No. _____

In the
Supreme Court of the United States

JAMES C. DIMORA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Philip S. Kushner
KUSHNER & HAMED CO., L.P.A.
One Cleveland Center
1375 E. Ninth St., Ste. 1930
Cleveland, Ohio 44113
(216) 696-6700
pkushner@kushnerhamed.com

David E. Mills
Counsel of Record
THE MILLS LAW OFFICE LLC
1300 W. Ninth St., Ste. 636
Cleveland, Ohio 44113
(216) 929-4747
dm@MillsFederalAppeals.com

Attorneys for Petitioner

February 8, 2021

QUESTION PRESENTED

Whether a *McDonnell* error—i.e., defining the element of "official act" overbroadly in bribery counts and thereby enabling a jury to wrongly conclude that a public official's lawful conduct is unlawful—can invalidate convictions on additional counts that do not have an "official act" element but depend on the jury's assessment of whether that same conduct is unlawful.

PARTIES TO THE PROCEEDING

All of the parties are named in the caption. Petitioner James Dimora sought relief in the district court under 28 U.S.C. § 2255 and was the appellant in the court below. Respondent United States of America was the respondent in the district court and appellee below.

STATEMENT OF RELATED PROCEEDINGS

1. The District Court for the Northern District of Ohio entered judgment in *United States v. Dimora*, No. 1:10-cr-00387, on August 1, 2012.

2. The U.S. Court of Appeals for the Sixth Circuit entered judgment on direct appeal in *United States v. Dimora*, No. 12-4004, on April 30, 2014.

3. This Court denied certiorari on direct appeal in *Dimora v. United States*, No. 14-55, on October 6, 2014.

4. The District Court for the Northern District of Ohio entered judgment in § 2255 proceedings in *Dimora v. United States*, No. 1:17-cv-1288 (criminal case No. 1:10-cr-00387), on October 22, 2018.

5. The U.S. Court of Appeals for the Sixth Circuit entered judgment on appeal in § 2255 proceedings in *Dimora v. United States*, No. 18-4260, on August 31, 2020. The Sixth Circuit denied en banc rehearing on December 29, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

PETITION FOR A WRIT OF CERTIORARI

James Dimora petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals below is available at 973 F.3d 496 and reproduced at Pet. App. 1. The decision of the court of appeals regarding the certificate of appealability is reproduced at Pet. App. 18. The decision of the district court is reproduced at Pet. App. 24.

JURISDICTION

The court of appeals issued its judgment on August 31, 2020. Pet. App. 1. En banc review was denied on December 29, 2020. Pet. App. 89. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law…." U.S. Const. amend. V.

The federal criminal statutes involved here are reproduced in the Appendix. Pet. App. 96.

STATEMENT OF THE CASE

James Dimora was a public official who was accused of exchanging official acts for things of value through what the prosecutors said were various *quid pro quo* schemes. The prosecutors insisted that anything he did, including any phone

call he made, counted as an "official act." He was found guilty and sentenced to 28 years in prison. Years later, this Court issued a unanimous decision overturning Governor Robert McDonnell's corruption convictions, explaining that "official acts" cannot be merely informal actions such as these sort of phone calls—they must be more formal governmental action, such as votes. *McDonnell v. United States*, 136 S. Ct. 2355 (2016). The panel below unanimously concluded that the jury instructions at Dimora's trial violated *McDonnell*. One judge concluded that all of Dimora's convictions should have been overturned and that Dimora should have been granted a new trial. But the majority left a number of the convictions intact, even where they involved the same conduct.

Background

Beginning in 1998, Dimora served as one of three commissioners on the Board of Commissioners for Cuyahoga County, Ohio. Cuyahoga County includes Cleveland, Ohio, and is one of the most populous counties in the state. The Board of Commissioners was the head of county government.

Dimora helped constituents wherever he could. People knew he might be able to assist them by setting up a meeting, providing information on the contractor bid process, calling staff to look into grant funding, and so forth. Dimora's typical day involved many phone calls and setting up many meetings to help businesspeople, contractors, and other constituents.

As with any powerful politician, people sought access to Dimora. He was probably treated to more steak dinners than almost anyone in the county. A businessman named Ferris Kleem who frequently brought groups to Las Vegas included Dimora on an outing there. Construction contractors gave Dimora discounted or free improvements to his backyard where he hosted family and friends. If one of these people asked Dimora to set up a meeting or provide information about a county project, Dimora would do what he could to assist.

