No. ____

In the Supreme Court of the United States

SARI ALQSOUS,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Circuit erred in analyzing ruling that Petitioner was not entitled to be present during the Charge Conference under Fed. R. Crim. P. 43 and the lack of transcripts from the weekend Charge Conference violated his Confrontation Clause and Due Process rights.

Whether, under this Court's holding in McDonnell, Dr. Alqsous is a Public Official who violated the Hobbs Act and had the requisite mens rea to be found guilty of conspiracy charges.

Whether the sentence imposed creates an intra-circuit split with respect to how the quantum of harm is calculated for purposes of sentencing.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Sari Alqsous.

United States of America.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE Northern DISTRICT OF OHIO
Trial Court Case Number 1:16-CR-00329
UNITED STATES OF AMERICA v. Hills, et. al.
Jury verdict of GUILTY entered on July 27, 2018.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Case No. 19-3573
UNITED STATES OF AMERICA v. SARI ALQSOUS
Judgment dated March 3, 2022. District Court's Judgment AFFIRMED. Opinion reported *United States v. Hills, et al*, 27 F.4th 1155 (6th Cir. 2022) and reproduced in the attached Appendix.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Case No. 19-3573
UNITED STATES OF AMERICA v. SARI ALQSOUS
Amended Judgment dated May 10, 2022. Petition for Rehearing Denied. Opinion not. Reported, but reproduced in the attached Appendix.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alqsous respectfully requests that a Writ of Certiorari be issued to review the judgment and sentence delivered by the United States District Court for the Northern District of Ohio, which was affirmed by the United States Court Of Appeals For The Sixth Circuit.

OPINIONS BELOW

The March 3, 2022, order from the United States Court Of Appeals For The Sixth Circuit is reproduced in the Appendix. ("Pet. App. 1"). This order is *United States v. Hills*, 27 F.4th 1155 (6th Cir. 2022).

BASIS FOR JURISDICTION IN THIS COURT

The United States Court Of Appeals For The Sixth Circuit entered judgment on March 3, 2022. Petitioner then timely filed a Petition for Rehearing, which was subsequently denied on May 9, 2022, and later amended on May 10, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution prohibits any person from being deprived his or her liberty without due process of the law:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when

> in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code § 1951(a) provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Title 28 United States Code § 753(b) provides:

> Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to

> regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court [as] may be requested by any party to the proceeding.

In relevant part, 18 U.S.C. § 666 provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists--
>
> (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 any thing of value of $ 5,000 or more; . . .

STATEMENT OF THE CASE

Concise Statement of Facts Pertinent to the Questions Presented.

Dr. Alqsous began his dental career by entering the Residency Program at MetroHealth in Cleveland, Ohio, and at all relevant times, remained with MetroHealth as an attending dentist. [Pet. App. 3]. Notably, during that time, Dr. Hills was the CEO and Chair of the Dental Department of MetroHealth. [Pet. App. 3].

As part of a 33-count indictment, the government alleged seven distinct fraudulent schemes. First, the Government alleged that from 2009 through 2014, Dr. Alqsous conferred cash and other things of value to Dr. Hills in exchange for favorable employment perks and conditions – such as, bonuses and alternative work schedules. Notably, Dr. Alqsous at all relevant times worked more than 40 hours per week. Additionally, the Government alleged that Dr. Alqsous and his co-defendants engaged in a fraudulent scheme to accept bribes from prospective residents in exchange for guaranteed admission.

Relevant to this Petitioner, the Sixth Circuit summed the alleged conspiracies and schemes as follows:

> **Stream of Benefits Bribery Scheme.** From 2009 through 2014, Hills solicited and received bribes (in cash and other things of value) from Alqsous, Al-Madani, and Elrawy in exchange for favorable

treatment with respect to their employment at MetroHealth (i.e., bonuses, schedules, and an accommodation for a preferred candidate for residency).

Dental Resident Bribery Scheme. From 2008 until 2014, Alqsous, Al-Madani, and Sayegh solicited and/or accepted bribes from dentists applying to the dental residency program at MetroHealth.

Oral Health Enrichment (OHE) Scheme. From 2009 through 2013, Hills and unindicted business partner Julie Solooki operated Oral Health Enrichment (OHE) to provide training for dentists with discipline or performance issues. Some of OHE's business was accomplished using MetroHealth personnel, equipment, or facilities without permission or compensation.

