No. _____

In The
Supreme Court of the United States

LEROY BACA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Twenty years ago, the First Circuit stated: "The scienter element in the obstruction statute is the subject of more confusing case law than can be described in brief compass." *United States v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999). The same is true today, and this petition provides an opportunity for this Court to address the longstanding confusion. The first question presented is: Whether the term "corruptly" in 18 U.S.C. § 1503 requires the government to prove that the defendant had a "specific intent to obtain an unlawful advantage," *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018), which includes a consciousness of wrongdoing similar to criminal willfulness.

2. In the past 40 years, some trial courts have developed a practice of using anonymous juries, prohibiting even the defendant and the attorneys from learning the jurors' identities. This Court has yet to consider this departure from the public jury trial tradition, a departure that continues to expand. The second question presented is: Whether a defendant has a Constitutional, statutory, or common law right to a public jury in a federal criminal trial, and, if so, whether publicity can justify a complete deprivation of that right or instead whether a court must consider lesser alternatives, including sequestration or limited disclosure of the jurors' identities to the attorneys so they may effectively select the jury.

STATEMENT OF RELATED CASES

- *United States v. Leroy Baca*, No. 16CR00066-PA, U.S. District Court for the Central District of California. Judgment entered May 16, 2017.
- *United States v. Leroy Baca*, No. 17-50192, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 11, 2019, rehearing denied April 19, 2019.

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OPINION BELOW

The Ninth Circuit's decision can be found at *United States v. Baca*, 761 Fed. Appx. 724 (9th Cir. Feb. 11, 2019).

JURISDICTION

The court of appeals filed its decision on February 11, 2019 and denied rehearing and rehearing *en banc* on April 19, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment states:

> 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.

The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1503(a) states:

Whoever corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats of force, or by an threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due

> administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

STATEMENT OF THE CASE

A. Background

Petitioner is now 77-years old and has Alzheimer's disease. He worked for the Los Angeles Sheriff's Department ("LASD") for almost 50 years, serving as the Sheriff for the last 15 years of his career before retiring in 2014.

In 2010, FBI Agent Leah Marx began conducting interviews of inmates at Los Angeles County jails who were alleging abuse by LASD deputies. One inmate interviewed was Anthony Brown, an offender with a long record who received a sentence of 423 years for armed robberies. The FBI decided to use Brown as an informant, and, in the summer of 2011, conducted an undercover operation where an agent posing as his friend paid a deputy named Gilbert Michel to bring a cell phone into the jail. Deputies found the phone on August 8. The LASD investigated the phone and, on

August 18, learned that Brown had contacted a civil rights investigator with the FBI. The same day, the FBI learned that the LASD was aware of its connection to the phone, and the assistant director of the FBI in Los Angeles called petitioner to discuss the phone.

The next morning, deputies interviewed Brown, as they were concerned that he was using the phone to plot an escape. They also looked at the phone's contents, which had photographs of marijuana, heroin, methamphetamine, and cocaine. Brown initially stated that a nurse had brought him the phone and drugs and then later that a deputy brought in the phone and had also brought in drugs on seven different occasions. Brown did not reveal the identity of the deputy and stated that there were multiple deputies and inmates involved. He did *not* state that he was an FBI informant working on an undercover investigation.

That afternoon, petitioner met with several LASD officials, who briefed him about the interview of Brown. Petitioner stated that he spoke with the FBI, who would not acknowledge any investigation but wanted to see the phone. Petitioner also stated that the LASD would keep the phone and hold Brown rather than send him to state prison. Petitioner ordered Brown to be isolated and protected, and he "wanted everything off the phone, and he wanted to know what the hell was going on." On August 21, LASD deputies interviewed Brown again. Brown finally named Michel as the deputy who had smuggled in the phone and drugs and claimed that other deputies and inmates were involved.

On August 23, Agent Marx and two other FBI agents interviewed Brown at the jail. After about an hour, a deputy terminated the interview. On August 25, the United States Marshals faxed a writ requesting that Brown be produced before the grand jury. LASD deputies, however, booked Brown under aliases so that he could not be tracked; deputies also moved him to a satellite jail for a few days. On August 29, petitioner met with then-U.S. Attorney Andre Birotte and expressed his displeasure about the phone.

On September 26, two LASD officials approached Agent Marx outside her house and stated that she could be arrested for violating state laws. The FBI immediately informed Birotte, who called petitioner; petitioner assured Birotte that Marx would not be arrested. The next day, petitioner met with Birotte and the FBI assistant director. Petitioner presented a letter indicating that the LASD would investigate state violations related to the entry of the phone and drugs into the jail. The discussion became heated, but the meeting ended with everybody shaking hands and hope for continued cooperation between the agencies. The LASD ultimately produced thousands of documents, videos, and other material in response to the federal investigation into inmate abuse.

Almost two years later, on April 12, 2013, FBI agents and Assistant United States Attorneys conducted a lengthy interview of petitioner. At the time, petitioner was either in the pre-clinical or mild cognitive impairment stage of Alzheimer's disease. During

the interview, petitioner was mistaken and confused about dates of events and other facts.

In 2016, a federal grand jury returned a three-count indictment against petitioner. Counts 1-2 charged conspiratorial and substantive obstruction of justice for the events in 2011. The theory of obstruction was that LASD officials hid Brown and attempted to intimidate Agent Marx. Count 3 alleged a false statements offense; the government maintained that during the 2013 interview petitioner made four false statements concerning the timing of some of the events in August and September of 2011.

