No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHI MENG YANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Questions Presented Are:

Whether this court should Grant *certiorari*, vacate and remand, because the Ninth Circuit's harmless error holding was based on an interpretation of bribery in 18 U.S.C. § 666 which this court subsequently narrowed in *United states v. Snyder*?

Whether the public authority defense may be raised based on authority given by state officers working on joint operations with the federal government?

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CHI MENG YANG, by and through appointed counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit is unpublished. *United States v. Yang*, __ F. Appx. ___ (9th Cir. April 11, 2024). It is reproduced in the appendix at Appendix 1-4.

II. JURISDICTION

This Court has jurisdiction to review the judgment on a writ of certiorari pursuant to 28 U.S.C. Section 1254(1). The memorandum decision of the Ninth Circuit was filed on April 11, 2024. Appendix 1.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "(i)n all criminal prosecutions, the accused shall enjoy the right to . . . to have compulsory process for obtaining witnesses in his favor . . .

Section 666 of title 18 of the United States Code Section provides, in relevant part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists-- . . .
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

IV. STATEMENT OF THE CASE

CHI MENG YANG petitions for certiorari review following his convictions for bribery under 18 U.S.C. § 666(a)(2) and conspiracy to commit bribery in violation of 18 U.S.C. § 371, and one count of manufacturing more than 100 marijuana plants in violation of 21 U.S.C. § 841(a), in 2:17-CR-00169-JAM. 4-ER-724. The superseding indictment alleged that Chi Meng Yang (hereinafter Mr. Yang) and his sister Gaosheng Laitenen attempted to bribe Siskiyou County Sheriff Jon Lopey and alleged as an overt act in furtherance of the bribery conspiracy that on "Yang and Laitenen met with the Sheriff to discuss the scope of the protection they would receive in exchange for their offer to pay the Sheriff." 4-ER-727.

To rebut this specific over act allegation, Mr. Yang sought to raise the public authority defense, proffering his testimony that (1) he invited his sister Gaosheng Laitenen to the 2017 meeting only because Sheriff Lopey asked him to, (2) that he only told her what Sheriff Lopey told him to say, and (3) that his purpose was only to further the Sheriff's lawful objectives. 4-ER-721. Since Sheriff Lopey was a law enforcement officer as well as an official F.B.I. undercover agent at the time of this 2017 meeting, Sheriff Lopey had the legal authority on that date to discuss criminal activity or bribery with any person he suspected of being involved in marijuana cultivation. CR 422-425. Mr. Yang gave notice that he intended to

testify that his first actions involving the co-defendant were only done because he believed he was an agent for Sheriff Lopey. 4-ER-722.

The United States moved *in limine* to preclude the public authority testimony and to preclude any testimony regarding believed compliance with California's state medical marijuana laws. 1-ER-22-24, CR 285-286.

In his trial brief filed on February 22, 2022, Mr. Yang gave a detailed proffer regarding his proposed testimony on the public authority defense as it applied to conspiracy to bribe a state public official:

> Mr. Yang will testify that he had no agreements with anyone to work together to grow marijuana plants. The video recordings will show that he admitted to growing approximately 300 plants which were found on property he owned. Mr. Yang will testify that Sherriff Lopey asked him for the plot numbers for his family members and he got those numbers from family members without any agreement from them to become involved in bribery. He will testify that he obtained the parcels numbers at the request of Sherriff Lopey for what he believed was a valid law enforcement purpose. Mr. Yang gave notice of the public authority defense which narrowly covers his compliance with the Sherriff's request to obtain the parcel numbers. The Government contends that he obtained the parcel numbers for some improper purpose, but Mr. Yang insists that he did so at the request of Sherriff Lopey with no intent to encourage Sherriff Lopey to do anything illegal regarding those properties. It is clear that Gaosheng Laitenen asked Sherriff Lopey to protect those parcels, but that Chi Yang's involvement was not so clear.

CR 302 page 8-9. The Court granted the motion *in limine* precluding the public authority defense. 1-ER-24.

At trial, the United States introduced the testimony of Siskiyou County Sheriff Lopey who testified that he met with Mr. Yang in May 2017 in an unrecorded meeting in which Mr. Yang made statements which caused Sheriff Lopey to suspect that Mr. Yang was a large-scale marijuana trafficker who intended to bribe Sheriff Lopey to evade enforcement of marijuana laws. 2-ER-250-265. Sheriff Lopey reported the meeting to the F.B.I. and he testified that all remaining meetings with Mr. Yang were recorded on videotapes, excerpts of which were played at trial. 2-ER-258-311. Sheriff Lopey testified that in the second meeting on June 9, 2017, he met with Mr. Yang and Mr. Yang's sister, co-defendant Gaosheng Laitenen. 2-ER-271-311. The video excerpts showed that during the meeting Mr. Yang explained the proposal to Ms. Laitenen who asked Sheriff Lopey, questions and eventually during the meeting Ms. Laitenen is shown discussing paying specific sums of money for protection of marijuana grows. 2-ER-271-311. In later recorded videotapes of meetings, Ms. Laitenen are shown bringing $5,000 and a list of 10 parcel numbers which the parties stipulated corresponded to lots where marijuana was found growing during a raid on August 31, 2017. 2-ER-271-311. The parties stipulated that one of the parcels was owned by Mr. Yang where over 300 marijuana plants were found, and the other properties where over 700 marijuana plants were discovered were owned by codefendant