Patient Referral Kickback Scheme. In March 2014, Hills announced that MetroHealth's dental patients could be referred to Buckeye Dental Clinic—a private clinic owned by Alqsous and Al-Madani—for which Hills received payments that included seven checks notated "consulting fees."

Free Labor Scheme. For the period from 2008 through 2010, Hills assigned MetroHealth residents, including Alqsous and Al-Madani, to work at Noble Dental

> for which they were compensated personally.

[Pet. App. 3-7].

Furthermore, as noted in the Sixth Circuit's opinion, the record shows that the district court has a conference regarding jury instructions on Friday, July 20, 2018, which continued through the weekend into Monday morning. [Pet. App. 42]. Notably, counsel was attended the conference. However, this proceeding was not transcribed.

Procedural History

1. Underlying indictment and conviction.

A multi-count indictment was filed against Dr. Alqsous and his co-defendants on October 19, 2016 for healthcare fraud and related charges arising from their Dentistry practices and side businesses. [Pet. App. 3].

The Jury found Alqsous guilty of:

- Count 1, Title 18 U.S.C. § 1962(d), participating in a RICO Conspiracy;
- Count 2, Title 18 U.S.C. § 1951(a) Conspiracy to Commit Hobbs Act Bribery;
- Count 3 Title 18 U.S.C. § 371, Conspiracy to Commit Bribery Concerning Programs Receiving Federal Funds;

- Count 4, Title 18 U.S.C. § 1349, Conspiracy to Commit Honest Services Mail Fraud and Wire Fraud;
- Count 5, Title 18 U.S.C. § 666(a)(1)(B) and (2), Corrupt Solicitation and Acceptance of a Bribe in Relation to a Program Receiving Federal Funds;
- Count 8, Title 18 U.S.C. § 1349, Conspiracy to Commit Money and Property Mail and Wire Fraud;
- Count 13, Title 18 U.S.C. § 371, Conspiracy to Solicit, Receive, Offer and Pay Health Care Kickbacks;
- Counts 21 through 27, Title 42 U.S.C. § 1320(a)(7)(b), (b)(2)(A), Offering or Paying Kickbacks in Connection with Federal Health Care Program;
- Count 28, Title 18 U.S.C. § 1349, Conspiracy to Commit Honest Services and Money and Property Mail Fraud;
- And Count 29, Title 18 U.S.C. § 1512(k), Conspiracy to Obstruct Justice.

[Pet. App. 78].

The Jury found Appellant not guilty of:

- Count 6, Title 18 U.S.C. § 666(a)(1)(B), (a)(2), Corrupt Solicitation and Acceptance of a Bribe in Relation to a Program Receiving Federal Funds;

- Count 7, Title 18 U.S.C. § 666(a)(1)(B), (a)(2), Corrupt Solicitation and Acceptance of a Bribe in Relation to a Program Receiving Federal Funds;

- And Counts 9, 10, 11, and 12, Title 18 U.S.C. §§ 1341 and 1342, Money and Property Mail Fraud.

After trial, Dr. Alqsous was sentenced to 151 months imprisonment. [Pet. App. 80]. Thereafter, Dr. Alqsous filed an appeal to the Sixth Circuit challenging the denial of his Motion for New Trial, Motion for Judgment of Acquittal, convictions, and sentence. The Sixth Circuit affirmed the trial court's rulings on March 3, 2022 and denied Dr. Alqsous' Petition for Rehearing on May 10, 2022.

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DISTRICT COURT ERRED IN PERMITTING A CHARGE CONFERENCE TO PROCEED WITHOUT DR. ALQSOUS BEING PRESENT, OR IN THE ALTERNATIVE, WAIVING HIS RIGHT TO BE PRESENT.

Dr. Alqsous was erroneously deprived his right to attend all critical stages of his trial when the District Court held a Charge Conference outside of his presence. To compound this issue, the Conference was not recorded or transcribed. As such, Dr. Alqsous' appellate counsel was not provided an opportunity to review the proceeding for possible errors on appeal. Given the Sixth Circuit's ruling in the case below, there are discrepancies between and among the Circuits regarding a defendant's right to be present during critical stages, waiver of such right, and the requirement for the proceeding to be transcribed or recorded.

