No. 19-102

In The
Supreme Court of the United States

LEROY BACA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

BENJAMIN L. COLEMAN
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF FOR PETITIONER

The Court should grant review on both questions presented. Alternatively, it should grant, vacate, and remand ("GVR") for reconsideration in light of *Marinello v. United States*, 138 S. Ct. 1101 (2018). *Lawrence v. Chater*, 516 U.S. 163, 169-70 (1996).

ARGUMENT

I. This case is an excellent vehicle to address the longstanding confusion regarding the meaning of "corruptly" in 18 U.S.C. § 1503, as the Ninth Circuit explicitly passed upon the question.

1. The government contends that this case is an unsuitable vehicle to review the meaning of "corruptly" in § 1503 because petitioner failed to object sufficiently in the district court. BIO 14, 16-18, 23-24. The Ninth Circuit rejected this argument below and did not find waiver or even forfeiture, *United States v. Olano*, 507 U.S. 725, 733 (1993), as it addressed the merits and did *not* apply plain error review. App. 5-6.

The "traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below[,]" and "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon. . . ." *United States v. Williams*, 504 U.S. 36, 41 (1992). This rule applies in the jury instruction context. *United States v. Wells*, 519 U.S. 482, 487-89

(1997). Like *Wells*, it is particularly appropriate to consider the question presented because this Court decided *Marinello* after the district court proceedings, and therefore nothing should disqualify petitioner "from the chance to make [his] position good in this Court." *Id*. at 489. Given that the Ninth Circuit passed upon the "corruptly" question without applying plain error review, this case is a fine vehicle.

Furthermore, the Ninth Circuit correctly concluded that petitioner *did* adequately object in the district court. ER 217-19. While petitioner argued that "corruptly" limits the means by which obstruction can be committed under § 1503, BIO 16, he also objected to the instruction allowing the jury to convict based on "normal law enforcement practices," App. 12, contending that the instructions undermined the requisite intent in this context given his official duty to respond to the dangers associated with the federal investigation. ER 219. Petitioner's objections were consistent with Judge Silberman's view of "corruptly" in *United States v. North*, 910 F.2d 843, 943-44 (D.C. Cir.), *opinion withdrawn and superseded in other part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990) (Silberman, J., dissenting), and this Court's similar rationale that "corruptly" must require consciousness of wrongdoing for obstruction based on conduct that is "not inherently malign." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005). As found below, petitioner's objections preserved the issue, and this Court rejected the government's similar forfeiture argument in *Arthur Andersen*, particularly because, like here, the court of

appeals passed upon the question presented. *Id.* at 707 n.10.

2. The government does not dispute the confusion recognized by the lower courts regarding the "corruptly" element but contends petitioner has not identified a court of appeals that "has adopted the specific mens rea requirement he advocates for Section 1503(a)." BIO 21. Petitioner's construction is consistent with Judge Silberman's view in *North*, 910 F.2d at 940-44, and Fifth Circuit precedent stating that "corruptly" is interchangeable with "willfully," *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978); *see United States v. Richardson*, 676 F.3d 491, 507-08 (5th Cir. 2012), which requires knowledge of illegality. *Bryan v. United States*, 524 U.S. 184, 192-93 (1998). Even if no circuit has adopted his interpretation, that underscores the need for review, especially because *this* Court's precedent supports his construction. *See Rehaif v. United States*, 139 S. Ct. 2191 (2019) (circuits unanimously rejected petitioner's interpretation).

The government concedes that the definition of "corruptly" in *Marinello*, 138 S. Ct. at 1108, requires knowledge of illegality but contends this definition only applies in the tax context. BIO 19-20. The statute in *Marinello* was an *obstruction* statute with nearly identical language, *see* 26 U.S.C. § 7212(a), and there is no reason why "corruptly" in § 1503 should be construed differently given the "similarity" between the two statutes. *Marinello*, 138 S. Ct. at 1109. The government merely cites its own brief in *Marinello*, ignoring that the opinion *rejected* its position and emphasized

that the two statutes should be interpreted consistently. *Id.* Nothing in *Marinello* limited the definition to the tax context, as the majority recognized that § 7212(a) uses "corruptly" rather than the typical "willfully" mens rea for tax offenses but found that, "practically speaking," they meant the same thing, *id*. at 1108, and Justice Thomas's dissent distinguished the "willfully" mens rea generally used for tax offenses from the "corruptly" mens rea by explaining that the latter requires *both* knowledge of illegality *and* the purpose of obtaining an unlawful benefit. *Id.* at 1114.

