No. ______________________

In The

Supreme Court of the United States

WILLIAM F. BOYLAND, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI
WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether not "all" of Mr. Boyland's dealings with undercover officers Getson and Quinn were culpable post-McDonnell requiring the court to determine, finally, whether the modified plain error rule espoused in Viola survives and whether it affords Mr. Boyland relief.

2. Whether McDonnell's constitutional concerns apply equally to all corruption laws.

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OPINION BELOW

The Second Circuit Court of Appeals decision can be found at 862 F.3D 279 (2d Cir. 2017) and a copy of it is attached as Appendix 1.

JURISDICTION

The Second Circuit filed its decision and order on July 10, 2017. On September 18, 2017, that Court denied Mr. Boyland's petition for rehearing with suggestion of rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on writ of certiorari.

STATEMENT OF FACTS

<u>The Indictment</u>

Mr. Boyland was charged in a twenty-one count indictment. In the preamble, it was alleged that, between August 2010 and August 2011, Mr. Boyland, then a member of the New York State Assembly, "corruptly solicited" bribes and accepted cash and other payment, "in exchange for taking official actions and exerting official influences . . ."

As to the "carnival scheme," it was specifically alleged that he: 1) engaged in discussions with governmental agencies to assist a carnival promoter in obtaining carnival-related leases and permits; 2) arranged for a non-profit to sponsor the promoter's carnivals; and 3) took steps to ensure that the promoter would receive letters of support needed to obtain permission to operate carnivals in Mr. Boyland's District.

As to the "real estate scheme," it was alleged that, in exchange for money, two undercover officers posing as real estate developers would receive Mr. Boyland's official action and influence as specific opportunities arose.

Based on these allegations, Mr. Boyland was charged in the carnival scheme with extortion and bribery related offenses (counts 16-19). In the extortion charges, it was alleged that he acted "under color of official right" (counts 16 and 18). In the bribery charges, it was alleged that Mr. Boyland was an agent of the state intending to be influenced and rewarded (counts 17 and 19).

Further based on the allegations set forth in the preamble, Mr. Boyland was charged in the real estate scheme with extortion, bribery, a Travel Act violation and Honest Services wire fraud (counts 1 - 16). The extortion charges alleged action "under color of official right" (counts 1-2); the bribery charges alleged that Mr. Boyland was an agent of the state intending to be influenced and rewarded (counts 3-4); the Travel Act offense alleged that, with regard to the bribery, he traveled interstate (count 3); and, with regard to the Honest Services fraud, it was alleged that he deprived New York State citizens of their intangible right to honest services (counts 5-15).

<u>The Jury Charge</u>

As to counts six through fifteen, the Honest Services wire fraud counts pertaining to the real estate scheme, the court charged:

> A public official owes a duty of honest and faithful services to the public he served and his public employer. When a public official solicits, agrees to receive or receives a corrupt payment for or because of his official action, the official has breached his duty of honest and faithful disinterested service. The term "official act" includes the decisions or actions generally expected of a public official, including but not limited to contacting or lobbying other governmental agencies, and advocating for his constituents.

As to count five, conspiracy to commit Honest Services wire fraud, the court incorporated its remarks vis a vis counts six through fifteen.

As to counts two and eighteen, charging, attempted extortion in relation to, respectively, the real estate and carnival schemes, the court instructed the jury that "[e]xtortion under color of official right is the use of one's position as a public official, or the authority of public office, to obtain money or services not [due] to the official or his public office." As to one element, misuse of official position, it charged:

> [T]he government must prove beyond a reasonable doubt that the defendant used the authority of his office or position to obtain the money, goods or services. That is, you must decide whether the defendant represented him[self] as capable of doing something, or refusing to do something, because of his official position."

As to count eighteen, the court went on to instruct the jury how to assess the $3,800 and $3,500 payments made by Getson on October 28, 2010 and February 17, 2011. If those payments were found to be "campaign contributions," the jury was told to next determine whether Mr. Boyland "demanded or accepted the money in exchange for a specific requested exercise of his official power.". Also with regard to the $3,500 payment (as to which the parties did not agree it was a campaign contribution) and all other payments and solicitations, the court instructed the jury it must determine whether the "payment was made in return for [Mr. Boyland's] official acts rather than being given voluntarily or unrelated to the defendant's office . . . [Mr. Boyland] must have known that the payment was offered in exchange for a specific exercise of his official powers."

As to counts one and sixteen, conspiracy to commit extortion under color of right, with regard to the real estate and carnival schemes, respectively, the court reminded the jury of its earlier charges with regard to conspiracy and the elements of extortion by color of right.