A. Dr. Alqsous' right to be present during all critical stages of trial and for those stages to be transcribed.

It is the law of this Court that a defendant has the right to be present when his or her critical rights or liberties are at stake.[1] A criminal defendant has the

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[1] "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372, 36 L. Ed. 1011, 13 S. Ct. 136 (1892); *see Rushen v. Spain*, 464 U.S. 114, 117-18, 78 L. Ed. 2d 267, 104 S. Ct. 453

right to be "present at all stages of the trial." *Faretta v. California*, 422 U.S. 806, 820 n.15 (1975). This right is preserved by the Sixth Amendment and implicates the fair trial concerns of the Due Process Clauses of the Fifth and Fourteenth Amendments. *Illinois v. Allen*, 397 U.S. 337, 338 (1970)[2]; *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

A defendant's right to be present under Fed. R. Crim. P. 43 is waivable only under the specific conditions stated in the rule. *United States v. Mezzanatto*, 115 S. Ct. 797, 801-02 (1995) (citing *Crosby v. United States*, 113 S. Ct. 748 (1993)). Rule 43 provides that the defendant can waive his right to be present but does not provide that his counsel can waive that right in his absence. And counsel made no such waiver, nor was even invited to by the district court in this case. Moreover, the Court Reporters Act requires a court reporter to record "verbatim by shorthand, mechanical means, electronic sound recording, or any other method . . . (1) all proceedings in criminal cases had in open court...." 28 U.S.C. § 753(b).

Given that the record is void of a transcript of these proceedings, it should be assumed that the Court did not expressly give Dr. Alqsous an

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(1983) (per curiam) (right to personal presence at all critical stages of the trial is a "fundamental right[] of each criminal defendant").

[2] See *Allen*, 397 U.S. at 338, ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at **every** stage of his trial.")(emphasis added).

opportunity to waive his right to be present. The Sixth Circuit's ruling below unquestionably contravenes other Circuits' stance on the issue raised herein.

The Second Circuit has noted that "the right to presence is scarcely less important than the right of trial itself." *Grayton v. Ercole,* 691 F.3d 165, 170 (2d Cir. 2012)*;* See also *Clark v. Stinson*, 214 F.3d 315, 322 (2d Cir. 2000) (explaining that "[i]f fact issues are presented . . . it would seem that defendant has a right to be present" (quoting 3A Charles Alan Wright, Federal Practice and Procedure § 721.1 at 12 (2d ed. 1982)). Rule 43's reference to "presence" means that Rule 43(a)(3) requires a defendant to be physically present in the same courtroom as the judge when the judge imposes sentence. See *United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018); see also *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (Rule 43's presence language requires physical presence). Importantly, "a Rule 43(a) violation constitutes per se error." *Id*. at 867 (holding that conducting a combined plea and sentencing hearing by videoconference was a per se error warranting automatic reversal) (citations omitted), citing *United States v. Torres-Palma*, 290 F.3d 1244, 1248 (10th Cir. 2002) (vacating defendant's sentence because having defendant appear via videoconference in lieu of having the defendant physically present violated Rule 43(a)(3); *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (same)). Likewise in *United States v. Canady*, 126 F.3d 352, 360 (2d Cir. 1997), the Second Circuit clearly established that this is a constitutional right codified by Rule 43. The *Canady* court went so

far as to deem this right structural error and vacated the verdict.

Importantly as it relates to the lack of transcripts, the Fifth Circuit in *United States v. Selva*, 559 F.2d 1303, 1305 (5th Cir. 1977) held that: "When, [. . .] a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal."[3] The responsibility to insure compliance with the statute lies with the court, not the court reporter or the parties. See *United States v. Gallo*, 763 F.3d 1504, 1530 (6th Cir. 1984); *United States v. Garner*, 581 F.2d 481, 488 (5th Cir. 1978). The requirements of 28 U.S.C. § 753(b), the Court Reporters Act, "are mandatory not permissive." *In Re: Progressive Games, Inc.*, 194 F.3d 1329 (D.C. Cir. 1999); *Veillon v. Exploration Services*, 876 F.2d 1197, 1200 (5th Cir. 1989).