The district court *sua sponte* suggested that the two obstruction counts be severed from the false statements count because evidence of petitioner's Alzheimer's disease was relevant to the latter and would unfairly prejudice the government as to the former. Trial on the obstruction counts commenced in December 2016 but ended in a mistrial, over petitioner's objection, when the jury deadlocked 11-1 in favor of *acquittal*.

The district court denied petitioner's motion to dismiss the obstruction counts on double jeopardy grounds, rejoined all three counts for a second trial, and excluded evidence of petitioner's Alzheimer's disease at the retrial. The second jury deliberated over three days before returning guilty verdicts. The district court imposed a sentence of 36 months. A panel of the Ninth Circuit affirmed the convictions, App. 1-7, with

Judge Rawlinson separately stating: "I concur in the result." App. 7.

B. The "corruptly" requirement for obstruction of justice

With respect to the elements of obstruction of justice, the jury instructions required a finding that "the defendant acted corruptly, meaning that the defendant had knowledge of the federal grand jury investigation and intended to obstruct justice." App. 14. That same instruction also stated that the "government does not need to prove that actual obstruction of the pending grand jury investigation occurred, so long as you find that the defendant acted with the purpose of obstructing the pending grand jury investigation. . . ." App. 14-15.

The instructions further stated: "For the conspiracy charge in Count One and the obstruction of justice charge in Count Two, the government need not prove that the defendant's sole or even primary intention was to obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct justice must be substantial." App. 15. Over petitioner's objection, the district court also instructed the jury:

> Local law enforcement departments, including the LASD, do not have the authority to direct or control federal investigations, including those by the FBI, the U.S. Attorney's

> Office, or a federal grand jury. In order to investigate crime, federal law enforcement agencies are entitled to choose their own tactics and strategies, conduct their own evaluations of risks, assign their own personnel, and make their own decisions regarding whether to inform others, including targets, that an investigation is underway. . . .
>
> It is not for you to decide whether or how the federal government should have conducted its investigation. . . .
>
> A local officer has the authority to investigate potential violations of state law. This includes the authority to investigate potential violations of state law by federal agents. A local officer, however, may not use this authority to engage in what ordinarily might be normal law enforcement practices, such as interviewing witnesses, attempting to interview witnesses or moving inmates, for the purpose of obstructing justice.

App. 11-12.

On appeal, petitioner challenged the jury instructions for the obstruction of justice counts. The Ninth Circuit rejected his claim, holding: "The district court properly instructed the jury that in order to convict [petitioner] for obstruction of justice, the government had to prove beyond a reasonable doubt that [petitioner] acted 'corruptly,' meaning that he knew of the federal grand jury investigation and acted with an intent to obstruct it. The Supreme Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696

(2005), did not require the government to prove that [petitioner] acted with a consciousness of wrongdoing or that his conduct was wrongful, immoral, depraved, or evil." App. 5-6 (citation omitted).

C. The use of an anonymous jury

The district judge had held prior trials where LASD officials were defendants in other cases charging the same obstruction allegations. In these other trials, which were extensively covered by the media, the jurors were publicly identified by name, and there were no reports of tampering or any other harassment. In petitioner's case, however, the district court decided to use an anonymous jury over his objection. Thus, petitioner, the attorneys, and the public did not learn the identities of the venire or the jurors deciding the case.

The district court issued a brief written order, but not until *after* the verdicts, explaining its decision to empanel an anonymous jury. App. 8-10. The district court reasoned that the case involved a conspiracy of law enforcement officers, petitioner likely had connections to officers with the ability to access jurors' privation information, and an unidentified number of potential jurors had expressed unspecified concerns about access to private information and safety in the prior trials. App. 8. The district court's order also stated that petitioner was charged with interfering with the judicial process, the charges carried potential 5-10 years of imprisonment, and there had been media coverage. App. 8-9.

Petitioner challenged the use of an anonymous jury on appeal. The Ninth Circuit rejected his claim, reasoning: "The district court's decision to empanel an anonymous jury was reasonable in light of the highly publicized nature of this case, [petitioner]'s and his co-conspirator's positions as former high-ranking law enforcement officers, and the nature of the charges at issue." App. 3.

ARGUMENT

I. This Court should grant this petition to address the longstanding confusion regarding the mens rea for obstruction of justice under § 1503 and should conclude that the term "corruptly" in the statute requires the government to prove that the defendant had a "specific intent to obtain an unlawful advantage," which includes a consciousness of wrongdoing similar to criminal willfulness.

A. There is longstanding and widespread confusion regarding the mens rea for § 1503

Petitioner was prosecuted under the "corruptly" provision of the so-called "omnibus clause" of § 1503(a), which makes a person a felon if he "*corruptly* or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice. . . ." 18 U.S.C. § 1503(a)

(emphasis added). Courts construing the "corruptly" requirement in "§ 1503 have adopted a wide variety of interpretations." *United States v. Poindexter*, 951 F.2d 369, 385 (D.C. Cir. 1991). Stated differently, "[t]he scienter element in the obstruction statute is the subject of more confusing case law than can be described in brief compass." *United States v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999). These are not outdated assessments, as judges have recently noted that "[m]any fundamental questions persist regarding the meaning and scope of § 1503[.]" *United States v. Bonds*, 784 F.3d 582, 591 (9th Cir. 2015) (*en banc*) (Reinhardt, J., concurring).