Gaosheng Laitenen, as well as three defense witnesses, William Cody Hughes, Youakos Xyootxiajlwv, and Cy Shia Yang.

Sheriff Lopey also testified that his agency received $56,000 in federal cannabis eradication funds from the U.S. Drug Enforcement Administration to be directed towards cannabis operations on either private or public lands. 2-ER-221, 310, 313. Sheriff Lopey testified that his agency followed the D.E.A. guidelines, and "worked in partnership" with federal law enforcement each year. 2-ER-310. This receipt of federal funds gave federal jurisdiction over bribery of a state officer under 18 U.S.C. §666(b).

During the defense case, Mr. Yang testified that he first met Sheriff Lopey in 2016 at a public meeting at a golf resort where Sheriff Lopey gave guidance to the community about how to comply with marijuana rules. 4-ER-585-588. Mr. Yang testified that at the time of this meeting he did not have any marijuana plants growing. 4-ER-587. He testified met with Sheriff Lopey again months later on May 17, 2017, after he moved to California in February 2017. 4-ER-589. Mr. Yang testified that as of May 17, 2017 he was not growing marijuana, he had never previously grown marijuana, and he had no plans to grow marijuana. 4-ER-598. Mr. Yang testified that in the unrecorded May 17, 2023 meeting Sheriff Lopey gave him the idea to grow marijuana saying "he told me that if I wanted to grow, I could do indoors." 4-ER-600. Mr. Yang testified that by the June 9, 2017 he was

still only growing ten plants indoors. 4-ER-600, 615. He testified that he got the idea to grow ten plants from Sheriff Lopey. 4-ER-600. He testified that on June 9, 2017, he discussed increasing his plants to more than ninety-nine, and said "that was another proposal from Sheriff Lopey." 4-ER-615.

Mr. Yang also testified that during the May 17, 2017, meeting Sheriff Lopey proposed that he would protect Mr. Yang's family from upcoming eradications "but I would have to provide him with APN numbers . . . and to come in to make him an offer on the next scheduled meeting. I must say that I don't want any enforcement, plus I needed his protection. That was his proposal." 4-ER-596-598.

Mr. Yang testified that this proposal was not in response to anything Mr. Yang suggested. 4-ER-597. Mr. Yang testified that prior to May 2017 he donated $1,000 to Sheriff Lopey's campaign hoping to secure his friendship and assistance, and because he wanted to build a partnership with Sheriff Lopey to reduce racial discrimination. 4-ER-591-592. He testified that he wanted the Sheriff's influence in order to reduce racial discrimination in Siskiyou county. 4-ER-627. Mr. Yang testified that he had heard of the discrimination against Hmong but had not experienced it himself. 4-ER-591-592. He testified that he believed there was a connection between his donations and resolving racial discrimination. 4-ER-592-597. Mr. Yang testified that he told his sister Gaosheng that Sheriff Lopey was not a racist like other people thought, and that the Sheriff could help her with the

harassment and racial problems at her store. 4-ER-604. He also testified that he wanted the Sheriff's protection from "bad people" who were harassing his family. 4-ER-603.

Mr. Yang further testified that he did not think the $5,000 payment to the Sheriff for protection would be illegal. 4-ER-603. He testified that prior to giving Sheriff Lopey the parcel numbers from properties owned by Cody Hughes, Mr. Xyoojtxiajlwu, and Cy Shia, he had not spoken to any of the three about the Sheriff's offer of protection for marijuana grows. 4-ER-605-606.

Mr. Yang also testified that during the meeting on June 9, 2017 he talked about increasing the number of his plants above ninety-nine, and explained "that was another proposal from him." 4-ER-615.

During the defense case, the defense subpoenaed three witnesses who owned properties which matched the parcel numbers provided to Sheriff Lopey in connection with Gaosheng Laitenen's request for protection from enforcement. These three witnesses William Cody Hughes, Youakos Xyootxiajlwv, and Cy Shia Yang all moved to invoke the Fifth Amendment on all testimony. 4-ER-634, 675-678. Defense asked the Court to permit the three witnesses to testify that they had no communications with Chi Yang or Gaosheng Laitenen about protection and that they were not involved in any agreement to bribe Sheriff Lopey. 1-ER-25. Defense counsel proffered that Mr. Hughes would answer "no" if asked about whether he

was involved with Mr. Yang in attempting to obtain protection from the Sheriff. Mr. Hughes' lawyer admitted that there were some questions that could be asked that would not implicate his Fifth Amendment rights. 1-ER-14. The district judge ruled that this denial would incriminate Mr. Hughes, and allowed him not to testify. 1-ER-14-15.