As to counts four and nineteen, federal programs bribery, the court required the jury to find that Mr. Boyland acted corruptly with intent to be influenced. "Corruptly" included the concept that "[i]t is the defendant's intent to make good on the bargain or to be rewarded for his actions." The court added:

> It is no defense that the official act sought to be influenced was lawful or beneficial to the public welfare, or that it would have been done anyway regardless of the fact that corrupt payments had been offered or given. That is to say, even if the defendant acted as he normally would have had the corrupt payments not been offered or given, the crime has still been committed.

The court then reminded the jury of its earlier instructions with regard to the $3,800 and $3,500 payments relevant to count eighteen.

As to count three, conspiracy to commit federal programs bribery or bribery in violation of the Travel Act, related to the real estate scheme, the court reminded the jury of its instructions relating to counts four and nineteen. As to the Travel Act, the court instructed that the government must prove, in essence, inter-state travel for the purpose of committing bribery as defined under New York State law. The relevant State law provided that:

> A public servant is guilty of bribe receiving . . . when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

As to count seventeen, conspiracy to commit federal programs bribery, relating to the carnival scheme, the court reminded the jury of its charges with regard to counts four, eighteen and nineteen, excerpted above.

<u>The Government's Summation</u>

In summation, the government made a "summary" of the evidence based on the anticipated final jury instructions. As to counts two and eighteen, the government quickly dispensed with most of the elements before asking "so 'what's the question,'" which it presented as "[d]id the defendant know that the money he took or requested was in return for his taking, withholding or influencing official actions." The government then presented a lengthy address about that element.

With regard to the carnival scheme, the government noted that Mr. Boyland was expected to "help with" setting up meetings and "getting" carnival locations. The government argued that Mr. Boyland knew he was being paid for "using his official position and meeting and contacting government officials" on behalf of the carnival promoters. It argued that the jury's verdict depended on whether Mr. Boyland knew he was requesting and taking money "in return for his taking or influencing official action."

With regard to both the real estate and carnival schemes, the government addressed the $7,000 payment. It asked the jury to determine "did the defendant know that this $7,000 cash payment . . . was in return for his taking or influencing official action." It noted that when Mr. Boyland pocketed the cash, he gave a "thumbs up." It also noted that he set up tours for the undercovers through his District to look at potential carnival sites and real estate opportunities. He also sold his official power, it argued, as a gatekeeper, offering to get the undercovers to, for example, HPD VIP, when, otherwise, they would have no access.

To show corrupt conduct with regard to the real estate and carnival scheme charges other than the Honest Services fraud counts (five through fifteen), the government relied predominantly on the facts it cited with regard to counts two and eighteen.

As to the Honest Services counts, the government paraphrased the elements of the charge to say that "a public official can't take bribes . . . in exchange for his official actions," which, it said, "we've already gone through." As "official acts" the government cited: the request and delivery of block and lot specifics from HPD; agreeing to take an official meeting with the Department of Health and the Dormitory Authority regarding St. Mary's Hospital.

REASONS FOR GRANTING THE PETITION

POINT I

NOT "ALL" OF MR. BOYLAND'S DEALINGS WITH UNDERCOVER OFFICERS GETSON AND QUINN WERE CULPABLE POST-MCDONNELL REQUIRING THE COURT TO DETERMINE, FINALLY, WHETHER THE MODIFIED PLAIN ERROR RULE ESPOUSED IN VIOLA SURVIVES AND WHETHER IT AFFORDS MR. BOYLAND RELIEF

In McDonnell v. United States, 136 S.Ct. 2355 (2016), the parties agreed that for purposes of determining whether a public official committed honest-services fraud or Hobbs Act extortion, the jury should determine whether the official, in exchange for loans or gifts, performed "official acts" as that term is defined in 18 U.S.C. §201(a)(3). This Court determined that the jury charge in this regard was too expansive. Specifically, it held:

> [A]n "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an "official act," or to advise another official, knowing or

> intending that such advice will form the basis for an "official act" by another official. Setting 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."

Here, the district court did not provide such a charge. Instead, in decidedly liberal, expansive language, it instructed the jury that an: "'official act' includes the decisions or actions generally expected of a public official, including but not limited to contacting or lobbying other governmental agencies, and advocating for his constituents." Under McDonnell, "actions generally expected of a public official" was overbroad. So, to, the lower court's definition would obviously include "[s]etting up a meeting, talking to another official, or organizing an event," which McDonnell made clear is not punishable.

In the panel decision, the Second Circuit agreed that the jury had been improperly charged with regard to honest-services fraud (counts five through fifteen) and Hobbs Act extortion (counts one, two, sixteen and eighteen).