As this case arises from the Ninth Circuit, petitioner will begin with its interpretation of the statute. The panel below relied on *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) in holding that only an intent to obstruct justice is required. App. 5. In *Rasheed*, the Ninth Circuit described the "corruptly" element as follows: "In *United States v. Ryan*, we said, in dicta, that 'the word 'corrupt' in (section 1503) means for an evil or wicked purpose.' Black's Law Dictionary defines 'corruptly' to mean with 'a wrongful design to acquire some pecuniary or other advantage.' We hold that the word 'corruptly' as used in the statute means that the act must be done with the purpose of obstructing justice." *Rasheed*, 663 F.2d at 852 (citations omitted). The Ninth Circuit relied on a Tenth Circuit opinion, which cited Bouvier's Law Dictionary and concluded that the term "really means unlawful," and then declared without citation to authority that an

endeavor to "impede the due administration of justice is per se unlawful and is tantamount to doing the act corruptly." *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir. 1979).

The conclusions in *Rasheed* and *Ogle* do not follow from the dictionary definitions cited, and several Ninth Circuit judges have stated that *Rasheed* has "given 'corruptly' such a broad construction that it does not meaningfully cabin the kind of conduct that is subject to prosecution." *Bonds*, 784 F.3d at 584 (Kozinski, J., concurring). "Justice" means different things to different people, and therefore a mere intent to obstruct justice provides no meaningful limitation. *Id.* at 584-85. Perhaps that is why the first jury voted 11-1 to acquit petitioner on the obstruction charges, while the second jury voted to convict (after lengthy deliberations).

The other case cited in *Rasheed*, the Fifth Circuit's opinion in *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978), stated that the word "corruptly" is "interchangeable with the term 'willful[ly,]'" which generally requires a criminal defendant to know that his conduct is unlawful. *See*, *e.g.*, *Bryan v. United States*, 524 U.S. 184, 192-93 (1998). The Fifth Circuit similarly described the requisite intent in *Haas* as "an improper motive," or "an evil or wicked purpose," or "an unlawful purpose." *Haas*, 583 F.2d at 220. However, like the Ninth Circuit, other Fifth Circuit cases have collapsed the "corruptly" element into a mere intent to obstruct justice and have even stated that "[u]nder Section 1503, an act with the 'natural and probable effect' of interfering with the due administration of justice

satisfies the intent requirement for obstruction of justice." *United States v. Sharpe*, 193 F.3d 852, 865 (5th Cir. 1999). More recently, the Fifth Circuit has acknowledged its prior statements in *Haas*, including that "corruptly" is "interchangeable with the term 'willful[,]'" but also held that a jury instruction defining the term as "knowingly and dishonestly" suffices. *United States v. Richardson*, 676 F.3d 491, 507-08 (5th Cir. 2012).

The D.C. Circuit's divided opinion in *United States v. North*, 910 F.2d 843 (D.C. Cir.), *opinion withdrawn and superseding in other part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990), which addressed 18 U.S.C. § 1505 but also discussed § 1503, similarly sets forth the conflict and confusion. The *North* majority cited the definition of "corruptly" from Ballentine's Law Dictionary, which is "the intent to obtain an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others." *Id.* at 881-82. But the majority also stated that those courts, like the Ninth and Tenth Circuits, that "have said that the word 'corruptly' means nothing more than an intent to obstruct the proceeding . . . have not read the corrupt intent requirement out of the statute. . . ." *Id.* at 882. "For the conduct covered by section 1503 . . . a legal presumption [of corruptness is] warranted because, after all, very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap immediately to mind." *Id.* The majority also concluded that "knowledge of unlawfulness" was not required because "[a]lthough the violation of this statute is a 'specific

intent' offense, 'the mental state required for most 'specific intent' offenses does not involve knowledge of illegality.'" *Id.* at 884 (citation omitted).

Judge Silberman dissented in *North*. He explained: "[T]here are cases – primarily dealing with section 1503 – which interpret 'corruptly' to refer to the defendant's motive but then inconsistently say that the bad or evil motive denoted by the word 'corruptly' means nothing more than an intent to obstruct the proceeding. The interpretation described in those cases reads the word 'corruptly' out of the statute." *Id.* at 940-41 (citations and footnote omitted). He explained that "corruptly" could mean that the defendant acts "with a corrupt purpose" or acts "by independently corrupt means" or both. *Id.* at 942-43.[1] "Whenever the means used are not independently criminal, the jury cannot avoid considering the defendant's purpose if it is to meaningfully determine whether the endeavor was corrupt or evil or depraved." *Id.* at 943. In this specific context, "in making its corruptness determination, [the jury] must be permitted to consider, at the very least, evidence tending to show that the defendant believed that the nature of his conduct (as opposed to its

[1] Other judges have also reasoned that "corruptly" limits the *means* required to obstruct justice under § 1503. *See Bonds*, 784 F.3d at 595-99 (Fletcher, J., concurring) ("corruptly" means by bribery); *see also id.* at 593 (Reinhardt, J., concurring) (under the canon of *noscitur a sociis*, conduct of the magnitude of using threats or force to suborn perjury is required). The theory of prosecution in this case was flawed if "corruptly" so limits the *means* of committing obstruction.

underlying justification) was appropriate – that is, in accordance with the law." *Id.* at 944.

The D.C. Circuit later held that the term "corruptly" in § 1505 was unconstitutionally vague, at least as applied in that case. *See Poindexter*, 951 F.2d at 377-86. The D.C. Circuit explained that "on its face, the word 'corruptly' is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" *Id.* at 378. "The various dictionary definitions of the adjective 'corrupt' quoted in *North I* do nothing to alleviate the vagueness problem involved in attempting to apply the term 'corruptly' to Poindexter's conduct. 'Vague terms do not suddenly become clear when they are defined by reference to other vague terms.' Words like 'depraved,' 'evil,' 'immoral,' 'wicked,' and 'improper' are no more specific – indeed they may be less specific – than 'corrupt.'" *Id.* at 378-79.