The Sixth Circuit's opinion creates a split among the Circuits and entirely departs from relevant legal precedent. The Sixth Circuit panel below stated that Dr. Alqsous did "not suggest how his absence

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[3] See also *United States v. Gallo*, 763 F.2d 1504, 1530 (6th Cir. 1985)(detailing that "*Selva* states two different standards depending on whether the same counsel represented defendant at trial and on appeal... A standard less exacting upon defendant applies if appellate counsel were not the trial counsel. In such situations, according to *Selva*, a defendant need only show the absence of "a substantial and significant portion of the record.").

could have detracted from his defense since he was represented by counsel during the [Charge Conference] discussions." [Pet. App. 43]. The panel below went even further to state that "the right to be present under Rule 43 is waived if not affirmatively asserted." [Pet. App. 43]. The panel further largely relied on *United States v. Romero*, 282 F.3d 683, 689-90 (9th Cir. 2002) to bolster its position. *In Romero,* the defendant was not present during a conference regarding jury instructions between counsel and the court. *The Romero* court held that the defendant was not entitled to be present because the jury instructions are purely legal matter. However, in *Romero* the defendant did not couple his Rule 43 claim with a violation of the Court Reporters Act. Furthermore, Dr. Alqsous asserts that the *Romero* holding is abrasive to the spirit of Rule 43 and highlights the need for this Court to resolve the split among circuits.

Because the lower court violated the Defendant's right to be present, and this is a fundamental structural error, its verdict of conviction must be vacated.

B. This Court should resolve this issue in a manner consistent with the text and spirit of Fed. R. Crim. P. 43 and 28 U.S.C. § 753.

This Court has noted: "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of" the defendant. *Lewis v. United States*, 146

U.S. 370, 372 (1892); see also *Rushen v. Spain*, 464 U.S. 114, 117-18 (1983).[4]

Normally, an appellant must show that the error complained of affected a substantial right. See Fed. R. Crim. P. 52(a). This Court has said that the prejudice resulting from a Rule 43 violation can in some circumstances be a harmless error, *Rogers v. United States*, 422 U.S. 34, 40 (1975), as have the lower Federal courts, *United States v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969) and *Blackwell v. Brewer*, 562 F.2d 596, 600 (8th Cir. 1977). This implies that in most instances of a Rule 43 violation, the error cannot be harmless.

Not only did the Sixth Circuit err in its ultimate conclusion, but it also erred in its analysis by not analyzing the claim under a structural error standard. Structural errors do not require a showing of prejudice and mandate reversal. *Neder v. United States*, 527 U.S. 1, 7 (1999) ("Errors of this type are so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome.") (internal citations omitted). An error is structural if it involves defects in the "constitution of the trial mechanism," *Arizona v. Fulminante*, 499 U.S. 279, 291 (1991), calls into question the accuracy and reliability of the trial process, *McGurk v. Stenberg*, 163 F.3d 470, 474 (8th Cir. 1998), affects the framework

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[4] In *Hardy v. United States*, 375 U.S. 277 (1964), the Court explained that an indigent defendant was entitled to free transcripts. The same notion should apply here. Dr. Alqsous was entitled to transcripts, whether free or for the appropriate and requisite cost.

within which the trial proceeds, *Neder*, 527 U.S. at 8, has the potential to infect the entire trial process, *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), or creates results that are difficult to assess or quantify. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 & n. 2 (2006).

All of these factors are present in Dr. Alqsous' case. The secrecy of the meetings and the lack of record, call into question his constitutional rights. The defect relates to the instructions provided to the jury, which is the primary trial mechanism in this case. If permitted to stand, the Sixth Circuit's decision will eviscerate the presence requirement memorialized in Rule 43 and protected by the Confrontation Clause and the Due Process Clause.

Here, neither an express waiver nor a failure to object occurred. Any implied waiver of the right to be present therefore had to have been based on the defendant's conduct. Given the fundamental character of the right in issue, moreover, the trial court could not simply assume that the defendant's conduct qualified as an implied waiver. To the contrary, "trial courts must vigorously safeguard a criminal defendant's right to be present", *United States v. Fontanez*, 878 F.2d 33, 36 (2d Cir. 1989), drawing "all reasonable inferences against the loss of such a right." *Canady*, 126 F.3d at 359; see *United States v. Achbani*, 507 F.3d 598, 601-02 (7th Cir. 2007) ("courts should indulge every reasonable inference against a finding of voluntary absence" and "explore on the record any 'serious questions' raised about whether the defendant's absence was knowing and voluntary"); *Larson*, 911 F.2d at 397 (same).