None of that is criminal.

What would be criminal is acting with the intent to provide formal official governmental action—such as votes—in exchange for these things of value. Such criminal intent sometimes can be inferred when a public official operates in secrecy by failing to comply with state disclosure laws regarding receipt of things of value.

Dimora knew all of this. People were buying him steak dinners, trips, and backyard improvements. He could lawfully accept so long as he followed two rules:

> (1) formally disclose, in a public ethics report, the names of those who gave him things of value; and
>
> (2) never exchange official county action—such as a vote—in return for a thing of value.

Over the next decade, Dimora did his job, made thousands of phone calls to assist people, was treated to dinners and various things of value, and followed both rules.

For example, the City of Berea was interested in obtaining federal grant funds administered through the county to build a pedestrian bridge over Coe Lake. Kleem relayed this to Dimora, who called the staff person in charge at the county to look into it. She first concluded it should not receive priority, but once she learned it also provided access for disabled people in compliance with the Americans with Disabilities Act, she concluded it was indeed a good fit for the federal funds. (R. 1030 at 7481–83, PageID#27073–75.) County staff fully vetted the project, and the funding was later approved by a unanimous vote of the three commissioners, including Dimora. Dimora also disclosed Kleem's name on his publicly filed ethics report as someone who had given him things of value. All the rules were followed. Today a beautiful bridge crosses over Coe Lake, benefitting anyone who visits.

But others in the county did not play by the rules. There was real corruption going on—massive corruption. At the top was Frank Russo, the County Auditor. Russo gave out jobs for money, rigged an election with a fake candidate, and took over $1 million in a kickback scheme. None of that had anything to do with Dimora. And Russo did the opposite of Dimora with the two rules of lawful conduct: (1) Russo never disclosed names of people who gave him things of value; (2) Russo exchanged official acts for things of value all the time.

Russo was committing bribery and admitted to all of it.

By contrast, Dimora never once told anyone he would trade an official favor for anything. If he had, the Government would have known—it had been listening

in on over 40,000 recorded phone calls. When Dimora voted on a county issue, he relied on independent staff recommendations, including approving the low bidder for construction projects. The recordings showed that Frank Russo could be bribed and Jimmy Dimora couldn't:

> Kelley: And why is Frank as strong as he is? Because he takes care of his friends.
>
> Rybak: Well, maybe, maybe Jimmy's gotta learn that, right?

(Ex. 2401.)

The Charges

In 2010, the Government brought corruption charges against many people in Cuyahoga County, including Russo and Dimora.

At the time—before *McDonnell*—the Government believed literally "anything" Dimora did as commissioner qualified as an official act, including every phone call he made that benefited anyone who had given him anything. This in turn resulted in many counts against Dimora—34 in all. Dimora probably could have been charged with 300 counts under the Government's view that "anything" he did was an official act. After all, he made phone calls and set up meetings constantly for people over many years. If those people bought him dinner, let alone a trip or backyard improvement, the Government considered the phone call a federal crime. Dimora's calls to staff inquiring about Coe Lake became the "Coe Lake scheme" and were charged as Hobbs Act bribery and § 666 federal program bribery.

Under the Government's overly expansive view of criminal conduct, people who gave Dimora things of value pleaded guilty and agreed to testify about things like the meals they paid for or discounted improvements for his yard. Frank Russo also pleaded guilty and admitted to the corrupt official acts he committed, and he would tell the jury about things of value both he and Dimora received.

Trial

The trial was about whether Dimora's conduct—which was largely undisputed—was lawful. Did he act with criminal intent? He planned to show he acted lawfully by showing the jury he followed the rules: (1) disclosing the names of people who gave him gifts; and (2) never exchanging official acts for a thing of value. His attorneys explained this in opening statement, and promised the jury it would see the disclosure forms.

The jury was never able to consider either point.

First, just before Dimora was going to show the jury the disclosures, the Government insisted they should be excluded as hearsay. The district court agreed. The jurors never saw them and received no explanation—jurors were left to assume they didn't exist.

Second, the jury instructions endorsed the Government's expansive view that anything Dimora did—even if "informal" or just "generally expected" for his job—was an official act for purposes of criminal bribery. (R. 735-1 at 24, PageID#16989, Pet. App. 93.) At closing, the Government emphasized that every phone call Dimora

made, every meeting he arranged—literally "anything" he did as commissioner—counted as an official act. Even having his assistant "open his mail" counted. (R. 1056, Tr. Vol. 37 at 8314, PageID#30470.) This meant Dimora's phone call to county staff to look into the Coe Lake project also qualified: "That phone call alone is an official act," the prosecutor insisted. (*Id.* PageID#30476.)

