Nos. 09-1422, 09-11039, and 09-11067

In the Supreme Court of the United States

PAUL S. MINOR, PETITIONER

v.

UNITED STATES OF AMERICA

WALTER W. TEEL, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN H. WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a prosecution for honest-services fraud based on a bribery scheme, *McCormick* v. *United States*, 500 U.S. 257 (1991), required the district court to instruct the jury that it could find petitioners guilty only upon a finding that the bribes were offered in exchange for a specific official act.

2. Whether the jury instructions on the honest-services fraud bribery charges failed to require proof of a *quid pro quo*.

3. Whether the honest-services fraud statue, 18 U.S.C. 1346, is unconstitutionally vague as applied to bribery schemes.

4. Whether alleged discrepancies between the district court's rulings in this case and the district court's rulings at an earlier trial violated the Due Process Clause.

5. Whether the district court plainly erred in failing *sua sponte* to dismiss the honest-services fraud charges against Whitfield under the Double Jeopardy Clause based on Whitfield's acquittal on a related charge at an earlier trial.

6. Whether it was reasonably foreseeable to Whitfield that the scheme to defraud would result in the mailings underlying three mail-fraud counts.

7. Whether the district court violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, when, with Whitfield's consent, it granted an "ends of justice" continuance pursuant to 18 U.S.C. 3161(h)(8)(B), to allow Minor's new counsel adequate time to prepare for trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 590 F.3d 325.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2009. A petition for rehearing was denied on February 24, 2010 (Pet. App. 82a-83a). The petitions for a writ of certiorari in Nos. 09-1422 and 09-11039 were filed on May 24, 2010, and the petition for a writ of certiorari in No. 09-11067 was filed on May 25, 2010. 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 Southern District of Mississippi, petitioner Minor was convicted of conspiracy, in violation of 18 U.S.C. 371; racketeering, in violation of 18 U.S.C. 1962(c); seven counts of honest-services fraud, in violation of 18 U.S.C. 1341, 1343, and 1346; and two counts of federal-funds bribery, in violation of 18 U.S.C. 666. He was sentenced to 132 months of imprisonment, to be followed by three years of supervised release, was fined $2,750,000, and was ordered to pay $1.5 million in restitution. Petitioner Teel was convicted of conspiracy, in violation of 18 U.S.C. 371; two counts of honest-services fraud, in violation of 18 U.S.C. 1341, 1343, and 1346; and federal-funds bribery, in violation of 18 U.S.C. 666. He was sentenced to 70 months of imprisonment, to be followed by two years of supervised release, and was ordered to pay $1.5 million in restitution. Petitioner

[1] Unless otherwise specified, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 09-1422.

Whitfield was convicted of conspiracy, in violation of 18 U.S.C. 371; five counts of honest-services fraud, in violation of 18 U.S.C. 1341, 1343, and 1346; and federal-funds bribery, in violation of 18 U.S.C. 666. He was sentenced to 110 months of imprisonment, to be followed by three years of supervised release, and was fined $125,000. The court of appeals reversed all of the convictions for federal-funds bribery and the convictions of Minor and Teel for conspiring to commit federal-funds bribery, and it affirmed the remaining convictions. It vacated petitioners' sentences and remanded for resentencing. Pet. App. 1a-81a.

1. a. In the fall of 1998, Minor, a Mississippi lawyer, arranged to guarantee two loans to Whitfield, a Mississippi Circuit Court judge. Based solely on Minor's guarantee, Minor's bank gave Whitfield a $40,000 loan to finance Whitfield's re-election campaign. Minor also guaranteed a separate $100,000 loan to Whitfield for the stated purpose of a "down payment on home." Pet. App. 3a. Whitfield and his girlfriend spent most of that loan to purchase a house and then spent the remainder on furniture and personal expenses. Shortly thereafter, Whitfield testified falsely about the loans in his divorce proceeding, denying that anyone had guaranteed the $40,000 loan, and claiming that he had contributed no funds toward the purchase of his new house. *Id.* at 2a-3a.

The two loans, which were ultimately consolidated, were balloon loans that came due every six months. When the bank contacted Whitfield, he was "unresponsive and largely ignored his obligation." Pet. App. 4a-5a. Instead, Minor repeatedly renewed the loans, using cash—either deposited at the bank or funneled through Whitfield—to disguise his role. *Id.* at 5a & n.3; Gov't

C.A. Br. 13-14. After Whitfield left the bench at the end of 2000, Minor twice gave Whitfield the necessary funds to renew the loan, accompanied by letters documenting a false purpose. In December 2001, for example, Minor sent Whitfield a $10,000 check for a "position paper" that Whitfield never wrote, and Whitfield promptly made a $10,000 loan payment. Pet. App. 7a & n.6.