Numerous non-tax offenses require knowledge of illegality, *see*, *e.g.*, *Ratzlaf v. United States*, 510 U.S. 135 (1994), and the government even concedes that *Arthur Andersen* required consciousness of wrongdoing in the non-tax obstruction context. BIO 20. To distinguish *Arthur Andersen*, the government relies on the word "knowingly" in 18 U.S.C. § 1512 but ignores that this Court has chosen to interpret these obstruction statutes consistently, despite any slight differences in the "language and history" of the provisions. *Marinello*, 138 S. Ct. at 1109. To justify treating § 1503(a) as an outlier, the government relies on the "nexus" requirement, *see United States v. Aguilar*, 515 U.S. 593 (1995), and contends that the jury instructions here were different from the ones in *Arthur Andersen* because the latter lacked both consciousness of wrongdoing and a nexus requirement. BIO 20-21. But this Court held that the *Arthur Andersen* instructions were *doubly* erroneous, and thus a "nexus" instruction is necessary but not alone sufficient. *Arthur Andersen*, 544 U.S. at

707. Similarly, *Marinello* rejected the government's argument that the "corruptly" and "nexus" requirements do the same work. *Marinello*, 138 S. Ct. at 1108-09. Like the statutes in *Marinello* and *Arthur Andersen*, § 1503(a) maintains both a "corruptly" element requiring consciousness of wrongdoing and a "nexus" requirement. The instructions here did not convey the former.

3. The government contends that any error does not justify reversal under plain error review. BIO 23-24. Petitioner has established that plain error does not apply, and the government does not dispute that reversal is required under a harmless beyond a reasonable doubt standard. *See McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016). Nevertheless, the "error" was "plain" under the first two prongs of *Olano*. The Ninth Circuit's view is plainly incorrect under *Arthur Andersen* and *Marinello*. The fact that *Marinello* was decided while this case was on direct appeal does not affect the plainness of the error, *Henderson v. United States*, 568 U.S. 266 (2013), and petitioner cited *Marinello* below, Rep. Br. 37-38, but the Ninth Circuit ignored it.

Petitioner also satisfies the prejudice and related inquiries under the third and fourth prongs. The jury voted 11-1 to acquit on the obstruction counts at the first trial, when the disputed "normal law enforcement practices" instruction was not given, App. 12, demonstrating that the government's case was underwhelming and confirming prejudice. The jury sent a note relating to the disputed instruction, D. Ct. Doc. 340, also showing prejudice. *Shafer v. South Carolina*, 532

U.S. 36, 53 (2001). Alternatively, the prejudice inquiry should be left for the lower court given that it did not address the question, *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015), and it can consider the parties' disputes regarding the offense-related facts. BIO 3-10. Although the government contends that the conspiracy instruction conveyed the requisite intent, BIO 24, that instruction did not require knowledge of illegality, App. 13, and the Ninth Circuit has rejected an identical effort to defeat prejudice. *United States v. Kim*, 65 F.3d 123, 126 (9th Cir. 1995). The Ninth Circuit would likely find prejudice on remand.

II. This case is an excellent vehicle to address whether the Court's public trial jurisprudence applies to the anonymous jury question because the government concedes that the lower courts failed to consider lesser alternatives as required under the Sixth Amendment standard.

1. The government reformulates the second question to further its theme that the anonymous jury determination is fact-intensive and discretionary and therefore inappropriate for review. BIO I, 14, 25, 32-33. The *actual* question presented asks this Court to determine whether an anonymous jury infringes the Sixth Amendment right to a public trial; if not, whether it implicates non-constitutional rights and whether a court must consider lesser alternatives. These are legal questions, and whether the right to a public trial was violated is a constitutional question

reviewed *de novo*. *United States v. Candelario-Santana*, 834 F.3d 8, 22 (1st Cir. 2016). Indeed, this Court granted review and reversed in *Presley v. Georgia*, 558 U.S. 209, 211 (2010), where the lower courts erroneously reviewed for abuse of discretion.

