *Id.* at 706. Indeed, "corruptly bespeaks a higher degree of criminal knowledge and purpose than does otherwise as provided by law for the proper discharge of official duty." *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974).

In this case, despite having *Arthur Anderson* cited, the district court found evidence of the purpose for which Buendia entered into the agreement with Shy to be irrelevant to whether she acted corruptly. In her brief to the Sixth Circuit, Buendia again relied on *Arthur Anderson*, but the Sixth Circuit did not even cite the case. Even the Government assumed the way Buendia spent funds was relevant to prove corruption, as the Government alleged in the Superseding Indictment that: "At [Mr. Shy's] direction, [Defendant] provided [Mr. Shy] with written requests for gift cards on school letterhead, which falsely stated that the gift cards were for school purposes, for the purpose of making the illicit payments appear legitimate." The Government itself made relevant the

¹ See also *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977) ("the word corruptly means a defendant acted with improper motive or with bad or evil or wicked purpose); *United States v. Ryan*, 455 F.2d 728 (9th Cir. 1971) ("corruptly means a defendant acted with improper motive or with bad or evil or wicked purpose).

purposes for which kickbacks were paid, which is wholly consistent with this Court's understanding that "corruptly" means to act beyond merely contrary to one's official duties, but with particular evil motive.

This Court defines "corruptly" as traditionally being "associated with wrongful, immoral, depraved, or evil." *Arthur Anderson LLP*, at 703 (2005). Indeed, virtually every Circuit Court of Appeal has published precedent defining the word corruptly as acting with an improper motive, or with bad or evil purpose, or with debased character infected with evil. *See, e.g., United States v. Veliz*, 800 F.3d 63 (2nd Cir. 2015); *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977); *United States v. Suarez*, 617 Fed. Appx. 537 (6th Cir. 2015); *United States v. Ryan*, 455 F.2d 728 (9th Cir. 1971). In fact, juries in the Sixth Circuit are routinely instructed that to act corruptly means to act with a "wrongful, immoral, or evil purpose." *Veliz, supra*.

The entirety of the Sixth Circuit's analysis in this case is contained in a single paragraph:

Buendia's first evidentiary challenge – to the exclusion of her kickback expenditures – fails because none of the excluded evidence was relevant. The jury convicted Buendia of federal-program bribery, which requires her to have corruptly solicit[ed] the kickbacks (citation omitted). She argues that she lacked the requisite corruptness because, as this evidence allegedly would have shown, she spent the kickbacks to benefit the school. But regardless of how Buendia might have eventually spent the kickback money, she "corruptly solicit[ed]" it because, by awarding contracts to Shy in exchange for kickbacks, she subverted the normal bidding process in manner inconsistent with her duty to obtain goods and services for her school at the best value. As Justice Scalia, writing separately, recounted in *United States v. Aguilar*, 515 U.S. 593 (1995), "the term corruptly in criminal

laws has a longstanding and well-accepted meaning. It denotes ‘an act done with an intent to give some advantage inconsistent with official duty and the rights of others. (citations omitted). The kickback-expenditure evidence would therefore have made no fact of consequence more or less probable, so the district court correctly excluded the evidence as irrelevant.

Opinion of the Court, p. 4. The Sixth Circuit relied on dicta from the late Justice Antonin Scalia, which provides that one acts corruptly when an act is done “with an intent to give some advantage inconsistent with official duty and the rights of others.” The Sixth then abruptly concludes that where a school principal does not follow the procurement procedures in a school district, she acts corruptly.

This misguided conclusion is contrary to traditional definitions of corruptly. The federal rules provide that it is indeed exceptional where the issue on which the panel decision conflicts with authoritative decisions of the United States Supreme Court or other United States Court of Appeals that have addressed the issue.

“[C]orruptly bespeaks a higher degree of criminal knowledge and purpose than does otherwise as provided by law for the proper discharge of official duty.” *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974). Holding that mere non-compliance with procurement procedures is corrupt is contrary to well-established law. Because the Sixth Circuit’s definition of the word “corruptly” is in direct conflict with this Court’s opinion in *Arthur Anderson*, this Court should issue a writ of certiorari.

II. THE SIXTH CIRCUIT'S OPINION IS IN CONFLICT WITH A PUBLISHED OPINION OF THE SECOND CIRCUIT COURT'S OPINION IN *UNITED STATES V. ROONEY*.

Buendia also relied on an analogous Second Circuit case to support her theory that evidence of how she spent alleged kickbacks was relevant to whether she acted “corruptly.” In *United States v Rooney*, 37 F.3d 847 (2d Cir. 1994), the Second Circuit held that the purpose for which one enters an allegedly improper arrangement is relevant in determining whether there was a corrupt intent. At oral argument, Appellant’s counsel specifically stated, without resistance from the Sixth Circuit or the Government, that in order to find against Buendia, the panel must reject *Rooney*. The panel did so without so much as a citation to *Rooney*. The Sixth Circuit then magnified the importance of its decision by publishing it.

Buendia argued she was denied her right to present a defense when the district court ruled irrelevant Defendant’s proffered evidence of how she spent alleged kickback funds. This evidence tended to show that she spent it on Bennett and therefore without corrupt intent. As has been stated, the statute at issue does not define the word “corruptly,” nor does any published Sixth Circuit case provide a clear answer as to what it means to act corruptly within the federal program bribery statute.