Ultimately, Dr. Alqsous has shown that he did not waive his right to be present at the Charge Conference, nor did counsel effectively waive his right to be present. Additionally, there was not recitation of what occurred during the Charge Conference. Appellate counsel was barred from knowing what occurred or which objections were made at a critical stage of trial – thereby implicating Selva. This Court should visit the holding of the Sixth Circuit, as it sets dangerous precedent and threatens the constitutional rights of all defendants.

II. The Sixth Circuit contravened this Court's jurisprudence when finding that Dr. Alqsous is guilty of violating the Hobbs Act or the remaining conspiracy charges as it relates to Honest Services Mail Fraud, Bribery, and Kickback schemes.

The District Court at the judgment of acquittal phase and the Sixth Circuit below erroneously applied this Court's holding in *McDonnell v. United States*, 579 U.S. 550, 136 S. Ct. 2355 (2016). Additionally, the Sixth Circuit erred in finding that Dr. Alqsous possessed the requisite mens rea to be guilty of violating 18 U.S.C. § 1349, 18 U.S.C. § 371, and 42 U.S.C. § 1320(a)(7)(b), (b)(2)(A).

A. The Sixth Circuit's Departure from *McDonnell*.

"The Hobbs Act makes it a crime to, among other things, conspire to obstruct, delay, or affect interstate commerce by extortion, including 'obtaining of property from another, with his consent [i.e., not

robbery], . . . under color of official right.'" [Pet. App. 14 (citing 18 U.S.C. § 1951(b)(2))].

The Court in *McDonnell* held that to constitute an "official act," the government must first "identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official." *McDonnell*, 136 S. Ct. at 2368 (quoting 18 U.S.C. § 201(a)(3)). An "official act" in § 201(a) requires: (1) a formal exercise of governmental power that is similar in nature to a lawsuit or a hearing; (2) "something specific and focused that is 'pending' or 'may by law be brought' before a public official[;]" and (3) a decision or action on that matter. *McDonnell*, 136 S. Ct. at 2372. Relying on *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999); *id.* at 2370, this Court held that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so) -- without more -- does not fit that definition of 'official act.'"

In *United States v. Tavares*, 844 F.3d 46 (1st Cir. 2016), the First Circuit gave a similar reading to *McDonnell* as did the Second Circuit in *United States v. Silver*, 954 F.3d 455 (2d Cir. 2020), both of them at odds with the Sixth Circuit below. *Tavares* involved a RICO conspiracy and mail fraud prosecution of officials of the Massachusetts Office of the Commissioner of Probation. The court of appeals reversed the convictions, finding that the government had "overstepped its bounds in using federal criminal statutes to police the hiring practices" of a state agency.

In *McDonnell*, because of constitutional vagueness and federalism considerations, the Court narrowed the reach of Honest Services and Hobbs Act violations. The indictment of Governor McDonnell alleged that he participated in a scheme to use his office to enrich himself and his family by soliciting and obtaining things of value for Jonnie Williams, a constituent, who was the CEO of Star Scientific. 142 The evidence showed that McDonnell received approximately $ 175,000 in benefits and, in return, McDonnell (i) arranged meetings for Williams with other Virginia officials to discuss a health supplement owned by Star Scientific, (ii) hosted a reception for Star Scientific at the Governor's Mansion attended by Virginia officials who could advance Williams's agenda, and (iii) contacted other Virginia government officials who could help Williams. 143 The jury found McDonnell guilty and the Fourth Circuit affirmed. The Court vacated the judgment and remanded.

The Court explained that an "official act" requires that a public official used their position to " exert pressure on another official to perform an 'official act,'" or that the official " provide[d] advice to another official, knowing or intending that such advice form the basis for an 'official act' by another official.'"

The Sixth Circuit's *McDonnell* analysis fails on several fronts and departs from this Court's holding in McDonnell, as well as the First and Second Circuit's holding in *Tavares* and *Silver*, respectively. First, in its opinion the Sixth Circuit cited to *Dixson v. United States*, 465 U.S. 496 (1984) for the proposition that a non-public employee can be a public office when "the person occupies a position of public trust with official

federal responsibilities." This comparison to *Dixson* is unfounded. Dr. Alqsous does not have **any** official federal responsibilities.

