No. 19-912

In the Supreme Court of the United States

ALBERT T. ROBLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to a certificate of appealability on his claim that he received ineffective assistance of trial counsel, where his claim is premised on trial counsel's omission of arguments about the requirements for conviction for federal-funds bribery, in violation of 18 U.S.C. 666, that were raised and rejected on the merits on direct review.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is unreported. The order of the district court (Pet. App. F1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2019. On November 12, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 18, 2020, and the petition was filed on January 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 21 counts of honest-services mail and wire fraud, in violation of 18 U.S.C. 1341, 1343 (2000), and 18 U.S.C. 1346; four counts of money laundering, in violation of 18 U.S.C. 1957 (2000); and five counts of federal-funds bribery, in violation of 18 U.S.C. 666. Judgment 1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. *Ibid.* The court of appeals reversed petitioner's convictions for honest-services fraud and money laundering, but affirmed his convictions for bribery. Pet. App. B1-B35. On remand, petitioner moved for a new trial or reconsideration, but the district court denied the motion, *id.* at C1-C19, and sentenced him to time served, to be followed by three years of supervised release, First Amended Judgment 1. The court of appeals affirmed. Pet. App. D1-D3. The district court subsequently denied petitioner's motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, and also denied a certificate of appealability (COA). Pet. App. E1-E4, F1. The court of appeals likewise denied a COA. *Id.* at A1-A2.

1. Petitioner was elected as Treasurer of the City of South Gate, California in 1997 and reelected in 2001. Pet. App. B3. Days before the 2001 election, petitioner asked the city's waste-hauling company to pay $15,000 in printing bills that he was about to incur for his campaign. *Id.* at B6. The company refused, and after petitioner won reelection, he told the company that "they were not his friends," that "as far as [he] was concerned, [the company] was 'out of town,'" and that if the company did not "go away quietly," he would "hurt the company in other cities." *Ibid.*

Later in 2001, petitioner worked to ensure that the city awarded its waste-hauling contract, worth around $48 million, to a different waste-hauling company. Pet. App. B7. The owner of that other company had given petitioner personal gifts and campaign contributions;

for example, he had bought petitioner a computer, paid in part for petitioner's telephone switchboard, and covered petitioner's and his campaign's printing and copying expenses. *Id.* at B5 n.3. Petitioner showed the company's owner a draft of the city's bid request, which was subsequently modified in accord with the owner's suggestions. *Id.* at B7. Petitioner then assigned a friend to be the local official facilitating the city's bidding process and told the friend that the company was his "horse in the race." *Ibid.* Petitioner additionally showed the company the competitors' bids and revealed the questions that city officials planned to ask bidders during their oral presentations—even though that information was confidential and was not shared with any of the other bidders. *Id.* at B8. City officials eventually awarded the waste-hauling contract to the company, even though the company failed to put in the lowest bid. *Id.* at B28-B29.

2. A grand jury in the United States District Court for the Central District of California indicted petitioner on 21 counts of honest-services mail and wire fraud, in violation of 18 U.S.C. 1341, 1343 (2000), and 18 U.S.C. 1346; four counts of money laundering, in violation of 18 U.S.C. 1957 (2000); and five counts of federal-funds bribery, in violation of 18 U.S.C. 666. Pet. App. B2, B10. The provision at issue here, Section 666, prohibits an organization's agent, or a state or local official, from corruptly soliciting, demanding, accepting, or agreeing to accept a thing of value while "intending to be influenced or rewarded in connection with" the organization's, or state or local entity's, business if the organization or entity receives more than $10,000 in federal funds per year and if the thing of value is worth at least $5,000. 18 U.S.C. 666(a)(1)(B) and (b). The indictment

charged that petitioner corruptly accepted and agreed to accept payments and campaign contributions from the owner of the waste-hauling company while intending to be influenced and rewarded in connection with the awarding of the city's waste contract. Pet. App. B26 n.11.