It did not reverse Mr. Boyland's conviction on those counts, however, because it found that:

> [A]ll of Boyland's dealings with Getson and Quinn involved concrete matters that, in order to proceed, needed to be brought before public officials or agencies that would have to make formal and focused administrative decisions. In connection with each matter, Boyland agreed to ensure that favorable governmental decisions would be made, whether for licensing, work contracts, zoning or funding. Although the jury was not instructed as to its need to find that the matters were concrete, that they required focused governmental decisions, and that Boyland took action on these matters, we see no reasonable possibility, in light of the record as a whole, that that flaw affected the outcome of the case. Decision at 23 (emphasis added).

This conclusion was both factually incorrect and skirted an important issue, to wit, the continued validity, post Johnson v. United States, 520 U.S.461 (1997), of the modified plain error standard of review set forth in United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994). See Decision at 17 ("We . . . decline to address [Viola's] continued viability here . . . .). As to the factual matter, not "all" of Mr. Boyland's dealings involved "concrete" matters. As to the real estate scheme, there was no "question, matter, cause, suit, proceeding or controversy" pending. The discussions between Mr. Boyland and the undercovers were embryonic. In addition, in summation, many of the government's citations to the record in favor of the requisite *quid pro quo* were benign. For example, Mr. Boyland drove Getson and Quinn to look at possible development sites and he agreed to set up meetings with local officials. Indeed, as to meetings, even the government conceded that its references "were perhaps overbroad under McDonnell." 2d Cir. Ans. Br. at 64.

Carnivals happen in New York City all summer long. They are perfectly legal. Organizing such an event, thus, without more, does not qualify as an "official act." In addition, the government's repeated refrain to advance the requisite *quid pro quo* was that Mr. Boyland planned to set up "meetings" or talk to other state officials. These acts, alone, were not punishable.

As such, a good portion of the evidence suggested that Mr. Boyland intended to take meetings and introduce Getson and Quinn to others who might be able to assist their development plans. Under McDonnell, this alone would not be actionable. The jury, thus, may well not have reached unanimity on a proper, as opposed to improper, theory of "official act." See United States v. Mahaffy, 693 F.3d 113, 136 (2d Cir. 2012) (post-Skilling, charge error warranted reversal where appellate court could not determine whether jury reached consensus on proper or improper theory of guilt).

Only by ignoring so much innocent conduct, was the panel able to avoid the Viola-Johnson showdown, which regularly arises in appellate jurisprudence and should, respectfully, be determined.

In that regard, Rule 52(b) of the Federal Criminal Rules of Procedure provides that: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." By its terms, prerequisites for consideration are: 1) error, 2) error that is "plain" under current law, and 3) error that affects substantial rights. As to prerequisite 3), this Court has found that an error that affects substantial rights simply means, in most cases, that the error was prejudicial, or, stated another way, it affected the outcome of the district court proceedings. See Bank of Nova Scotia v. United States, 487 U.S. 250, 255-57 (1988). Finally, as to the discretionary or permissive ("may") component of the Rule, this Court has added prerequisite 4), instructing that circuit courts should not exercise discretion unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Young, 470 U.S. 1 (1985); United States v. Atkinson, 297 U.S. 157 (1936).

In United States v. Olano, 507 U.S. 725 (1993), the Supreme Court reviewed the three textual prerequisites of Rule 52(b) and held that the Rule did not allow an appellate remedy in the absence of a showing, by appellant, of prejudice (prerequisite 3), affecting substantial rights), where the error complained of was the presence of alternate jurors during deliberations in violation of Rule 24(c). Importantly, the Court noted that it need not "consider the special case where the error was unclear at the time of the trial but becomes clear on appeal . . ." 507 U.S. at 734.

Viola involved such a special case. There, the Second Circuit held that:

> When a supervening decision alters settled law, the three Olano conditions for reviewing plain error under Rule 52(b) still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant. 35 F.3d at 42.

When there has been a supervening decision between trial and appeal, it reasoned:

> A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have "forfeited a right" by not making an objection, since at the time of trial no legal right existed. If we were to penalize defendants for failing to challenge entrenched precedent, we would be insisting upon an omniscience on the part of defendants about the course of the law that we do not have as judges. Imposing such a duty would only encourage frivolous objections and appeals. When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant. Id.

Johnson also involved a special case where the law changed [see United States v. Gaudin, 515 U.S. 506 (1995)] after trial requiring that the jury, not the judge, determine materiality in a perjury prosecution. 520 U.S. at 463. Petitioner did not argue, as per Viola, that the government shouldered the burden on prejudice. Rather, she argued that the error was "structural" and therefore it defied prejudice analysis entirely. Id. at 468. This Court side-stepped the issue. Finding that because the trial evidence as to materiality was "overwhelming" and the issue was "essentially uncontroverted" the error did not seriously affect the fairness, integrity or public reputation of judicial proceedings and, as such, there was no reason to exercise discretion to notice the error. Id. at 470. Thus, Johnson was a prerequisite 4) case.