The Court ruled:

> Court: It doesn't matter. It's a conspiracy. He doesn't have to be in the conspiracy. You only need his testimony in terms of the count. But again he is only 55 plants, so I am not going to spend a whole day arguing over 55 plants. His answers aren't going to make a difference in this case. It's the other guys who have four parcels that's going to bring this under a thousand, or not bring it under a thousand, right. You've already got your client's testimony saying he wasn't involved in any other grows, so I'm not going to run the risk of subjecting this guy to prosecution.

1-ER-15-16.

On appeal, the Ninth Circuit in a memorandum decision rejected Petitioner Yang's appeal finding any Sixth Amendment error was harmless beyond a reasonable doubt. Memo. Op. p. 2; Appendix 2.

V. REASONS FOR GRANTING CERTIORARI

A. THIS COURT SHOULD GRANT CERTIORARI, VACATE AND REMAND, BECAUSE THE NINTH CIRCUIT'S HARMLESS ERROR HOLDING WAS BASED ON AN INTERPRETATION OF 18 U.S.C. § 666 WHICH THIS COURT SUBSEQENTLY NARROWED IN *UNITED STATES V. SNYDER.*

Petitioner Yang was convicted of bribery under 18 U.S.C. § 666 and his conviction was affirmed by the Ninth Circuit two months before this Court substantially narrowed the definition of "bribery" in *United States v. Snyder*, __ S.Ct. __, 2024 WL 3165518 (June 26, 2024). Petitioner's appeal challenged the trial court's decision to allow all three of Mr. Yang's defense witnesses to make blanket invocations of the Fifth Amendment in violation of the Ninth Circuit's Sixth Amendment precedent.

The Ninth Circuit's memorandum decision necessarily relied on the pre-*Snyder* definition of bribery when it found any Sixth Amendment error to be harmless beyond a reasonable doubt. The Ninth Circuit held that "any failure caused by the categorical exclusion of Yang's three defense witnesses . . . is harmless beyond a reasonable doubt." Mem. Op. at 4. The Ninth Circuit mentioned that there was voluminous evidence that Mr. Yang conspired with his co-defendant sister to bribe the sheriff. Mem. Op. 4. However, the Ninth Circuit's assessment of the weight of the evidence was based on its interpretation of the offense of bribery under 18 U.S.C. § 666 prior to this Court's decision in *United*

States v. Snyder, __ S.Ct. __, 2024 WL 3165518 (June 26, 2024). In *Snyder, supra*, this Court held that the definition of bribery in § 666 does not include gratuities for past official acts. In its memorandum decision, the Ninth Circuit did not state what definition of bribery it was using, but the trial court in this case used the jury instruction for 18 U.S.C. § 201 which did not exclude gratuities. See ECF 347. This jury instruction is no longer correct after *Snyder*.

The new post-*Snyder* definition of bribery is relevant to Mr. Yang's appeal, because Mr. Yang was charged with a conspiracy to bribe the elected County Sheriff of Siskiyou County in order to not eradicate the 1,300 marijuana plants which the conspirators were growing on eight parcels of land in Siskiyou county. Mr. Yang claimed that he was not predisposed to be involved in bribery and gave the Sheriff money originally out of a general desire for friendship which the Sheriff months later converted into a *quid pro quo* deal by means of entrapment. The trial court instructed the jury on entrapment as to the bribery charges, but under Ninth Circuit pre-*Snyder* law the jury was free to consider Mr. Yang's donation of $1,000 as evidence of corrupt intent or pre-disposition to commit bribery.

Also under pre-*Snyder* law, the Ninth Circuit was free to consider Mr. Yang's unsolicited gifts to the County Sheriff as part of what the Circuit called the "overwhelming evidence" supporting its finding of harmless beyond a reasonable doubt. The Ninth Circuit's claim that there was "overwhelming evidence" of the

conspiracy to bribe is not supported by the facts, because Mr. Yang was entirely acquitted of the conspiracy to manufacture marijuana which was the only motive for the conspiracy to bribe the county sheriff. Since Mr. Yang was acquitted of one of two conspiracies which were logically connected, it is impossible to determine what additional evidence might have persuaded the jury to acquit on the bribery conspiracy.