Secondly, there was no pressure on another official to perform an official act, as required by *McDonnell*. The Sixth Circuit emphasizes that Dr. Alqsous was allowed to work less than five days a week, yet receive pay and bonuses. However, Dr. Alqsous continued to be a full-time employee and worked well over 40 hours per week. This Court has repeatedly held that it is not the aim of the Hobbs Act to intervene on lawful business practices. Ultimately, the "smoking gun" the Sixth Circuit is looking for does not exist. Any benefit received was the result of superior work at MetroHealth. Moreover, an action taken was not taken at the time Hills received gifts. This Sixth Circuit stated that this case is not like *Dimora*[5]; however, that conclusion is patently inaccurate. Gifts were provided to Hills, that is not contended. However, there was no expectation of any benefit as a result of providing gifts. Dr. Alqsous and Hills had a decade long relationship. Dr. Alqsous repeatedly was a top performer at MetroHealth. To say he conferred gifts to Hills for a schedule that still required him to work well over 40 hours and complete all his work responsibilities is a fallacy. Moreover, all bonuses were paid and signed off on by a member of MetroHealth, Ms. Meehan, that was in no way involved in the charged indictment. As such, it begs the question of how Dr. Alqsous could have exerted pressure on Ms. Mehaan if she was not involved in the

[5] *Dimora v. United States*, 973 F.3d 496 (6th Cir.2020).

alleged schemes and did not receive gifts from Dr. Alqsous. Moreover, there was no quid pro quo as memorialized in *Silver*.

This matter is ripe for review by this Honorable Court to resolve the existing conflict among Circuits involving the requisite showing for a Hobbs Act conviction and the proper application of *McDonnell*.

B. There was no bribe or kickback and MetroHealth Cannot be the alleged beneficiary and the Victim.

The Government charged Dr. Alqsous with honest-services fraud and federal-programs bribery. *Skilling v. United States*, 561 U.S. 358, 411 (2010). All of these charges fail as a matter of law. Bribery is giving a benefit to an agent to influence the actions he takes on behalf of his principal. It corrupts the relationship by giving the agent an extrinsic incentive misaligned with his principal's interests. The Government's argument fundamentally misunderstands what bribery is. Indeed, counsel has not identified a single bribery case in the history of American jurisprudence in which the victim of the bribe was also the recipient of the allegedly illicit payment. Nor can this novel theory be reconciled with *Skilling's* narrowing of honest-services fraud, or with § 666's text—much less with the applicable canons of construction. Moreover, it is worth noting that there is presently a split among the Circuits on whether to extend *McDonnell* to § 666.[6]

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[6] See *United States v. Lindberg*, 39 F.4th 151 (4th Cir. 2022); *United States v. Donagher*, 520 F. Supp. 3d 1034 (N.D. Ill. 2021);

As it relates to the Honest Service Fraud charge, bribery is when someone offers an agent a personal benefit, i.e., a corrupt payment, to influence his exercise of duties on behalf of his principal. See Bribery, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The corrupt payment, receipt, or solicitation of a private favor for official action." (emphasis added)). Often the agent is a public official—an agent of the public. He has a fiduciary duty to act in the public's best interests. If he is offered a private benefit in exchange for an exercise of his powers, he has been bribed to follow his own interest rather than the public's. The common denominator—what makes bribery bribery—is a private incentive that does not benefit the agent's principal, thereby creating a clear conflict between the agent's personal interests and his duties to his principal. See *Oscanyan v. Arms Co.*, 103 U.S. 261, 277 (1881) (describing object of a "contract to bribe" as "the control of … agents by considerations conflicting with their duty and fidelity to their principals" (emphasis added)). To counsel's knowledge after thorough research, every federal bribery case in U.S. history fits this mold.

Congress enacted § 1346 after *McNally v. United States* held that the federal fraud statutes protected only property rights, not the intangible right to honest employment. 483 U.S. 350, 358 (1987). Although § 1346 revived the honest-services theory,

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but see *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) ; see also *United States v. Thiam*, No. 17-2765, 934 F.3d 89, 2019 U.S. App. LEXIS 23293, 2019 WL 3540276, at *3 (2d Cir. August 5, 2019).