And the Government ensured that the jury never had to tie the things of value to Dimora's actual official actions, such as his vote regarding Coe Lake or any other county issue: "Nowhere in the instructions," the prosecutor emphasized, "does it say an official act is a deciding vote." *Id.*

This was the prosecutor's final message to the jury regarding the law:

> So, again official acts. It's anything that a commissioner can do…because they're a commissioner. It doesn't have to be actually influencing staff or changing someone's mind. It doesn't have to be bad for the county. It's anything a commissioner can do.

(*Id.* PageID#30473.)

Dimora never disputed he made calls and did things for people all the time—including the people he disclosed on his ethics report that the jury was promised but never saw. And he voted on county issues based on staff recommendations. Not surprisingly, the jury convicted him on nearly all counts, for various "schemes" just like the "Coe Lake scheme."

Convicted of so many counts, Dimora was sentenced to 28 years in prison. He is 65 years old and has nearly 20 years remaining.

Appeal

The two key points of Dimora's defense were the centerpiece of his argument on appeal: (1) the disclosure forms were wrongly excluded; and (2) the definition of "official acts" enabled convictions for lawful conduct. In a 2-1 decision, a panel of the Sixth Circuit affirmed the convictions. *United States v. Dimora*, 750 F.3d 619 (6th Cir. 2014). The second point regarding "official acts" was rejected pre-*McDonnell*. On the first point, the panel unanimously agreed that the disclosure forms were wrongfully excluded as hearsay. *Id.* at 628, 632. But the majority concluded the error was harmless based on what it said was overwhelming evidence that included Dimora's pre-*McDonnell* "official acts." *Id.* at 628–29. Judge Merritt dissented, explaining that the disclosure forms were critical to showing the jury that Dimora lacked criminal intent and acted lawfully. *Id.* at 632.

2255 Petition

This Court decided *McDonnell* two years later. Writing for a unanimous Court, Chief Justice Roberts explained that official acts "must involve formal exercise of governmental power." 136 S. Ct. at 2372. By contrast, "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit the definition of 'official act.'" *Id.* The error was not harmless because the jury "may have convicted Governor McDonnell for conduct that is not unlawful." *Id.* at 2375. The Court overturned the convictions. *Id.*

This Court emphasized that "the Government's expansive interpretation of 'official act' would raise significant constitutional concerns." *Id.* 2372. Public officials arrange meetings for constituents and contact other officials on their behalf "all the time," the Court observed. *Id.* "The Government's position could cast a pall of potential prosecution" anytime constituents had given the official a campaign contribution or invited the official to an outing. *Id.* "Invoking so shapeless a provision to condemn someone to prison" raises "the serious concern that the provision does not comport with the Constitution's guarantee of due process." *Id.* (citation omitted).

"The Government's position also raises significant federalism concerns," the Court continued. *Id.* at 2373. States, not the federal government, regulate the "permissible scope of interactions between state officials and their constituents," *id.* The Court refused to construe a federal corruption statute "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in settings standards of good government for local and state officials." *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

Dimora filed a § 2255 petition in the district court. He explained that the same sort of overbroad definition of "official acts" enabled the jury to convict him for lawful conduct such as setting up meetings and making phone calls—just as the Government had wrongly insisted all along. Dimora further explained that a panel of the Sixth Circuit had unanimously agreed that his state disclosure forms were

improperly excluded as hearsay. He contended these cumulative errors showed that the jury was able to convict him for lawful conduct, and he was entitled to a new trial.

The district court denied relief. It also denied a certificate of appealability.

Certificate of Appealability

Dimora sought a COA in the Sixth Circuit. A motions panel granted a COA on a variety of issues, including whether *McDonnell* instructional error affected certain counts and whether there was cumulative error in light of the exclusion of the disclosure forms. 3/27/29 COA Opinion at 6, Pet. App. 23. But the panel limited review of any *McDonnell* error to those counts for which "official act" was an element; namely, Hobbs Act Bribery (18 U.S.C. § 1951) and Honest Services Fraud (18 U.S.C. § 1346). Relying on the Sixth Circuit's precedent in *United States v. Porter*, 886 F.3d 562 (6th Cir. 2018), the panel held that *McDonnell* error could not be considered for other counts—even if they involved the same conduct. COA Op. at 4–5 (citing *Porter* to say § 666 convictions "are unaffected by the *McDonnell* decision," and mail fraud convictions are similarly unaffected as they do "not require an 'official act.'").