Meanwhile, Whitfield presided over *Marks* v. *Diamond Offshore Management Co.*, a maritime tort suit that Minor filed shortly after Whitfield was re-elected. Minor requested a bench trial and then arranged—with Whitfield's assistance—to ensure that Whitfield would decide the case. In June 2000, Whitfield awarded Minor's client $3.75 million in damages, an amount Whitfield later reduced to $3.64 million. *Marks* v. *Diamond Offshore Mgmt. Co.*, 2000 WL 35444565 (Miss. Cir. Sept. 25, 2000). On appeal, the Mississippi Supreme Court reduced the damages award by $2 million, finding the award "so high as to be unreasonable at first blush." *Diamond Offshore Mgmt. Co.* v. *Marks*, No. 2000-CA-01680-SCT, 2003 Miss. LEXIS 88, *36-*37 (Miss. Feb. 27, 2003), withdrawn, 2007 Miss. LEXIS 237 (Miss. Apr. 26, 2007); Pet. App. 5a-7a.[2]

The bribery scheme unraveled in July 2002, when criticism from bank examiners prompted the bank to seek repayment in full. Minor then recruited Leonard Radlauer, an acquaintance who also knew Whitfield, to act as a strawman and repay the loan. Soon after Rad-

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[2] After the verdict in this case, the Mississippi Supreme Court overturned the *Marks* judgment and ordered a new trial. Pet. App. 7a n.5. Marks was recently awarded $383,862 in damages. Harrison County Bd. of Supervisors, *Judgement Rolls*, *Judicial District 1 Search Result*, http://co.harrison.ms.us/elected/circuitclerk/jroll/judicial1/results.asp?file=163585 (last visited Aug. 24, 2010).

lauer repaid the loan using funds that Minor wired to him, a "panic stricken" Minor informed Radlauer that the FBI might want to talk to Radlauer. Pet. App. 8a. Minor insisted that Whitfield would pay Radlauer back, even after Radlauer pointed out that Radlauer had not spent any of his own money. Meanwhile, unbeknownst to Radlauer, Whitfield had mailed to Radlauer's office a falsified promissory note in the amount of $117,013.21, which was backdated to the day before the loan payoff occurred. *Ibid.* Whitfield also included an undated, handwritten note claiming that he would "repay the entire amount, plus interest." *Id.* at 9a. After reviewing those documents, Radlauer concluded that, in insisting that Whitfield would "pay him back," Minor had been offering him money to lie to the FBI. Gov't C.A. Br. 22; Pet. App. 7a-9a.

b. In the fall of 1998, Minor also guaranteed a $25,000 bank loan to Teel, a lawyer running for Mississippi Chancery Court. Teel was elected, and when the loan became due after six months, Teel treated repayment as Minor's obligation, failing to return phone calls from the bank. Minor renewed Teel's loan with cash on June 28, 1999, at the same time that he renewed Whitfield's two loans. Pet. App. 9a-10a.

In February 2000, Minor paid off the loan, using his friend Richard Scruggs as a strawman. After securing a 30-day promissory note from Teel, Scruggs sent Teel $27,500, which Teel used to pay off the loan. Minor reimbursed Scruggs about two weeks later. Teel never contacted Scruggs about the promissory note or made any effort to repay him. Pet. App. 10a.

Minor also assisted Teel in defending against a criminal proceeding. By October 2001, Teel was under investigation for pocketing money intended to reimburse ven-

dors for court office supplies. Minor met with Teel (and two other Mississippi judges who were under investigation) several times and paid a public-relations firm to advise them. Minor also transported the judges by private plane to Jackson, Mississippi, where he personally arranged for them to meet with the Mississippi Attorney General. After Teel went to trial on state criminal charges and was acquitted, Minor reimbursed Teel's attorney for $10,000 of expenses. Pet. App. 13a-14a.

In the meantime, Teel was pressuring the defendant in *Peoples Bank* v. *United States Fidelity & Guarantee Co. (USF&G)*, to offer Minor's client an advantageous settlement. The case, which involved USF&G's denial of insurance coverage to Peoples Bank, had been filed the summer before Teel took the bench. After Teel became a judge, Minor complained to the presiding judge in *USF&G* that he had "f***'d up this case" and demanded that it be reassigned to Teel. Gov't C.A. Br. 29-30; Pet. App. 10a-12a. The judge complied. By the summer of 2001, the dispositive issue in the litigation was pending before the Mississippi Supreme Court. See *United States Fid. & Guar. Co.* v. *Omnibank*, 812 So. 2d 196 (Miss. 2002). USF&G therefore asked Teel to stay the case. Teel effectively denied the motion, granting only a one-month stay and declining to reschedule an impending bench trial. He also granted partial summary judgment to Minor's client and announced that he would consider punitive damages at trial. Then, at a settlement conference, Teel announced that, in his view, an appropriate settlement figure for the case would be $1.5 million, five times the amount of actual damages. USF&G offered Minor's client $1.5 million on the spot, reasoning that it could do no better (and likely would do worse) at a trial before Teel. A few months later, the

Mississippi Supreme Court adopted USF&G's interpretation of the contract. Pet. App. 12a-13a.

c. To keep the bribery schemes concealed, both Whitfield and Teel improperly failed to disclose either the loans or Minor's repayment of them on their annual statements of economic interest or campaign disclosure forms. Pet. App. 3a-4a, 9a-10a. As a result, although defense counsel in both *Marks* and *Peoples Bank* harbored suspicions about Minor's relationship with the presiding judge, their inquiries failed to uncover any financial ties that would have justified recusal. *Id.* at 6a, 12a n.11.