Because Johnson did not address, explicitly or implicitly, the modified plain error rule under prerequisite 3), it did not overrule Viola.

United States v. Henderson, 133 S.Ct. 1121 (2013) does not alter this conclusion. The only issue there concerned prerequisite 2), to wit, whether the cited error was "plain" if it was "unsettled" at the time of the trial but "settled" before the appeal was decided. 133 S.Ct. at 1124-25. This Court found that such an error was, indeed, plain. Id. at 1124-25, 1127. Any discussion as to prerequisite 3) was *dicta*.

Finally, the government has not claimed that the reasoning of Viola – to wit, that appellants cannot be blamed for failing to object to entrenched law – is somehow flawed or specious. Thus, because Viola both has not been overturned and makes good sense, this Court should apply its modified plain error analysis, requiring the government to establish that the error did not affect substantial rights.

Upon reconsideration of the facts supporting a not-guilty verdict, the Court should reach the extremely important matter of the continued validity of Viola. Having done so, it should find that Viola is indeed good law and the government has not met its burden to show that the error at issue lacked prejudice.

POINT II

MCDONNELL's CONSTITUTIONAL CONCERNS APPLY EQUALLY TO ALL CORRUPTION LAWS

The federal corruption laws – including the Hobbs Act, honest services statute and 18 U.S.C. §666 – and New York's bribery statute, P.L. §200.10, prohibit offers of payment in exchange for "official acts." United States v. Ganim, 510 F.3d 134, 141-42 (2d Cir. 2007). In McDonnell, the Supreme Court narrowed the definition of "official action" for purposes of all such laws. Although the Court found it helpful to analyze the express definition of "official act" found in 18 U.S.C. §201, its holding rested on constitutional principles that apply broadly to the concept of official action implicated by every anti-corruption statute. The Court held that an expansive interpretation of official action, reaching everything that an official customarily does in an official capacity, would render corruption laws unconstitutionally vague and chill important interactions between officials and the public. McDonnell, 136 S.Ct. t 2372-73.[1] These constitutional problems arise regardless of which statute the government chooses to invoke in a particular case. Accordingly, McDonnell's definition of "official action" applies in §666 cases and to the Travel Act vis a vis New York's bribery statute.

This Court should take this opportunity to correct the Second Circuit's conclusion to the

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The Court also observed that a broad interpretation of official action in federal prosecutions of state and local officials would raise federalism concerns. See, id. The Court did not, however, indicate that the other constitutional concerns were insufficient to justify its narrow construction of official action. Moreover, the absence of federalism concerns in a particular case would not justify applying the corruption laws differently. Indeed, federalism concerns do not even arise in prosecutions under §201, which is the very statute the Supreme Court analyzed in McDonnell. See 18 U.S.C. §201(a)(1). Thus, it is evident that the Supreme Court was announcing a rule with broad applicability in all corruption prosecutions.

contrary. While neither §666 or P.L. §200.10 expressly includes §201's definition of official act, the same is true of the honest-services statute and the Hobbs Act. See 18 U.S.C. §1346 (referring to "a scheme or artifice to deprive another of the tangible right of honest services); id. §1951(b)(2) (referring to the extortion of property "under color of official right"); Ganim, 510 F.3d at 146 (observing that the Hobbs Act and honest services statutes, like §666, do not "contain the same express statutory requirement" of "official act[ion]" that appears in §201). The Circuit clearly did not deem these textual differences to be of any import. Rather, it found that "the instructions with respect to the honest-services fraud and Hobbs Act extortion counts were erroneous in light of the standard set in McDonnell." Decision at 22. In fact, the Circuit expressly acknowledged that the Hobbs Act differs from §201 and nevertheless held that the "constitutional concerns" identified in McDonnell required the district court to instruct the jury using McDonnell's definition of "official action." Id. As explained above, this reasoning is equally applicable to §666 and P.L. §200.10, and therefore McDonnell's definition of "official action" should apply to prosecutions under those statutes, an issue the Circuit did not apparently consider deeply. In fact, the Circuit focused on differences in statutory text between §§201 and 666 and P.L. §200.10 only and did not consider whether McDonnell's constitutional concerns applied to §666 or P.L. §200.10. In addition, shortly after the decision at issue here, the Second Circuit decided United States v. Silver, Docket No. 16-1615 (2d Cir. July 13, 2017), in which it emphasized the need to "allay the constitutional concerns expressed in McDonnell" regardless of whether the §201 definition of "official action" was directly applicable to the corruption statutes underlying the prosecution, representing an inconsistency between the Boyland and Silver cases.

Because the Circuit's decision with respect to §666 and P.L. §200.10 is difficult to reconcile with the constitutional concerns embraced by the Supreme Court in McDonnell and the Second Circuit in Silver, its decision in these regards should be reconsidered by this Court.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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