Decision Below

The merits panel unanimously agreed that a *McDonnell* error occurred because "official acts" were defined to criminalize lawful conduct. *Dimora v. United States*, slip op. at 10–11, Pet. App. 10–11. But the panel split 2-1 on the result. In

dissent, Judge Merritt stated that with the *McDonnell* error plus the error in excluding the disclosure forms, the conclusion was even stronger now that Dimora was entitled to a new trial on all counts. *Id.* at 15–17. The majority, per curiam, stated that the *McDonnell* error was harmless as to some "official act" counts and remanded to the district court to assess whether it was harmless as to others. *Id.* at 11–13. The majority declined to expand the COA to include effects of the errors on counts that did not require official acts, "for the reasons stated in [the COA] order." *Id.* at 13.

En banc rehearing was denied. Judge Merritt would have granted rehearing. Pet. App. 89.

Dimora now petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. Circuit precedent conflicts with *McDonnell* and Due Process because it enables juries to convict for lawful conduct.

McDonnell rests on an elementary principle of Due Process: People should not be convicted for lawful conduct. *In re Winship*, 397 U.S. 358, 364 (1970) (Due Process requires proof of guilt for the crime charged beyond a reasonable doubt). Where an instructional error (such as an overbroad definition of "official acts") enables a jury to convict for lawful conduct, the conviction must be overturned. This is true even if there was evidence of unlawful conduct—the jury could have rested its conviction on the lawful conduct and rejected (or not even addressed) the other evidence. The error cannot be harmless. *McDonnell*, 136 S. Ct. at 2375; *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017); *United States v. Fattah*, 902 F.3d 197 (3d Cir. 2018).

This error can equally cause a jury to wrongfully convict for counts that don't require official acts but rest on the same conduct.

Consider the overbroad "official acts" instructional error. Hobbs Act Bribery requires the jury to find that the defendant acted with criminal intent to exchange things of value for official acts. (R. 735-1 at 22, PageID#16987, Pet. App. 91.) If the official acts are wrongly defined to include informal actions such as making phone calls, the jury can wrongfully convict based on that lawful conduct.

When those phone calls relate to federal programs, that same conduct can also be the basis for § 666 federal program bribery. Section 666 instructs the jury to

convict for that conduct if the defendant acted "corruptly," which is defined as acting voluntarily, deliberately and dishonestly to either accomplish an *unlawful end or result*, or to use an *unlawful method or means* to accomplish an otherwise lawful end or result." (*Id.* at 26, PageID#16991, Pet. App. 95 (emphasis added).) The jury can just as readily wrongfully convict on this count because the conduct is already defined as unlawful. This wrong definition is the standard by which the jury will gauge lawfulness. *Cf. United States v. Kay*, 513 F.3d 432, 449 (5th Cir. 2007) ("The instructions suggested that illegal conduct under the FCPA defined the 'unlawful end or result' to which the court referred, since the jury had to have some standard by which to gauge lawfulness."). The same problem occurs with other counts, such as mail fraud, which allows convictions for the same lawful conduct underlying an honest-services conviction that is invalidated by *McDonnell* error.

Lower courts have overlooked this fundamental aspect of *McDonnell*. They have adopted the following overly simplified approach: A *McDonnell* error affects only counts requiring "official acts" and cannot affect other counts. *E.g., United States v. Ng Lap Seng,* 934 F.3d 110, 134 (2d Cir. 2019) (citing *Porter*). Some created an exception when the jury is instructed that official acts are part of those counts. *E.g., United States v. Skelos*, 707 F. App'x 733, 738 (2d Cir. 2017) (jury charged "on a § 666 theory based on 'official acts'").

This approach has superficial appeal when one thinks of the *McDonnell* error as merely about defining "official acts." But once you consider that the *McDonnell*

error is at its core about defining lawful conduct as unlawful, you see the approach is mistaken. It allows people to be convicted of that same lawful conduct for counts that don't require "official acts."

The correct interpretation of *McDonnell* is straightforward. When an overbroad "official acts" error enables a jury to wrongfully conclude that lawful conduct is unlawful, that error can affect any count where the jury has to assess whether that conduct is lawful. If, as this Court has unanimously stated, the jury "may have convicted [the person] for conduct that is not unlawful," the conviction cannot stand. 136 S. Ct. at 2375.