Skilling then limited the statute to "paramount applications" of the theory "pre-*McNally*"—i.e., cases of "bribes or kickbacks." 561 U.S. at 404. To avoid vagueness concerns, the Court narrowed the statute to those "core" or "paradigmatic" cases, *id*. at 409, 411, and refused to extend it beyond "that core category," *id*. at 405. *Skilling* dooms the Government's theory. This case can hardly be described as "paradigmatic" or within the "core of the pre-McNally case law." *Id*. at 411, 409. After a comprehensive review, neither counsel nor the Government has been able to identify any federal bribery case—including pre-*McNally*—where the bribe went to the alleged victim. Under *Skilling*, that lack of precedent is dispositive.

The text and structure of the federal-programs bribery statute likewise confirm that a payment to a purported victim is not a bribe. Section 666 prohibits "corruptly" giving or offering "anything of value to any person, with intent to influence or reward an agent of an organization ... in connection with any business, transaction, or series of transactions of such organization." 18 U.S.C. § 666. Can "any person" (the recipient of the bribe) be the same as the "organization" (the victim)? This Court answered "no" to a similar query in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001). There, the Court analyzed RICO, which makes it unlawful for "any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of such enterprise's affairs" through racketeering acts. 18 U.S.C. § 1962(c) (emphasis added). Looking to the "statute's language, read as ordinary English," the Court agreed with the "basic

principle" that this text requires "two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." 533 U.S. at 161-62.

Here, not only does the Sixth Circuit's holding contravene the Court's holding in *Cedric Kushner*, it misapprehends the definition of a bribe. In this present matter, there was no "official act" taken by Dr. Hills, let alone an "official act" that was to private benefit and public detriment. As such, these convictions cannot stand as a matter of law and common sense.

C. Dr. Alqsous lacked the requisite mens rea to sustain a conviction in regard to Dr. Alqsous intent to Defraud.

Importantly, the trial court neglected to properly instruct the jury on the fact that actions taken in good faith are not done with the intent to defraud. This notion was recently memorialized by this Court in *Xiulu Ruan v. United States*, 142 S. Ct. 2370 (2022). In *Ruan*, the Court aptly noted that "our criminal law seeks to punish the '"vicious will."' *Xiulu Ruan v. United States*, 142 S. Ct. 2370 (2022) citing *Morissette v. United States*, 342 U. S. 246, 251, 72 S. Ct. 240, 96 L. Ed. 288 (1952). Moreover, when a statute is silent on scienter, the mens rea element is necessary to "separate wrongful conduct from otherwise innocent conduct." *Xiulu Ruan v. United States*, 142 S. Ct. 2370 (2022) citing *Elonis v. United States*, 575 U.S. 723, 736, 135 S. Ct. 2001, 192 L. Ed. 2d 1, (2015) (quoting *Carter v. United States*, 530 U.S. 255, 269, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000).

In *United States v. Wexle*r, 522 F.3d 194 (2d Cir. 2008), the Second Circuit recognized that a mistake "however gross" is not sufficient find a defendant guilty under § 841. *Id*. Nevertheless, the court, in the same case, approved of a good faith instruction that defined good faith as what the defendant "should have reasonably believed to be proper medical practice." *Id*. The good faith instruction issued explicitly allowed for conviction based on an unreasonable mistake. If one can be convicted based on an unreasonable mistake, then one can be convicted for a "gross mistake" and without knowledge that she acted outside the usual course of professional practice. Here, there is no jury instruction to work from – a reversible error in of itself.

The Sixth Circuit below seems to depart entirely from this Court's long-held mens rea jurisprudence. The Sixth Circuit below noted that:

> "Because there is no claim that the jury was inaccurately or insufficiently instructed regarding the intent required to prove any of the offenses, any error in failing to also give a good faith instruction would be harmless. See *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir. 1984). The jury's finding that a defendant acted with the requisite intent necessarily negates the possibility that the defendant acted in good faith. See *United States v. Damra*, 621 F.3d 474, 502-03 (6th Cir. 2010)."

[Pet. App. 50].