Following a jury trial, petitioner was convicted on all counts and sentenced to 120 months of imprisonment. Pet. App. B10. The court of appeals reversed petitioner's convictions for honest-services fraud and money laundering, affirmed petitioner's convictions for bribery, and remanded the case for further proceedings. *Id.* at B1-B35. As relevant here, the court of appeals rejected petitioner's contentions that, in order to obtain a conviction under Section 666, the government is required to prove that the defendant has "a specific intent to receive a bribe in exchange for an official act"; that, in this case, the power to approve the waste-hauling contract was "vested in the city council" rather than in petitioner; and that, as a result, the evidence that petitioner "intended to be, or even could have been, influenced in his performance of one of his *official* duties" was insufficient. *Id.* at B26. The court observed that Section 666 "makes no mention of an 'official act' or a requirement that anything be given in exchange or return for an official act." *Id.* at B30. The court further stated that "the Third, Sixth, Seventh, and Eleventh Circuits" had "all held [that] § 666 does not require that a bribe be given or received with the intent to influence the public official in an official act." *Id.* at B31. And the court determined that "[a] jury could reasonably find that [petitioner] intended to be influenced in connection with the city's award of the waste-hauling contract, even though the authority to award the contract" was vested in the city council. *Id.* at B28.

This Court denied a petition for a writ of certiorari. See 571 U.S. 1222 (2014) (No. 13-8099).

3. On remand, petitioner filed a motion for new trial or reconsideration, arguing that each count of bribery rested at least in part on his receipt of campaign contributions and that, under the First Amendment, he could be convicted under Section 666 only on a showing that he received the contributions in exchange for official acts. Pet. App. C9. The district court denied the motion. *Id.* at C1-C19. The court found that the motion, which petitioner filed more than eight years after the verdict, was untimely. *Id.* at C9-C13. The court also determined that the motion lacked merit, observing that the court of appeals had already rejected petitioner's argument that conviction under Section 666 required a showing that the defendant intended to engage in a *quid pro quo* under which he received a thing of value in exchange for an official act. *Id.* at C14-C18.

The court of appeals affirmed. Pet. App. D1-D3. The court of appeals determined that the district court properly denied petitioner's motion as untimely. *Id.* at D2-D3. The court of appeals further determined that its previous decision "established the law of the case by affirming [petitioner's] conviction" under Section 666 and that petitioner had failed to identify any intervening authorities that could overcome that previous decision. *Id.* at D3.

4. Petitioner then filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, arguing that a conviction under Section 666 requires proof of an exchange of a thing of value for an official act and that trial counsel had been ineffective for failing to raise

that argument adequately and failing to request a jury instruction to that effect. See Pet. App. E2-E4 & n.2. The district court denied the motion. *Id.* at E1-E4. The court explained that, because petitioner had already raised his argument concerning the meaning of Section 666 on direct review, petitioner could not relitigate that issue in a motion under Section 2255. *Id.* at E3. The court further explained that the underlying ineffective-assistance-of-counsel claims failed on the merits in any event, because "counsel's failure to argue a quid pro quo requirement and failure to request a quid pro quo jury instruction did not 'fall outside the wide range of professionally competent services'" and "did not prejudice" petitioner. *Id.* at E3 n.2 (citation omitted). The court noted that "[a] defendant has no constitutional right to compel counsel to raise particular claims if counsel, as a matter of professional judgment, decides not to present those issues." *Id.* at E4 n.2.

The district court denied a COA. Pet. App. F1. The court of appeals also denied a COA, observing that petitioner had failed to show that "jurists of reason would find it debatable whether the section 2255 motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at A1 (brackets and citation omitted); see *id.* at A1-A2.

ARGUMENT

Petitioner contends (Pet. 11-24) that he is entitled to a COA on his claim of ineffective assistance of counsel. The court of appeals correctly denied a COA, and that decision does not conflict with any decision of this Court or of any other court of appeals. In addition, the question on which petitioner seeks review—whether conviction under 18 U.S.C. 666 requires a showing that the defendant accepted or agreed to accept a thing of value in return for an official act—is not properly presented by this case. This Court has previously denied petitions for writs of certiorari presenting that question, including on direct review in this case. See 571 U.S. 1222 (2014) (No. 13-8099); *McNair* v. *United States*, 562 U.S. 1270 (2011) (No. 10-533). The Court should likewise deny the petition for a writ of certiorari here.

1. A prisoner may take an appeal from a final order in a proceeding under Section 2255 only if a judge or circuit justice issues a COA. 28 U.S.C. 2253(c)(1). A COA may be issued only if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Where the district court denies a Section 2255 motion on procedural grounds, an applicant must make two showings in order to obtain a COA: (1) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" and (2) "that jurists of reason would find it debatable whether the [Section 2255 motion] states a valid claim of the denial of a constitutional right." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000).

In this case, petitioner explains (Pet. 22) that his "§ 2255 argument is that counsel was inadequate in presenting th[e] argument" that a conviction under Section 666 requires a showing that the defendant accepted or agreed to accept a thing of value in exchange for an official act. The district court denied the Section 2255 motion on procedural grounds as well as on the merits, so in order to obtain a COA, petitioner was required to show that jurists of reason would find each of those rulings debatable. The court of appeals correctly found that petitioner had failed to make either of those showings.