The D.C. Circuit's opinion in *Poindexter* led Congress to define "corruptly" for purposes of § 1505 to mean "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. § 1515(b). Similarly, the Second Circuit has seized on a definition of "corruptly" for purposes of § 1503 as "motivated by an improper purpose[,]" *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), although *Poindexter* points out that this definition may be even less specific than the term "corruptly." *See Poindexter*, 951 F.2d at 378-79. One judge

has stated that "improper purpose" does provide sufficient guidance in the context of 18 U.S.C. §§ 1503 and 1512 but criticized cases like *Rasheed* and *Ogle* as "overlook[ing] that not all actions taken with the intent to hinder or obstruct justice necessarily violate § 1503 or § 1512." *United States v. Farrell*, 126 F.3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting).

Given the confusion, Judge Kozinski once stated that "[a]ttempts to cabin the definition of 'corruptly' within a single rule have proven unsatisfactory" and therefore the term "can only be defined case by case." *United States v. Dorri*, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting). He explained that one definition is an act "'done with the intent to secure an unlawful benefit either for oneself or for another,'" but then questioned, "what benefits are unlawful?" *Id.* "Black's Law Dictionary says 'corruptly' refers to a 'wrongful design to acquire some pecuniary or other advantage,' but this too begs the question: Exactly when is a design to acquire some advantage 'wrongful'?" *Id.* (citation omitted). "Ballentine's Law Dictionary defines 'corruptly' as involving an 'intent to obtain an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others.' Again, though, whether the intended advantage is improper and whether the conduct is inconsistent with official duty are the very questions we should be answering." *Id.* (citation omitted).

Judge Kozinski correctly recognized that the state of lower court precedent is unsatisfactory, and this Court should clarify the longstanding confusion.

Petitioner, however, does not agree with his conclusion that "corruptly" can only be defined on a case-by-case basis. As set forth below, this Court's precedent offers a guiding definition. Under this correct definition, the Ninth Circuit's view that "corruptly" as used in § 1503 does not require a "consciousness of wrongdoing" is fundamentally flawed. App. 5-6.

B. This Court's precedent establishes that "corruptly" requires "consciousness of wrongdoing" and that the Ninth Circuit's approval of the jury instructions was incorrect

In *Marinello v. United States*, 138 S. Ct. 1101 (2018), this Court considered the omnibus clause of an obstruction statute, 26 U.S.C. § 7212, using "corruptly" and other language similar to § 1503(a). This Court accepted the *government's* position that "corruptly" means "acting with 'the *specific intent* to obtain an *unlawful* advantage' for the defendant or another." *Marinello*, 138 S. Ct. at 1108 (emphases added). This Court equated a "corruptly" mens rea with a "willfully" mens rea, *id.*, and the dissent stated that the term "corruptly" carries a higher scienter than a "willfully" standard. *Id.* at 1114 (Thomas, J., dissenting).

As mentioned, in the criminal context, the term "willfully" generally requires the government to "prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan*, 524 U.S. at 192; *see*, *e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). This

Court has arrived at this conclusion after explaining that many of the definitions of "willfully" are the same ones used to describe "corruptly," such as a "bad purpose," or "perversely," or "evil." *Bryan*, 524 U.S. at 191 and nn.12 and 13. Given that the terms are defined similarly and are considered "interchangeable," *Richardson*, 676 F.3d at 507; *Haas*, 583 F.2d at 220, a "corruptly" mens rea should also require the government to prove that the defendant knew that his conduct was unlawful. Indeed, the language used in the *Marinello* definition – the *specific intent* to obtain an *unlawful* advantage – requires knowledge of illegality on its face.

Like *Marinello*, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) supports this view. In reversing an obstruction conviction under § 1512(b), this Court stated that "restraint" in interpreting the statute was "particularly appropriate" because the purported obstructive conduct was "by itself innocuous" and was "not inherently malign." *Id.* at 703-04. This Court also explained that a "corrupt" intent requires the defendant's conduct to be "wrongful, immoral, depraved, or evil." *Id.* at 705. It was particularly easy to conclude that a consciousness of wrongdoing was required in the context of § 1512(b) because the language of the statute required the defendant to act "knowingly . . . corruptly." *Id.* at 705-06. While § 1503 does not modify "corruptly" with the word "knowingly," there is no reason why a consciousness of wrongdoing should not also apply, as the ultimate rationale in *Arthur Andersen* was that "limiting criminality to [those]

conscious of their wrongdoing sensibly allows [the obstruction statute] to reach only those with the level of 'culpability we usually require in order to impose criminal liability.'" *Id.* at 706. Similarly, in holding that there is a "nexus" requirement for § 1503, this Court relied on the same rationale, even stating that an intent to obstruct justice is a standard that "is a good deal less clear" than what is "usually require[d] in order to impose criminal liability." *United States v. Aguilar*, 515 U.S. 593, 602 (1995).