The government's response tees up the threshold legal question because it does not contend that the lower courts considered lesser alternatives, like sequestration or releasing the jurors' names to the attorneys. Thus, if this Court agrees that an anonymous jury infringes the constitutional right to a public trial, as two circuits have held, *see United States v. Blagojevich*, 612 F.3d 558, 564-65 (7th Cir. 2010); *United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008), then reversal is required because the lower courts committed structural error by failing to comply with this Court's public trial standard. *Presley*, 558 U.S. at 214-16; *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

The government seeks to deflect review of an important constitutional question by complaining that petitioner only "briefly" raised the public trial question in his appellate briefs. BIO 29. The heading of petitioner's argument below asserted that the district court erred under *Wecht*, one of the cases holding that this Court's public trial analysis applies to anonymous juries. Op. Br. 36; Rep. Br. 16. Petitioner relied on *Wecht* in arguing that the Ninth Circuit should apply *de novo* review because the anonymous jury question implicated constitutional concerns, Op. Br. 37, and he cited *Wecht* to argue that the district court's findings were "generic" under the public trial standard. Rep. Br. 22.

He contended: "The government attempts to limit *Wecht* as purely a First Amendment case and claims [petitioner] has no such right, but First Amendment and Sixth Amendment protections are coextensive in this context" and cited *Presley* in support. *Id.* at 23. He argued that the district court committed a fatal flaw by failing to consider the lesser alternative of disclosing the jurors' names to the attorneys. Op. Br. 42-43; Rep. Br. 17-18. Petitioner also cited *Presley* and *Waller* in arguing that the error was structural and infringed the First Amendment right to public access and "the right to a public trial" under the Sixth Amendment. Op. Br. 43; Rep. Br. 23.

Even if this ample discussion were somehow lacking, this situation would fall under this Court's "traditional rule" that once a federal claim is presented, parties can make any argument in support of the claim and "are not limited to the precise arguments they made below." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 382 (1995).[1] In sum, petitioner raised the public trial issue below, and the fact that the Ninth Circuit ignored that constitutional standard demonstrates why this Court should grant review. Despite the fact that two circuits have held that this Court's public trial cases govern the anonymous jury inquiry, the Ninth Circuit and other lower courts continue to apply their own watered-down standard.

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[1] The cases cited by the government are not on point, as they generally involved petitioners who did not raise an issue at the *certiorari* stage and then attempted to do so for the first time in a merits brief. BIO 29.

2. The government contends that anonymous juries do not involve a "complete closure" and therefore do not infringe the Sixth Amendment public trial guarantee. BIO 30. This argument could be made in response to any public trial claim: *i.e.*, the closure was not "complete" because it was only for one witness or one hearing. The government's view is also hard to square with the understanding of the Sixth Amendment at the time of the Founding. The long historical record from the Norman Conquest to colonial America "makes clear" that jury selection was conducted "openly," and public jury selection "was the common practice in America when the Constitution was adopted." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 507-08 (1984). The government does not give a single example of an anonymous jury at the time of the Founding, or even before the late 20th century, BIO 25-26, and does not dispute that the original anonymous jury opinion "adopted an entirely new rule of law . . . without precedent in the history of Anglo-American jurisprudence." *United States v. Barnes*, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting from rehearing).

Even before this Court emphasized that lesser alternatives must be considered in *Waller* and *Presley*, Judge Oakes presciently observed that "there were other less drastic alternatives available . . . including revelation of the jurors' identities in camera to counsel[,]" and that judges would subsequently and too easily employ anonymous juries like "a flock of sea gulls follows a lobster boat." *Id*. His accurate prediction and

the government's refusal to address lesser alternatives, such as sequestration or limited disclosure to the attorneys, demonstrate that it is time to grant review, particularly because disregarding alternatives flatly conflicts with this Court's most recent public trial precedent. *Presley*, 558 U.S. at 214-16.