Since the Ninth Circuit issued its decision in memorandum form, it is not clear whether the Ninth Circuit relied on any facts which are not criminal after *Untied States v. Snyder, supra*. The Ninth Circuit's rejection of Mr. Yang's Sixth Amendment claim implicated the definition of bribery, because at trail Mr. Yang obtained subpoenas for three owners of the properties on which approximately 500 of the marijuana plants had been discovered. Each of the three would have testified that they had no communications with Mr. Yang about either marijuana farming or bribery. The district judge permitted the three witnesses to make a blanket invocation of the Fifth Amendment without making a particularized inquiry question by question by question.

The denial of the right to subpoena witnesses is an important issue of public importance on which there is a split in the circuits. There is a split in the Circuits as to the standard to apply when a defense witness seeks to invoke the Fifth Amendment. The First Circuit does not permit the privilege to be invoked on a

blanket basis. *See In re Grand Jury Matters*, 751 F.2d 13, 17 n. 4 (1st Cir.1984). In the First Circuit, the invocation operates question by question and the district court must conduct a "particularized inquiry." *United States v. Castro*, 129 F.3d 226 (1st Cir. 1997). The district court in Mr. Yang's case did not conduct any question-by-question inquiry.

The Ninth Circuit and Fifth Circuit require only a higher degree of scrutiny, holding that "[a] court's duty to scrutinize a witness' invocation of the Fifth Amendment is particularly weighty where ... the witness makes a blanket assertion of the privilege." *United States v. Vavages*, 151 F.3d at 1192 (citing *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir.1980).

The standard for determining whether a claim of privilege is justified is whether the claimant is confronted by "substantial and real, and not merely trifling or imaginary, hazards of incrimination." *United States v. Rubio–Topete,* 999 F.2d 1334, 1338 (9th Cir.1993) (*quoting United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980)).

In Mr. Yang's case, the three witnesses' denials of any involvement with the bribery conspiracy would have been relevant to support Mr. Yang's defense to the conspiracy charge that was based on his testimony that he gave the Sheriff money out of friendship not based on any *quid pro quo* bribery. The three witnesses' denials of involvement in the bribery would not have created any risk of

incrimination since there was no evidence that any of the three had communicated with either of the two charged co-defendants and trial was only three months before the statute of limitations was due to expire.

B. REVIEW IS NEEDED TO DETERMINE WHETHER THE PUBLIC AUTHORITY DEFENSE MAY BE RAISED BASED ON AUTHORITY GIVEN BY STATE OFFICERS WORKING ON JOINT OPERATIONS WITH THE FEDERAL GOVENRMENT

Mr. Yang sought to raise the public authority defense to some of the overt acts in his indictment. The Ninth Circuit upheld the district court's refusal to instruct on the public authority defense on the ground that the public authority defense can only be based on the actions of a federal official. Mem. Op. 5 citing *United States v. Mack,* 164 F.3d 467, 474 (9th Cir. 1999). The Ninth Circuit explained that the public authority defense derives from common law and is grounded on the principal that due process is offended by conviction of a person who reasonably relied on the official statements that the conduct is lawful. Mem. Op. 5.

The Ninth Circuit's holding that state officers have no power to authorize a confidential informant to do an act which would violate federal law creates massive federalism problems by exposing all civilians who work as undercover operatives for state agencies in state drug cases to risk of prosecution by federal authorities for federal drug crimes. This decision represents a massive incursion

on the rights of state law enforcement to investigate crimes without a need for a federal officer to approve every undercover drug buy where an undercover civilian purchases drugs in a sting.

Mr. Yang sought to raise the public authority defense based on his claim that he arranged a meeting and brought a list of parcel numbers where marijuana was being grown only at the request of the County Sheriff. The Ninth Circuit decision in Mr. Yang's case holds that state law enforcement have no authority to authorize civilians to do anything to collect evidence without approval of federal officers. This massive federalization of state law enforcement techniques is most egregious in drug cases where the federal government only prosecutes a small fraction of drug cases compared to state law enforcement.

The Ninth Circuit's drastic narrowing of the common law public authority defense is an important issue of national importance because it implicates the federalism concerns addressed in *United States v. Snyder, supra.* This result provides another reason to grant the writ.

C. THIS CASE IS AN APPROPRIATE VEHICLE TO DECIDE THE ISSUE

In his trial, Mr. Yang's Sixth Amendment claims were meritorious, there is no doubt that the errors were prejudicial and not harmless beyond a reasonable doubt on the record in this case. It thus presented a good mechanism for

addressing and resolving the conflicts created by the Circuit's memorandum decision.

VI. CONCLUSION

For the foregoing reasons, this Court should grant the petition. Dated: July 9, 2024

Respectfully submitted,

HEATHER E. WILLIAMS
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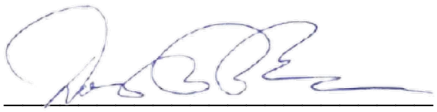

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