The jury instructions in *Arthur Andersen* were defective because they "failed to convey the requisite consciousness of wrongdoing" and "it was enough for [the defendant] to have simply 'impeded' the Government's" investigation; in other words, the instructions failed to "incorporate any 'corruptness' at all." *Arthur Andersen*, 544 U.S. at 706-07. Similarly, and remarkably, the instructions in this case allowed the jury to convict petitioner based on conduct constituting "normal law enforcement practices, such as interviewing witnesses, attempting to interview witnesses or moving inmates[,]" App. 12, and the jury was not required to find any corruptness or consciousness of wrongdoing at all. App. 14-15. Even if the consciousness of wrongdoing standard set forth in *Arthur Andersen* somehow does not always apply in the context of § 1503, it should at least apply when the conduct underlying the obstruction "is not inherently malign." *Arthur Andersen*, 544 U.S. at 703-04. In other words, under Judge Silberman's view in *North*, the jury should at least have been required to determine that

petitioner knew his conduct was unlawful because it was allowed to convict him based on means, like interviewing witnesses and moving inmates, that are not independently criminal for a Sheriff. *See North*, 910 F.2d at 943-44.[2]

The majority in *North* declined to require knowledge of unlawfulness based on the often invoked principle that knowledge of illegality is generally not a defense. *Id.* at 884. This analysis begs the question because the use of terms like "willfully" and "corruptly" indicate an exception to this purported general rule. Moreover, "[t]his maxim . . . normally applies where a defendant has the requisite mental state in respect to the elements of the crime but claims to be 'unaware of the existence of a statute proscribing his conduct.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019). "In contrast, the maxim does not normally apply where a defendant 'has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct,' thereby negating an element of the offense. Much of the confusion surrounding the ignorance-of-the-law maxim stems from 'the failure to distinguish these two quite different situations.'" *Id.* (citations omitted).

This distinction is squarely presented by petitioner's defense. Petitioner's defense was *not* that he

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[2] As mentioned, under the "means" analysis in the concurrences in *Bonds*, the jury instructions and theory of prosecution were flawed. *See Bonds*, 784 F.3d at 595-99 (Fletcher, J., concurring); *see also id.* at 593 (Reinhardt, J., concurring).

was ignorant of the existence of criminal obstruction statutes. Rather, his defense was that he believed the federal investigation was being conducted in violation of the state laws that he was tasked with enforcing as a Sheriff, and therefore he did not have the corrupt intent to obstruct justice in taking the actions that he did with respect to the federal investigation. Even if petitioner was mistaken about the collateral matter of the legality of the federal investigation, he still had a viable defense that he did not believe his conduct was unlawful.

Chief Justice Roberts has explained: "'[I]gnorance of the law is typically no defense to criminal prosecution.' I agree that is 'typically' true. But when 'there is a legal element in the definition of the offense,' a person's lack of knowledge regarding that legal element *can* be a defense." *McFadden v. United States*, 135 S. Ct. 2298, 2308 (2015) (Roberts, C.J., concurring). Here, § 1503 contains a legal element – the obstruction of "the due administration of justice" – and therefore petitioner's belief that he was not violating the law is a valid defense to § 1503.

Finally, construing the "corruptly" element as requiring a defendant to know that his conduct is unlawful also eliminates another problem with the jury instructions in this case. Specifically, the instructions included a "mixed-motive" instruction stating: "[T]he government need not prove that the defendant's sole or even primary intention was to obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to

obstruct justice. The defendant's intention to obstruct justice must be substantial." App. 15. As Judge Sutton has explained, this instruction was erroneous under *Burrage v. United States*, 571 U.S. 204, 217-18 (2014). *See United States v. Miller*, 767 F.3d 585, 591-92 (6th Cir. 2014). If the "corruptly" mens rea is interpreted as requiring knowledge of illegality, then a purported "mixed-motive" instruction is unnecessary.

C. The question presented is timely and important, and this case is an excellent vehicle for resolving it

This country has spent much of the past couple of years contemplating what constitutes "obstruction" and, even more specifically, a corrupt intent. *See* Report on the Investigation into Russian Interference in the 2016 Presidential Election. In doubting their circuit's view of the "corruptly" element in § 1503, several Ninth Circuit judges noted that their precedent could make "everyone who participates in our justice system a potential criminal defendant" and "gives prosecutors the immense and unreviewable power to reward friends and punish enemies by prosecuting the latter and giving the former a pass." *Bonds*, 784 F.3d at 584-85 (Kozinski, J., concurring). In short, the question presented is timely, and it is of national importance because "[s]tretched to its limits, section 1503 poses a significant hazard for everyone involved in our justice system. . . ." *Id.* at 584.

This case is also an excellent vehicle for review because the analysis below was succinct and clear. The Ninth Circuit explicitly concluded that the government was *not* required "to prove that [petitioner] acted with a consciousness of wrongdoing or that his conduct was wrongful, immoral, depraved, or evil." App. 5-6. Thus, the issue is squarely presented. The factual context of this case – an elected Sheriff prosecuted for obstructing a federal investigation that he believed was being conducted in violation of State law – is also an excellent vehicle to answer the question.

Finally, this case was extraordinarily close. The first jury voted 11-1 to acquit on the obstruction counts. The second jury only convicted after lengthy deliberations. In the balance is potential imprisonment for a 77-year old former Sheriff with Alzheimer's disease. For all of these reasons, review is warranted.

II. This Court should grant review to clarify whether a defendant has a Constitutional, statutory, or common law right to a public jury in a federal criminal trial, and, if so, whether publicity can justify a complete deprivation of that right or whether a court must consider lesser alternatives, including sequestration or limited disclosure of the jurors' identities to the attorneys so they may effectively select the jury.