In this regard, the Sixth Circuit's precedent starts with *Porter*, which didn't involve a *McDonnell* error. Porter was convicted of violating § 666. He argued on appeal that an "official acts" requirement should be read into § 666 and that, once it was, the *McDonnell* definition had to apply. The Sixth Circuit rejected the premise of the argument, holding that § 666 does not require "official acts." 886 F.3d at 565.

The problem is that *Porter* is being read to say that even when a *McDonnell* error does occur, it can affect only counts requiring "official acts." This overlooks that a *McDonnell* error—which wrongfully defines lawful conduct as unlawful—affects other counts where a jury has to assess the same conduct. 3/27/19 slip. Op. at 5–6, Pet. App. 22–23 (denying COA in light of *Porter*); *Ng Lap Seng,* 934 F.3d at 134.

Under this precedent, which conflicts with *McDonnell* and Due Process, no defendant can challenge those counts, even if convicted of lawful conduct—even if innocent of the charge.

II. This case is the ideal vehicle to resolve the Question Presented.

The court below unanimously agreed that a *McDonnell* error occurred in Dimora's case. Because of an overbroad definition of "official acts," the jury was told lawful conduct was unlawful, and it was told to convict for that lawful conduct.

The court recognized this error affected counts requiring "official acts," such as Hobbs Act and Honest Services Fraud. For example, the Government wrongfully told the jury it could convict Dimora under the Hobbs Act for making the phone call to county staff to inquire about the Coe Lake project on behalf of Kleem. (Indeed, the *McDonnell* error invalidates all the Hobbs and Honest Services convictions here.)

The same conduct formed the basis of counts not requiring an "official act." Again, as just one example, Dimora's calls regarding Coe Lake were also charged under § 666. Jurors had to decide if Dimora acted "corruptly"—acting with "unlawful means" or toward an "unlawful end." But they were already wrongfully told the conduct was unlawful Hobbs Act bribery. In this way, the *McDonnell* error regarding the Hobbs Act count—which instructed the jury that the same lawful conduct was unlawful—equally invalidates the § 666 count. Even worse, the

instructions here explicitly incorporated the overbroad "official act" definition as part of § 666. (R. 735-1 at 21, PageID#16986, Pet. App. 21.)

This same process occurred with Dimora's convictions for honest-services fraud and traditional mail fraud. The honest-services fraud counts require "official acts" and therefore the *McDonnell* error enabled the jury to convict for lawful conduct. The Government told the jury that traditional mail fraud involved "the same misrepresentation" and emphasized that "the intent to defraud is the same." (PageID#30155, 30188.)

Yet when Dimora sought to raise the full impact of the *McDonnell* error, the motions panel concluded that circuit precedent precluded the argument. Dimora then requested that the merits panel expand the COA, but it declined to do so.

Under *McDonnell*, Dimora's convictions cannot stand. The jury "may have convicted him of conduct that is not unlawful." *Id.* at 2375. Indeed, that's exactly what likely occurred. The jury never knew Dimora complied with the disclosure laws and never knew that these many phone calls and similar actions were actually lawful. Judge Merritt was correct to conclude a new trial is required.

This is the ideal case to resolve the conflict with Supreme Court precedent. The same constitutional concerns in *McDonnell* are present here. Indeed, last term this Court unanimously overturned convictions of New Jersey officials under § 666 and wire fraud because the conduct was not criminal: "To rule otherwise would undercut this Court's oft-repeated instruction: Federal prosecutors may not use

property fraud statutes to set standards of disclosure and good government for local and state officials." *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (citation omitted).

A former Ohio official is now serving 28 years after the jury was told to convict him of conduct that is lawful. Precedent in the lower courts bars him, and others like him, from even raising the point on many counts involving that very conduct.

The precedent below conflicts with this Court's holdings, the consequences are severe, the solution is straightforward, and only this Court can provide it.

CONCLUSION

The petition should be granted.

Respectfully submitted,

David E. Mills
Counsel of Record
THE MILLS LAW OFFICE LLC
1300 West Ninth St., Ste. 636
Cleveland, OH 44113
(216) 929-4747
dm@MillsFederalAppeals.com

Philip S. Kushner
KUSHNER & HAMED CO., L.P.A.
One Cleveland Center
1375 E. Ninth St., Ste. 1930
Cleveland, OH 44113
(216) 696-6700
pkushner@kushnerhamed.com

Attorneys for Petitioner