No. 21-2986

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES E. SNYDER,
Defendant-Appellant.

Appeal from the United States District Court,
Northern District of Indiana,
Hammond Division
Case No. 2:14-CR-00129-JVB-JEM-2
The Honorable Joseph S. Van Bokkelen
The Honorable Matthew F. Kennelly

DEFENDANT-APPELLANT JAMES SNYDER'S CIRCUIT. RULE 54 POSITION SUBMISSION

DEFENDANT-APPELLANT JAMES SNYDER, through counsel, respectfully requests that this Court remand Mr. Snyder's case to the District Court with instructions that the court dismiss Count 3[1] with prejudice and convene further proceedings on the remaining Count 4[2], in accordance with the decision of the United States Supreme Court, which found that Title 18, United States Code, Section 666 does not apply to soliciting or receiving "gratuities," the

[1] Count 3 of the original indictment has also been referred to as Count 2 [corrupt solicitation of a thing of value count].
[2] Count 4 of the original indictment has also been referred to as Count 3 [tax count].

allegation upon which Mr. Snyder was tried and convicted, and only applies to charges of bribery. *Snyder v. United States,* 144 S.Ct. 1947 (2024).

In delivering the opinion of the Court, Justice Kavanaugh unequivocally stated the Title 18, United States Code, Section 666 does not make it a crime for state and local officials to accept gratuities ((giving or receiving a thing of value because of an action already completed). 603 U.S. ___ ; 144 S.Ct. 1947, 1951 (2024). "Rather, §666 leaves it to state and local governments to regulate gratuities to state and local officials." *Id.* Yet, "Snyder has never been charged by state prosecutors for bribery. And he has never been charged or disciplined by Portage for violating the City's gift rules. The Federal Government charged, and a federal jury convicted Snyder of accepting an illegal gratuity (the $13,000 check from Peterbilt) in violation of 18 U.S. C. §666(a)(1)(B)." Justice Gorsuch concurred with the opinion of the Court but went further to state that "the bottom line is that, for all those reasons, any fair reader of this statute would be left with a reasonable doubt about whether it covers the defendant's charged conduct." *Snyder,* 144 S.Ct. at 1954.

In rejecting the government's position, the Supreme Court emphasized that the government's interpretation of the statute "moved the Government from one sinkhole to another. The flaw in the Government's approach – and it is a very serious real-world problem – is that the Government does not identify any remotely clear lines separating an innocuous or obviously benign gratuity from a criminal gratuity." *Snyder,* 144 S.Ct. at 1957. The Supreme Court also was critical of the Government's emphasis on the inclusion of both the terms "rewarded" and "influenced" in the statute as a way of clarifying the application of the statute to both bribes [influenced] and gratuities [rewarded]. The Court resolved the issue by focusing on the use of

the term "corruptly" as it was used on Section 201(b) to indicate that it references bribery, since the 201(c)-provision applying to federal gratuities cases does not contain the term. The timing of the agreement, not the timing of the payment is what distinguishes a bribe from a gratuity. *Snyder,* 144 S.Ct. at 1959.

In short, the Supreme Court foreclosed any possibility that this Court could now consider whether Mr. Snyder's conviction should be upheld under a bribery theory.

First, as described above, the Supreme Court's majority opinion described this as a gratuities case. Indeed, the three-member dissent would have merely vacated and remanded to this Court. *Snyder v. United States*, 144 S. Ct. 1947, 1968 n.6 (2024) (Jackson, J., dissenting). The majority purposefully went further, "deci[ding] to reverse Snyder's conviction, rather than vacate and remand." *Id.* The majority's decision to fully reverse is consistent with Justice Kavanaugh's description of the case as one involving gratuities, and Justice Gorsuch's point that "any fair reader would have a reasonable doubt" that Snyder's charged conduct was prohibited. In other words, allowing this count to proceed yet again would be consistent with the dissent's view, but would be inconsistent with the majority's view.

Secondly, as early as September 21, 2018, R. 129, when Mr. Snyder first challenged the government's interpretation of the statute and asked for a Bill of Particulars, the government refused to provide a response, claiming that the law did not require it. R. 137 at 4 ("The government declines to respond substantively to points (1) and (2) above because Defendant's conclusion that § 666 does not cover gratuities is directly contradicted by binding precedent") .[3]

[3] After the Supreme Court granted Mr. Snyder's petition for a writ of certiorari, Judge Kennelly, citing to this case, ordered the government to produce a Bill of Particulars as to which theory it would apply under Title 18, United States Code, Section 666, in *United States v. Mitzga,* 23 CR

Yet, the government repeatedly described this as a gratuities case. This began with the indictment in which Count 3 was headed "Corrupt Solicitation of a Thing of Value" and in which it described the solicitation and payment of the $13,000 check both of which occurred after the bidding for and awarding of the contracts described in the indictment

Lacking evidence of an agreement between the Buhas and Mr. Snyder in advance of the bidding and awarding of contracts, the government emphasized repeatedly the fact that Mr. Snyder both asked for work and was provided payment from the Buhas *after* the contracts had been awarded to Peterbuilt. R. 273 at 7 (prosecutor's Rule 29 response, "That timing strongly suggested the payment was made in exchange, *or as a gratuity*, for the lucrative garbage truck contracts GLPB had received" (emphasis added)). Before the Supreme Court, the Solicitor General reframed the Rule 29 argument urging the Court to find that the allegation that Snyder rigged the bids was evidence of a bribe rather than a gratuity. SG Opposition to Cert. at 2-3; SG Br. at 18. The Supreme Court decisively rejected the government's arguments, finding instead that Snyder was "charged" with and "convicted" of a gratuity.