A. Courts disagree on the source of the right to a public jury, which has led to imprecise and conflicting standards for evaluating when that right can be compromised

The rise of anonymous juries is generally traced to *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979) and a string of other federal prosecutions in New York starting in the late 1970's. *See United States v. Scarfo*, 850 F.2d 1015, 1021-22 (3d Cir. 1988). In *Barnes*, 604 F.2d at 133-43, a majority of a Second Circuit panel concluded that withholding the names of jurors was permissible, although it mostly based its ruling on the nature of peremptory challenges and a trial court's discretion to choose the procedures for conducting voir dire. Subsequent courts have largely ignored that Judge Meskill dissented in *Barnes*, *id.* at 168-75, and then Judge Oakes, joined by Judge Timbers, called for rehearing *en banc*, commenting that the *Barnes* majority "adopted an entirely new rule of law that so far as I know stands without precedent in the history of

Anglo-American jurisprudence." *Id.* at 175 (Oakes, J., dissenting from rehearing). Despite this tenuous origin, the use of anonymous juries quickly gained approval in the lower courts, and they continue to increase in frequency. See Note, *A Jury of Your [Redacted]: The Rise and Implications of Anonymous Juries*, 103 Cornell L. Rev. 1621, 1623 (2018).

The cases initially considering anonymous juries were decided before this Court clarified its Sixth Amendment public trial jurisprudence in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), *Waller v. Georgia*, 467 U.S. 39 (1984), and ultimately *Presley v. Georgia*, 558 U.S. 209 (2010). While the lower courts generally agree that a federal criminal defendant has a right to a public jury, their rationales as to where the right emanates from demonstrate significant confusion, and most have ignored this Court's Sixth Amendment public trial jurisprudence.

Lower courts sometimes mention a defendant's Sixth Amendment right in conducting an "anonymous jury" analysis, but they do not specifically state that a defendant has a Sixth Amendment right to a public jury, nor do they apply this Court's public trial cases. *See*, *e.g.*, *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003). Courts often mention that anonymity can affect a defendant's ability to select a jury, and anonymous juries can suggest that a defendant is dangerous thereby compromising his Fifth Amendment right to the presumption of innocence. *Id.* at 971; *see United States v. Edmond*, 52 F.3d 1080, 1090 (D.C. Cir.

1995); *United States v. Ross*, 33 F.3d 1507, 1519-20 (11th Cir. 1994).

Other courts ground the right to a public jury in statutory law. Some courts cite 28 U.S.C. § 1863, which requires district courts to devise plans that fix the time when the names of jurors shall be disclosed to the parties and the public; if disclosure to the public is part of the plan, the statute allows a court to keep the jurors' names confidential "where the interests of justice require." 28 U.S.C. § 1863(b)(7); *see*, *e.g.*, *United States v. Ramirez-Rivera*, 800 F.3d 1, 35 (1st Cir. 2015); *United States v. Deitz*, 577 F.3d 672, 684 (6th Cir. 2009). Some courts also mention "the common-law tradition of open litigation" in addressing the question. *United States v. Blagojevich*, 612 F.3d 558, 563 (7th Cir. 2010). Other courts cite a statute providing that a list of the potential jurors and their place of abode shall be disclosed at least three days before a capital trial, unless "the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." 18 U.S.C. § 3432; *see Scarfo*, 850 F.2d at 1023.

Given this confusion regarding where the right emanates from, there is disagreement and confusion on the appropriate standard to guide the inquiry. The majority rule states that it is permissible to seat an anonymous jury if "(1) there are strong grounds for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused." *Ramirez-Rivera*, 800 F.3d at 35; *see*, *e.g.*, *United States v. White*,

810 F.3d 212, 225 (4th Cir. 2016); *Shryock*, 342 F.3d at 971; *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995). To determine whether the first prong is satisfied, these courts have generally articulated five factors to guide the inquiry: (1) the defendant's involvement with organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that the defendants will suffer a lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. *See*, *e.g.*, *Shryock*, 342 F.3d at 971.

The Third and Seventh Circuits have taken a different approach. In a pre-*Presley* opinion, the Third Circuit retreated from its initial observations in *Scarfo*, concluding that anonymous juries also implicate the First Amendment and therefore this Court's public trial cases govern. *See United States v. Wecht*, 537 F.3d 222, 234-39 and n.30 (3d Cir. 2008). The *Wecht* opinion was not unanimous, however, as Judge Van Antwerpen dissented, reasoning that although the *Wecht* majority correctly looked to this Court's public trial cases, it incorrectly applied them. *Id.* at 251-63.

Similarly, in a post-*Presley* case, the Seventh Circuit has explicitly cited this Court's public trial test, as established in *Waller* and *Presley*, in the anonymous jury context. *See Blagojevich*, 612 F.3d at 564. In *Waller* and *Presley*, this Court stated: "The right to an open trial may give way in certain cases to other rights or

interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Presley*, 558 U.S. at 213 (quoting *Waller*, 467 U.S. at 45). To determine whether these "rare" circumstances are established, a court must apply a four-factor test:

> The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Presley, 558 U.S. at 214 (quoting *Waller*, 467 U.S. at 48). Thus, the Seventh Circuit concluded that a district court must apply *Waller/Presley* to the anonymous jury inquiry and therefore "before closing any part of the criminal process to the public (the part at issue in *Presley* was voir dire), a judge not only must make the findings required by *Waller* but also must consider alternatives to secrecy, whether or not the lawyers propose some." *Blagojevich*, 612 F.3d at 565.

There is a significant difference between the Sixth Amendment *Waller/Presley* standard and the standard that the majority of lower courts have employed to anonymous juries. In particular, the *Waller/Presley* standard requires courts to consider alternatives and to issue orders that are no broader than necessary,

whereas the majority test for anonymous juries requires no such consideration, as demonstrated by the analysis of the lower courts in this case. This Court should grant review to resolve the conflicting approaches. This Court should adopt the Seventh Circuit's conclusion that the *Waller/Presley* test governs the anonymous jury inquiry, and it should hold that the lower courts erred because they failed to apply that test.