First, this notion fails as each defendant in this case raised the issue of insufficient jury instructions as it relates to the intricacies of *McDonnell*. So, the Sixth Circuit's stance is unfounded.

Here, as in *Ruan*, there is subjective good faith. It is without contention the Dr. Alqsous was a top performing dentist at MetroHealth. It is further unopposed that Dr. Alqsous took on additional administrative duties and filled in when other dentists were unavailable. Dr. Hills simply referred patients to Dr. Alqsous because Dr. Alqsous was well-equipped and well-qualified to handle the additional patients. Even if this practice is outside business norms, it was done with the health and well-being of the patients and the hospital in mind. Importantly, Dr. Alqsous met his burden of production in showing that Dr. Hills and Dr. Alqsous acted in good-faith and without the intent to fraud. Therefore, under *Ruan*, the government is required to prove beyond a reasonable doubt that there was in fact an unauthorized intent to defraud.

III. THE TRIAL COURT AND SIXTH CIRCUIT CONTRAVENED ESTABLISHED JURISPRUDENCE AS IT RELATED TO THE QUANTUM OF HARM CALCULATED FOR PURPOSES OF SENTENCING.

The Panel created two new rules that have no basis in precedent or the Guidelines and conflict with the other Circuits. First, the Panel held—without citation to any authority—that [i]t was not error for the district court to decide to make the calculations on a scheme-by-scheme basis, using the method that

results in the greatest amount, and adding those amounts together.

The Guidelines are determinative. Courts are to pick a single metric for measuring harm: "the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest." USSG §2C1.1(b)(2) Application Note 2 states that in cases "involving more than incident of bribery or extortion, the applicable amounts . . . are determined separately for each incident and then added together." Court's cannot deploy a grab bag of metrices to establish loss. And the Sixth Circuit affirmed such departure from established jurisprudence without citation to prevail authority.

Additionally, *United States v. Lianidis*, 599 F.3d 273, 283 (3d Cir. 2010) creates a Circuit split that requires resolution. Importantly, in *United States v. Pena*, 268 F.3d 215, 218-21 (3d Cir. 2001), the Third Circuit departed from the Fifth Circuit's stance in *United States v. Landers*, 68 F.3d 882 (5th Cir. 1995). In *Pena*, the Third Circuit emphasized that the bribery guideline focuses on the "value" of the benefit received, not necessarily its purely arithmetic amount. In the *Pena* case, police accepted $ 96,000 in bribes to protect an illegal gambling operation, which was consequently able to take in $ 2.6 million in illegal proceeds. Notably, where "the transactions are entirely illegitimate," the "concept of netting out costs to arrive at profit is inappropriate under the Guidelines section," 268 F.3d at 219, because illegal

activities have no cognizable "value." Here, as in *Lianidis* that is not the case.

Relatedly, for offenses involving fraud or theft, U.S. Sentencing Guidelines Manual § 2B1.1 provides for an offense level enhancement based on the value of the loss attributable to the defendant's conduct. Plainly, the Third Circuit Court of Appeals noted that to prove pecuniary harm, a particular mens rea is required. See *United States v. Yu Xue*, Nos. 21-2227, 21-2228, 2022 U.S. App. LEXIS 21258 (3d Cir. Aug. 2, 2022) (noting "The District Court's task was therefore to determine whether the defendants purposely sought to inflict a loss on the victim in the amount claimed by the government. *United States v. Kirschner*, 995 F.3d 327, 336-337 (3d Cir. 2021) (noting that a district court fails to perform a "deeper analysis" if "it adopts an intended-loss methodology without demonstrating that the defendant's 'purpose' was to inflict the losses the government claims he intended to inflict"); see also *United States v. Yeaman*, 194 F.3d 442, 460 (3d Cir. 1999) ("Intended loss refers to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims.")").

To this end, the Sixth Circuit contravened their own jurisprudence by holding that the market value of Dr. Alqsous's labor may not be credited against the loss to MetroHealth. See *United States v. Koserski*, 969 F.3d 310, 313 (6th Cir. 2020) (holding that the district court utilized a "net benefits received" metric as opposed to a credits-against-loss approach is a distinction without any meaningful difference.).

Petitioner respectfully asserts that this honorable Court is properly situated to resolve the split among the Circuit's regarding quantum of harm in bribery cases.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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