Although the government contends that *Press-Enterprise* indicates that the name of a juror can be withheld to protect valid privacy concerns, BIO 30, this Court emphasized that any in camera parts of voir dire must be "with counsel present" and that a trial court must employ every reasonable measure resulting in the most minimal possible secrecy. *Press-Enterprise*, 464 U.S. at 512. In this context, that would mean at least allowing counsel to learn the jurors' identities. The government ignores this critical part of the inquiry, *Presley*, 558 U.S. at 214-16, and *Press-Enterprise* establishes that the Sixth Amendment prohibits wholesale juror anonymity without any consideration of this reasonable alternative.[2]

The government does not dispute that the Third and Seventh Circuits apply this Court's public trial standard to anonymous juries but contends those courts recognize that they are permissible in some rare circumstances. BIO 32. Under a proper application of the *Waller/Presley* standard, which requires consideration of lesser alternatives, a complete anonymity order

[2] The government asserts that the district court utilized a "detailed" juror questionnaire, BIO 11, 28, but it was only a standard one limited to hardship excuses. Tr. 5 (Feb. 22, 2017). Regardless, a questionnaire is not the least restrictive alternative.

like the one here should be extraordinarily rare because a court would have to be confronted with a corrupt lawyer likely to divulge juror information in violation of its orders. No such corrupt attorney was involved here, and the lower courts never considered limited disclosure to the attorneys, or any other alternatives, a dispositive point that the government continues to ignore. For this reason alone, the Sixth Amendment was violated, constituting structural error and meriting review. *Presley*, 558 U.S. at 214-16.

3. The government concedes that a defendant at least has a non-constitutional right to a public jury but does not specify whether the right is based on statutory authority or the common law. BIO 25-27. The government contends that review is not warranted under a purportedly fact-bound, non-constitutional standard but fails to address the cases demonstrating a lower-court conflict. *See United States v. Mansoori*, 304 F.3d 635, 651 (7th Cir. 2002); *United States v. Sanchez*, 74 F.3d 562 (5th Cir. 1996). If there was error in *Mansoori* and *Sanchez*, respectively involving "a large-scale gang-related operation with ready access to firearms" and a police officer charged with crimes of violence, there was error in this case involving a retired sheriff charged with non-violent offenses that occurred six years earlier.

To avoid the apparent conflict, the government asserts there were "problems" and jurors reported "feeling intimidated" at prior related trials. BIO 10-11, 27. There was no *actual* tampering at the prior trials, refuting the necessity of an anonymous jury at

petitioner's trial, and the government only relies on a comment made by the district court that "two separate jurors [at the prior trials] mentioned that they were in fear of intimidation because of the nature of these charges and because of the defendant's ties to law enforcement." ER 334. Given the lack of detailed findings, it is unclear whether these jurors raised a tentative concern that was easily allayed with a response from the judge or perhaps simply wanted to get out of jury duty. In any event, the fact that a mere two out of hundreds of potential jurors expressed such generalized concerns, not "serious" ones, BIO 27, is hardly cause for an anonymous jury, as a few jurors may fear contact by a party or his associates in every trial. *Wecht*, 537 F.3d at 240-41.

Finally, the government contends that anonymity protected the jurors from exposure to "extraneous information about the case," BIO 28, or "the litigation history of the case[,]" App. 9, but does not explain how that is so. A juror, whether named or anonymous, could research the case with a few taps of his phone, and anonymity frustrates the ability to investigate such misconduct. *Wecht*, 537 F.3d at 241-42. This rationale, like the others offered, could be employed in virtually any case. Such boilerplate justifications demonstrate that the non-constitutional standard for anonymous juries has become too lax as this procedure has become too common. The Court should grant review and restore an appropriately rigorous standard for this troubling departure from the public jury trial tradition.

CONCLUSION

The Court should grant this petition or GVR based on *Marinello*.

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Respectfully submitted,

BENJAMIN L. COLEMAN
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

Counsel for Petitioner