B. This Court should hold that its Sixth Amendment public trial standard, as articulated in *Presley*, applies, and the Ninth Circuit erred in affirming the use of an anonymous jury

Although many lower courts have ignored this Court's public trial cases, those opinions make clear that an anonymous jury infringes on the openness that is essential to the jury selection phase of the case. *See Press-Enterprise*, 464 U.S. at 505-09 (recounting the historical tradition that emphasizes the open and public nature of jury selection). Furthermore, although the Third Circuit's opinion in *Wecht* and the Seventh Circuit's opinion in *Blagojevich* were in the context of First Amendment claims made by the press, this Court made clear in *Presley* that the defendant is entitled to the same, if not greater, constitutional protections under the Sixth Amendment. "[T]here is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings

than the accused has. 'Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.' There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit." *Presley*, 558 U.S. at 213 (citation omitted).

Given *Presley*, the anonymous jury inquiry should be governed by the *Waller* standard and factors, not the test and factors articulated by the majority of the lower courts. Under the *Waller* standard, "trial courts are required to consider alternatives . . . even when they are not offered by the parties. . . ." *Presley*, 558 U.S. at 214. Furthermore, "generic risk[s]" that are "unsubstantiated by any specific threat or incident" are not sufficient to justify an infringement on the public trial guarantee. *Id.* at 215. "If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could [use an anonymous jury] almost as a matter of course." *Id.*

It is clear that the lower courts in this case failed to comply with the *Waller*/*Presley* standard. As an initial matter, the courts did not consider reasonable alternatives to juror anonymity, and the anonymous jury order was far broader than necessary to protect the interests at stake. *See Presley*, 558 U.S. at 214. Most obviously, the courts did not consider whether disclosure of the jurors' names at least to the attorneys during the trial and then to the public after the trial would have satisfied whatever overriding interests the district court thought were implicated. Similarly, the lower courts did not consider whether juror sequestration

would have been sufficient. *See Blagojevich*, 612 F.3d at 565. Because the district court's findings were generic and issued after-the-fact, a reviewing court cannot ascertain whether these alternatives were viable. *See United States v. Gupta*, 699 F.3d 682, 687 (2d Cir. 2012) (findings issued after-the-fact did not justify closure during voir dire).

While the lower courts failed to comply with the second and third *Waller/Presley* factors thereby committing constitutional error, they also failed to make sufficient findings to demonstrate that an overriding interest was likely to be prejudiced if a public jury was utilized. The lower courts' reliance on the publicity surrounding the case, which was the primary factor cited in the Ninth Circuit's undeveloped analysis, App. 3, was "generic." *Presley*, 558 U.S. at 215; *Blagojevich*, 612 F.3d at 565.

The generic analysis of the lower courts here was similar to the district court's analysis in *Wecht*, which involved the high-profile corruption trial of a well-known county coroner. The district court in *Wecht* reasoned that an anonymous jury would prevent the media from harassing the jurors, but the Third Circuit held that the "prospect that the press might publish background stories about the jurors is not a legally sufficient reason to withhold the jurors' names from the public." *Wecht*, 537 F.3d at 240. The Third Circuit explained that even though the case involved a prominent defendant, the district court's explanation "amount[ed] to the sort of 'conclusory and generic' finding that we have held to be insufficient to overcome the

presumption of openness." *Id.* "The participation of jurors 'in publicized trials may sometimes force them into the limelight against their wishes,' but '[courts] cannot accept the mere generalized privacy concerns of jurors' as a sufficient reason to conceal their identities in every high-profile case." *Id.* (citation omitted).

The "publicity" rationale in this case was as generic, if not more generic, than the one in *Wecht*. Indeed, despite several earlier publicized trials in similar LASD cases *without* anonymous juries, the district court did not cite a single incident where a juror was harassed by anyone – the defendants, other LASD personnel, or the press. The fact that perhaps a couple of potential jurors out of hundreds expressed unspecified concerns at other trials is not cause for an anonymous jury. If that were the standard, then an anonymous jury could be employed in any purported high-profile case. In virtually every trial, a handful of potential jurors may fear being contacted by a party, or his or her associates. *See Wecht*, 537 F.3d at 241.

The other findings by the district court and the Ninth Circuit were similarly generic and insufficient to satisfy the *Waller/Presley* standard. Indeed, other circuits have found that an anonymous jury was inappropriate even when the circumstances more strongly supported one. For example, in *United States v. Sanchez*, 74 F.3d 562 (5th Cir. 1996), the district court used an anonymous jury for the trial of an officer who threatened to arrest prostitutes to coerce them to engage in sex acts. The district court there relied on "the potential fears of jurors adjudicating the guilt or

innocence of a police officer" and stated there was nothing "more frightening to the populous than having a rogue cop on their hands." *Id.* The Fifth Circuit reversed, as nothing showed that the defendant would attempt to harm the jurors, and the "decision erroneously rested on the 'mere allegations or inferences of potential risk.'" *Id.* at 565.

Here, there was no allegation that petitioner had engaged in any violence against members of the public. Although petitioner had been retired for three years, the district court speculated that he was "likely" to have connections to deputies with the ability to access private information. App. 8. It was pure speculation that current LASD personnel would seek to help a retired sheriff in such a manner, and the district court did not explain what information could be accessed that private investigators or the government could not access in any case.