In *Rooney*, an individual sought to develop a modest federally-funded housing project for the elderly in New York. *Rooney*, 37 F.3d at 848. Rooney was authorized to disperse federal funds to pay for the project. The evidence in *Rooney* included a recording of Rooney telling a subcontractor on the project that he would only apply for additional federal funds if the contractor built a pond on the property at no additional

cost. This conduct, according to the Government, and the Second Circuit Court of Appeals, left “no dispute that Rooney solicited something of value and did so intending to be influenced in connection with some business or transactions . . .” *Id.* at 852. Accordingly, Rooney was charged and convicted for “corrupt solicitation.” *Id.* at 848. The open question for the Second Circuit to decide was whether the conduct described was “done corruptly.” *Id.*

For its part, the Government in *Rooney* argued that the solicitation was “corrupt [because] his refusal to pay [the contractor] the money he already owed without first receiving a ten percent kickback in the form of construction of a pond” fits within the meaning of the federal program bribery statute. The Court rejected this argument. The Second Circuit held that “what the government characterizes as a ‘kickback’ . . . is not comparable to the usual diversion of government funds or secret under-the-table cash payment . . . **The addition of the project Rooney requested . . . would have benefitted the project.**” *Id.* at 853 (emphasis added).

Critically important to the *Rooney* analysis is the fact that Rooney stood to personally benefit from the construction of a pond. Indeed, the project was being built on Rooney’s land. The Government thus made the exact same arguments in *Rooney* that the Government made in this case, arguing Rooney using his position to solicit was enough, *in itself*, to fall within §666. On top of that, the pond would have come at a benefit to Rooney personally. Oral arguments in *Rooney* brought the issue into narrow focus. The Second Circuit asked “[h]ow is the government hurt if this project turns into the Taj

Mahal?” The Government answered, “[t]hat’s not the point, your honor, and it’s irrelevant.”²

The *Rooney* Court rejected the Government’s position because the argument forwarded by the Government “reads out of the statute the requirement of corruptness altogether.” *Rooney* at 854. In other words, the purpose of Rooney’s actions and the fact that the conduct inured to the benefit of the federal government was relevant evidence as to whether Rooney acted corruptly. The Second Circuit reversed Rooney’s jury trial conviction under §666.

In this case, assuming the truth of the Government’s evidence, Buendia, like Rooney, used her position as a federal government agent to solicit value from a third party. Also like Rooney, Buendia’s conduct inured to the benefit of the federal government. Rooney made the Government’s project more valuable, while Buendia made Bennett elementary one of the best schools in Detroit.

More importantly, however, the Government in this case made, quite literally, the same exact argument that the Government made in *Rooney*, stating: “[E]vidence of how Buendia spent the money is “not relevant at all. Not relevant at all. It’s not a defense. Even if she spent them for reasons, which we don’t concede, it’s not a defense to accepting a bribe. It’s irrelevant.” D/E #46, 7:17-20. The District Court, too, made an identical finding to that of the District Court in this case, stating: “whether the defendant

² The Prosecutor here stated: “It’s not relevant at all. Not relevant at all. It’s not a defense. Even if she spent them for reasons, which we don’t concede, it’s not a defense to accepting a bribe. It’s irrelevant.”

intended to use some portion of this money or all of it in purchasing goods and services for students is immaterial to her guilt or innocence of having had a corrupt state of mind . . .”

The Second Circuit distinguished the ordinary case where “the government’s interests are sacrificed by the corrupt activities of the responsible parties.” *Id.* at 850. By contrast, in *Rooney*, as is the case here, “Rooney did not seek to divert government funds for the project to himself . . .” but rather to benefit the Government’s interests. “The manifest purpose [of § 666] is to safeguard finite federal resources from corruption . . .” and “in conspicuous breadth [] prohibits any corrupt solicitation [] of anything of value.” *Id.* at 852. That is why, according to the Second Circuit, it is so vital that corruptness not be read out of the statute.

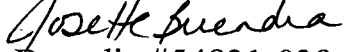
One way the Second Circuit described Rooney’s actions were that the solicitation was merely a negotiation tactic, designed to benefit the Government’s project. *Id.* at 851-852. Here, too, in addition to the fact that Defendant received no personal benefit, it could be argued, based on the evidence proffered, Defendant, who had total authority to procure the necessary items for her school, bargained in a way that ended up benefitting Bennett. The Government’s construction of the statute, according to the Second Circuit, would capture conduct that furthers governmental interests, which, in turn, reads corruptness out of the statute. *Id.* at 854.

This Court should resolve the conflicting conclusions of the Sixth and Second Circuits on the issue of what it means for a government agent to act corruptly within the meaning of 18 U.S.C. §666.

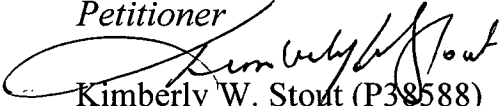
CONCLUSION

For all of the reasons stated, Buendia respectfully requests that this Court grant her petition for a writ of certiorari.

Respectfully Submitted,


Josette Buendia #54831-039
Alderson FPC
Glen Ray Rd., Box A
Alderson, WV 24910

Petitioner


Kimberly W. Stout (P38588)
370 E. Maple Rd.
Third Floor
Birmingham, Michigan 48009
(248) 258 – 3181
kstoutdefense@gmail.com

Assisting Petitioner

Date: Sept. 16, 2018