The district court's procedural ruling reflects the longstanding general rule that a district court may properly reject a Section 2255 motion that rests on a ground that a federal court has already rejected during direct review. See *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969); see also *Withrow* v. *Williams*, 507 U.S. 680, 720 (1993) (Scalia, J., concurring in part and dissenting in part). In this case, petitioner's claim of ineffective assistance of counsel was based on his contention that "§ 666 convictions require proof of a quid pro quo." Pet. App. E3. As the district court observed, however, that underlying contention had "already been disposed of." *Id.* at E2. On his initial appeal, petitioner contended that Section 666 incorporates a *quid pro quo* requirement, and on appeal from petitioner's motion for reconsideration or new trial, he contended that the First Amendment imposes such a requirement in cases involving campaign contributions. See *id.* at B26-B34, D3. The court of appeals found his argument unavailing both times. See *ibid.* The district court thus properly determined that, "[h]aving raised this argument 'unsuccessfully on direct appeal,'" petitioner "'cannot now seek to relitigate it as part of a petition under § 2255.'" *Id.* at E3 (citation omitted). The court of appeals, in turn, properly determined that petitioner had failed to show that jurists of reason would find the district court's procedural ruling debatable. *Id.* at A1.

On the merits, in order to show ineffective assistance of counsel, a defendant must establish both that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland* v.

Washington, 466 U.S. 668, 687 (1984). In this case, petitioner claims that trial counsel was ineffective for failing to develop an argument that the court of appeals later found meritless in any event—namely, the argument that Section 666 incorporates a *quid pro quo* requirement. See Pet. App. E3 n.2. As the district court explained, petitioner failed to show "counsel's failure to argue a quid pro quo requirement and failure to request a quid pro quo jury instruction did not 'fall outside the wide range of professionally competent services.'" *Ibid.* (quoting *Strickland*, 466 U.S. at 690). The district court also explained that counsel's failure to develop an argument that the court of appeals later deemed meritless did not prejudice petitioner. *Ibid.* And the court of appeals, in turn, correctly determined that petitioner failed to show that jurists of reason would find the district court's ruling debatable. *Id.* at A1.

Petitioner does not contend that the court of appeals' decision to deny a COA itself conflicts with any decision of this Court or of any other court of appeals. Petitioner also does not contend that the court of appeals applied the wrong legal standard in denying a COA or that the district court applied the wrong legal standard in its procedural determination or in its assessment of the claim of ineffective assistance of counsel. Petitioner states (Pet. 11) that he "disagrees" with the lower courts' decisions, but "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10; see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. Petitioner contends (Pet. 11) that this Court should grant a writ of certiorari to address the question

that the court of appeals addressed on direct review: "whether § 666 requires proof of a *quid pro quo*" involving an official act. Petitioner, however, previously filed a petition for a writ of certiorari on that issue during direct review, and this Court denied that petition. See 571 U.S. 1222 (No. 13-8099). The only question that is now properly before the Court is whether the court of appeals should have granted a COA on petitioner's claim of ineffective assistance of counsel, not whether the court of appeals' previous decision on direct review was correct. And as just explained, that COA question does not warrant this Court's review.

Petitioner errs in asserting (Pet. 11) that "whether Petitioner should receive a certificate of appealability collapses back to" the question "whether § 666 requires proof of a *quid pro quo*." Regardless of whether petitioner is correct on the merits of that statutory question, the relitigation bar independently supports the district court's decision to preclude petitioner from raising on collateral review a ground that was (rightly or wrongly) already rejected on direct review. Petitioner contends (*ibid.*) that the relitigation bar "do[es] not constrain *this* Court," but he identifies no precedent for granting a writ of certiorari where a district court permissibly declined to entertain a collateral attack premised on a previously rejected argument and the court of appeals denied a COA. To obtain a COA, petitioner was required to show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478. Petitioner appears to accept (Pet. 23 n.2) that the relitigation bar, at a minimum, was applicable in the district court, and petitioner has not shown that jurists of reason would debate that court's application of it.