Similarly, in *United States v. Mansoori*, 304 F.3d 635, 651 (7th Cir. 2002), the Seventh Circuit held that the district court erred in empaneling an anonymous jury in a drug case even though it involved "a large-scale, gang-related operation with ready access to firearms. . . ." The Seventh Circuit explained: "True, the defendants may have had the ability to intimidate jurors through associates who were not incarcerated, but that is true of many defendants. What demonstrates the need for jury protection is not simply the means of intimidation, but some evidence indicating that intimidation is *likely*. No such evidence is presented here. Nor is there evidence that the defendants had engaged

in a pattern of violence unusual enough to cause jurors to fear for their safety." *Id.* (emphasis added) (citations omitted).

The generic findings in this case did not identify any violence, let alone a pattern of unusual violence, and did not even mention a single fact since the time of the mere one-month period of activity way back in 2011 that could possibly demonstrate the *likelihood* of juror intimidation. The district court reasoned that petitioner was charged in a conspiracy to obstruct justice that included hiding an informant and intimidating an FBI agent, but the informant was in the custody of the LASD, serving over 400 years for violent crimes, and was isolated for a short time in 2011 after it was determined that a cell phone, with pictures of drugs, had been smuggled into him. The informant was later produced to the FBI, as were hundreds of thousands of documents in response to the federal investigation, and the indictment itself alleged that the brief conspiracy terminated by at least September 2011, six years before the trial. The asserted intimidation of the FBI agent also occurred six years earlier and did not involve any violence; deputies approached the agent and stated that they would seek an arrest warrant for her violation of state law. Petitioner immediately informed the U.S. Attorney that no such arrest would be sought.

The district court stated that there was the potential for a lengthy sentence, App. 9, but the charges were lower level Class C and D felonies, 18 U.S.C. § 3559(a), with Sentencing Guidelines that were not unusually harsh. Indeed, the government had offered petitioner

a deal for 0-6 months in custody, the lowest range possible under the Guidelines. Once again, if the penalty range in this case could justify an anonymous jury, then virtually every federal criminal case would be by anonymous jury given the current state of federal sentencing laws and the flexibility given to prosecutors to proliferate charges through multiple counts. *See Mansoori*, 304 F.3d at 651.

In sum, the lower courts in this case failed to consider alternatives to an anonymous jury as required under the Sixth Amendment public trial standard, such as releasing the names of the jurors to the attorneys or juror sequestration, and their findings were generic and otherwise failed the *Waller/Presley* standard by a wide margin. Even if this Court concludes that the *Waller/Presley* standard does not apply to the anonymous jury inquiry, it should still grant review because the Ninth Circuit's approval of an anonymous jury in this case conflicts with the Third Circuit's conclusion in *Wecht*, the Fifth Circuit's conclusion in *Sanchez*, and the Seventh Circuit's conclusion in *Mansoori*.

C. The issue presented is important, and this case is a good vehicle for review

It has been approximately 40 years since the Second Circuit's original and divided anonymous jury opinion in *Barnes*. Given the increased use of anonymous juries, this Court should now consider what rights are implicated and what circumstances justify their use. There is no need for further "percolation" in

the lower courts, as their positions are firmly entrenched. Indeed, this Court decided *Presley* almost a decade ago, and the majority of the lower courts still maintain their flawed anonymous jury analysis, despite the Third Circuit's pre-*Presley* opinion in *Wecht* and the Seventh Circuit's post-*Presley* opinion in *Blagojevich*.

The issue presented is important, as it implicates several fundamental aspects of our public jury trial system. Among other things, anonymous juries affect a defendant's ability to select a fair and impartial jury, and they deprive a defendant and the public of a verdict that "is both personalized and personified when rendered by 12 known fellow citizens." *Sanchez*, 74 F.3d at 565. The use of anonymous juries also defeats the public's right to know the individuals deciding some of the most important controversies in our society. The trend in the lower courts is to utilize anonymous juries more frequently in high-profile trials, but those are arguably the cases where the need for accountability should be at its greatest. Anonymity diminishes the public's confidence in the impartiality of the jury and thus whether the result of the trial was correct and just. Investigations of jurors in one high-profile trial revealed that some had lied in providing information to the court, *see Blagojevich*, 612 F.3d at 561, and openness allows the ability to investigate matters concerning juror misconduct and thereby enhances confidence in the system. *See Wecht*, 537 F.3d at 241-42. These interests are extraordinarily important to our criminal justice system.

This case also presents an excellent vehicle for review. The lower courts completely ignored potential alternatives, such as juror sequestration or release of the jurors' identities to the attorneys, starkly presenting the Sixth Amendment question under the *Waller/Presley* standard. Even if this Court does not find that the *Waller/Presley* standard applies to anonymous juries, this case still presents a troubling application of an anonymous jury even under a less strict test. Similar prior cases involving LASD officials were tried with public juries and without incident, and the decision to utilize an anonymous jury in this case conflicts with the opinions of several other circuits.

Finally, a violation of the right to a public trial is a structural error requiring reversal for a new trial. *See*, *e.g.*, *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). Thus, if this Court agrees that an anonymous jury infringes the Sixth Amendment public trial right and that the lower courts erred under the *Waller/Presley* standard, then petitioner is entitled to a new trial. Even if the district court committed non-structural error, reversal for a new trial is appropriate given that there was absolutely no need for an anonymous jury and this case was extraordinarily close, as demonstrated by the prior 11-1 deadlock in favor of acquittal. *See Sanchez*, 74 F.3d at 565 (reversing for anonymous jury error).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

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Respectfully submitted,

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