Indeed, the government's final description of the case in its closing rebuttal continued its gratuity theme. R. 581, p. 2150 ("when times got tough, he doesn't go out and work at McDonald's like a regular, everyday person would do, get a second job and work hard for a living. *He showed up to a business he had just done a favor for and said: I need money*" (emphasis added)). The conduct -- showing up to a business for which one had just done a favor and asking

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242, R. 117. The Court did this because "[a]dvance disclosure of this information is important not only to permit defendants to prepare for trial but also because the answer may bear on whether the trial of the case should await a decision of the Supreme Court in *Snyder*." Defendant Mitzga was acquitted. R. 173.

for money-- constitutes a "gratuity." The Supreme Court has now unequivocally held that such conduct is not a crime under section 666.

The District Court, in sentencing Mr. Snyder for Count 3, remarking that "we really don't know" whether the jury convicted on a bribery or gratuity theory, found by a preponderance of the evidence that Mr. Snyder had been convicted of a soliciting a gratuity and not of participating in bribery for the purpose of applying the appropriate sentencing guideline provision. R. 586, p. 111-112.

It would be fundamentally unfair to let the prosecution recast its allegations eight years into the case—and after two trials—as if it meant to allege a bribery case all along. *See, e.g., See Econ. Folding Box Corp.*, 515 F.3d 718, 721 (7th Cir. 2008) (finding an argument raised for the first time on appeal to be waived because the party must "accept the consequences of [its] decision" to present its claims under one legal theory instead of another), cited in, *Broaddus v. Shields*, 665 F.3d 846, 854 (7th Cir. 2011); *Art Akiane LLC. v. Art & SoulWorks LLC*, 2021 WL 5163288, at *1 (N.D. Ill. Nov. 5, 2021) ("Motion practice is not a series of trial balloons where you [submit] what you think is sufficient, [you] see how it flies, and if it does not, you go back and try again"); *Zimmerman v. Bd. of Trustees of Ball State Univ.*, 940 F.Supp.2d 875, 884 (S.D. Ind. 2013) ("[T]he Court is mindful of the principle ... that once a party chooses to take a certain position, it 'cannot change horses in midstream.' ").

This Court affirmed the district court's interpretation of Title 18, United States Code, Section 666, as applying to both "bribes" and "gratuities", following this Court's now overruled precedent. This Court found that the "governing statutory language 'influenced or rewarded' easily reaches both bribes and gratuities. *United States v. Snyder,* 71 F.4th 555, 579 (2023). The

Supreme Court has pointedly rejected this interpretation of the statute. Instead, the Supreme Court incorporated the reasoning of the First and Fifth Circuits in its decision, finding that gratuities are not covered by Section 666.

The reasoning of the Supreme Court also addressed and rejected the reasons cited by this Court in addition to *stare decisis* for upholding the district courts' decisions: (1) the statutory language "rewarded" does not indicate the inclusion of gratuities in the statute, but provides alternative timing for the payment of a bribe; (2) in the Supreme Court's view the word "corruptly" points to bribery and does not mitigate the disparate penalties imposed for gratuities under the two statutes; [201 and 666]; and (3) the Supreme Court does not think that the federal government should usurp the duty of state and local bodies to police the payment of gratuities to state and local officials.

Contrary to this Court's initial decision, the Supreme Court's opinion and the reasoning underlying it make it clear that the district court erred when it refused to dismiss the gratuity count from the indictment, when it declined to give Snyder's proposed jury instruction, and when it denied the judgment of acquittal at the conclusion of both trials.

Finally, as both the majority opinion and Justice Gorsuch's concurring opinion make clear, this Court and the district court erred in finding that there was sufficient legal or factual evidence to uphold a conviction: "Snyder has never been charged by state prosecutors for bribery. And he has never been charged or disciplined by Portage for violating the City's gift rules. The Federal Government charged, and a federal jury convicted Snyder of accepting an illegal gratuity (the $13,000 check from Peterbilt) in violation of 18 U.S. C. §666(a)(1)(B)." And "the bottom line is that, for all those reasons, any fair reader of this statute would be left with a reasonable doubt

about whether it [Title 18, United States Code, Section 666] covers the defendant's charge conduct." *Snyder,* 144 S.Ct. at 1960.

Any argument by the government that this Court should undertake a harmless error analysis is foreclosed by the Supreme Court's finding that Snyder was charged and convicted of a gratuity. The Supreme Court knows how to order a remand for harmless error review and did not do so in this case. *See, e.g., Erlinger v. United States,* 602 U.S. ____ , 144 S.Ct. 1840, 1860-1861 (2024)(CJ Roberts, concurring, "The Seventh Circuit should thus consider on remand the Government's contention that the error here was harmless."). This Court's precedent also supports remand for dismissal– "*reversal is generally required* when on a general verdict only one of two bases for the conviction is *legally* sound, *see Yates v. United States*, 354 U.S. 298, 311-12, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957*)." United States v. Turner*, 551 F.3d 657, 666 (7th Cir. 2008) [emphasis added]. Where, as here, the Supreme Court has rejected the primary *legal* theory under which the government proceeded, reversal, not a harmless error analysis, is appropriate.

WHEREFORE, JAMES SNYDER, through counsel, respectfully requests that this Court remand the case to the District Court with instructions to dismiss Count 3 with prejudice and to take any further action required with respect to Count 4.

DATE: August 19, 2024 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Debra Bonamici, Esq.
Amarjeet Bhachu, Esq.
Brian Kerwin, Esq.

Assistant United States Attorneys

and I hereby certify that I have mailed by United State Postal Service, or hand-delivered the document to the following non-CM/ECF participants: N/A.

DATE: August 19, 2024

Respectfully submitted,

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