The question whether jurists would debate the validity of petitioner's claim of ineffective assistance likewise does not collapse back the statutory question concerning the meaning of Section 666. Petitioner argues (Pet. 23) that, if this Court now agrees that petitioner's statutory argument is meritorious, counsel would "by definition" have been ineffective in failing to develop it. This Court has explained, however, that the "mere failure" to raise an argument that a reviewing court later deems meritorious "does not constitute *per se* ineffective assistance of counsel." *Kimmelman* v. *Morrison*, 477 U.S. 365, 383-384 (1986). The Court has instead explained that, in order to establish ineffectiveness, a defendant must show that the failure to raise the argument falls outside "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The district court here found that "counsel's failure * * * did not 'fall outside the wide range of professionally competent services,'" and it observed that "[a] defendant has no constitutional right to compel counsel to raise particular claims if counsel, as a matter of professional judgment, decides not to present those issues." Pet. App. E3 n.2 (citation omitted). As a result, a showing that petitioner's statutory argument is meritorious would not establish that counsel was ineffective for failing to develop that argument or that the court of appeals should have issued a COA on that claim.

3. In any event, contrary to petitioner's contention (Pet. 12-16), the court of appeals' decision on direct review does not implicate any conflict of authority among the courts of appeals. Petitioner states (Pet. 13-16) that the courts of appeals have interpreted Section 666 in somewhat different ways, but no court of appeals has

adopted petitioner's theory that, in order to secure conviction under Section 666, the government must show that the defendant accepted or agreed to accept a thing of value in exchange for an act within the scope of the defendant's own official duties.

Petitioner errs in arguing (Pet. 13) that the court of appeals' decision on direct review conflicts with the Second Circuit's decision in *United States* v. *Ford*, 435 F.3d 204 (2006). In *Ford*, the Second Circuit stated that the government was "required to prove beyond a reasonable doubt that [the public official] accepted [the thing of value] 'intending to be influenced' in her official duties." *Id.* at 212. The focus of that passage, however, was on "the specific intent element," not on official acts or official duties. *Ibid.* As the court of appeals observed on direct review, although that case "refer[s] to bribery in connection with an official act, the Second Circuit has not squarely held that official acts or duties are required for a § 666 conviction." Pet. App. B32.

Petitioner similarly errs in relying (Pet. 13-14) on the Eighth Circuit's decisions in *United States* v. *Redzic*, 627 F.3d 683 (2010), cert. denied, 563 U.S. 956 (2011), and *United States* v. *Griffin*, 154 F.3d 762 (1998). In *Redzic*, the defendant argued that Section 666 "does not criminalize the payment of 'gratuities,'" 627 F.3d at 691—which do not require proof of a *quid pro quo*, see *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398, 404-405 (1999). The Eighth Circuit declined to address that argument, instead determining that the conviction was valid even on the defendant's reading of the statute. *Redzic*, 627 F.3d at 691-692. In *Griffin*, the defendant "admitted violating" Section 666. 154 F.3d at 763. The Eight Circuit did not address the meaning of the statute; rather, it considered only the meaning of certain provisions of the Sentencing Guidelines applicable to bribes and illegal gratuities. *Id.* at 763-764.

Finally, petitioner errs (Pet. 13) in claiming a conflict with the Fourth Circuit's decision in *United States* v. *Jennings*, 160 F.3d 1006 (1998). In that case, the Fourth Circuit "assume[d] (without deciding)" that Section 666 criminalizes only bribes and not gratuities; further "assume[d]" that a jury "may convict a defendant for violating § 666(a)(2) only if it finds that the defendant intended to exchange a payment for some specific official act or course of action"; and concluded that, even under those assumptions, the defendant could not show that his conviction was invalid. *Id.* at 1018-1019; see *id.* at 1023. Those assumptions do not constitute holdings that conflict with the court of appeals' decision on direct review here.

4. In all events, the court of appeals' decision on direct review was correct even on petitioner's reading of the statute. The evidence clearly showed that he accepted money and gifts as a *quid pro quo* for an official act.

First, "there was ample evidence that [petitioner] accepted bribes * * * with the intention to be influenced in connection with the waste-hauling contract." Pet. App. B28. And this Court has explained that the government satisfies even the explicit official-act requirement of the federal-official bribery statute, 18 U.S.C. 201, by showing that a defendant "us[ed] 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.'" *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372 (2016) (emphasis added). Here, petitioner at a minimum used his official position to exert pressure on other officials to perform the official act of awarding the contract to the company that paid petitioner the bribes. As the court of appeals observed, petitioner "used his considerable influence exclusively for [the company's] benefit," including by altering the substance of the bid request, instructing the local official in charge of facilitating the bidding process—whom petitioner himself assigned—that the company was his "'horse in the race,'" and by directing confidential information to the company. Pet. App. B28-B29. The result in this case would thus be the same even if the district court had adopted petitioner's interpretation of Section 666.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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