2. In October 2004, a federal grand jury sitting in the Southern District of Mississippi returned an indictment against Minor, Whitfield, Teel, Mississippi Supreme Court Justice Oliver E. Diaz (Diaz) and his former wife, Jennifer Diaz. Jennifer Diaz was dismissed from the case, and a jury trial took place in the summer of 2005. Diaz was acquitted on all counts, and Minor was acquitted on six counts, five of them relating to an alleged bribery scheme involving Diaz. Minor and Whitfield were each acquitted on one mail-fraud count relating to the bribery scheme the government alleged between them. A mistrial was declared on all other counts. Pet. App. 14a & n.12.

3. On December 6, 2005, a federal grand jury returned a 14-count indictment against Minor, Whitfield and Teel. Pet. App. 15a. Count one charged Whitfield and Minor with conspiracy to commit various offenses against the United States, in violation of 18 U.S.C. 371; count two charged Teel and Minor with conspiracy. Count three charged Minor with racketeering, in violation of 18 U.S.C. 1962. Counts four through eight charged Minor and Whitfield with devising a mail-fraud

and wire-fraud scheme to deprive the State of Mississippi of its intangible right to Whitfield's honest services, in violation of 18 U.S.C. 1341, 1343, and 1346. Counts nine and ten charged Minor and Teel with devising a mail-fraud scheme to deprive the State of Mississippi of its intangible right to Teel's honest services. Count eleven charged Whitfield with accepting bribes while acting as an agent of a state agency receiving federal funds, in violation of 18 U.S.C. 666(a); count twelve charged Minor with offering bribes to Whitfield. Count thirteen charged Teel with accepting bribes while acting as an agent of a state agency receiving federal funds, in violation of 18 U.S.C. 666(a); count fourteen charged Minor with offering bribes to Teel. Pet. App. 15a-16a.

At petitioners' urging, the jury was instructed that the honest-services fraud counts required proof that the defendant violated Mississippi bribery law. Pet. App. 84a; Tr. 4076-4078. At the jury-instruction conference, petitioners further argued that Mississippi law required proof that the briber intended to influence a public official to perform a specific act that was identified at the time money changed hands. Tr. 4662-4663, 4699, 4701-4704, 4711-4712, 4716; see Tr. 4077-4082 (Minor advanced a similar argument in a Rule 29 motion). The district court declined to give such an instruction. Tr. 4704-4705, 4707-4708. Instead, it defined bribery to require the corrupt intent to influence a judge to render decisions "based on things of value provided * * * rather than the judge's honest view of the law and facts." Pet. App. 85a. It further instructed the jury that the judicial defendants could not be convicted unless they entered into a "corrupt agreement" with Minor to provide them with a bribe, and unless their judicial deci-

sions were actually "corrupted by a bribe," *i.e.*, not based on their "honest views." *Ibid.*

The jury found petitioners guilty on all counts. Pet. App. 16a.

4. The court of appeals affirmed the petitioners' honest-services fraud convictions and the convictions of Minor and Whitfield for conspiring to commit honest services fraud; at the same time, it vacated the federal-funds bribery convictions and remanded for resentencing. Pet. App. 1a-80a.

As relevant here, the court of appeals rejected petitioners' argument that, because "the loan guarantees were made in the context of * * * electoral campaigns," *McCormick* v. *United States*, 500 U.S. 257 (1991), required proof of "an explicit *quid pro quo* involving a specific official act identified at the time that Minor arranged and guaranteed the loans." Pet. App. 29a; see *id.* at 27a-40a. The court assumed, "[f]or the sake of argument," that the $40,000 loan to Whitfield and the $25,000 loan to Teel were "campaign contributions," but it "reject[ed] any attempt to characterize" the other benefits Minor supplied to Whitfield and Teel "as having anything to do with their respective electoral campaigns." *Id.* at 38a. The court also assumed that a *McCormick*-based "*quid pro quo*" requirement applied to honest-services fraud charges. *Ibid.* Nonetheless, the court held that, in the context of "two prolonged bribery schemes" that "spann[ed] nearly four years each," the instructions "fulfilled that requirement." *Ibid.*

The court of appeals determined that the instructions sufficiently conveyed the "essential idea of give-and-take" embodied in the *quid pro quo* requirement. Pet. App. 39a-40a. Moreover, although the instructions did

not require the government to prove that "Minor and the judge had identified a particular case that would be influenced at the time that Minor guaranteed the loans, [footnote omitted]," the court stated that "the overwhelming weight of authority" did not require such a showing. *Id.* at 39a (citing *United States* v. *Abbey*, 560 F.3d 513, 519 (6th Cir.), cert. denied, 130 S. Ct. 739 (2009); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir.), cert. denied, 130 S. Ct. 795 (2009); *United States* v. *Kemp*, 500 F.3d 257, 282 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008); *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998); *United States* v. *Tomblin*, 46 F.3d 1369, 1381 n.19 (5th Cir. 1995)).

The court of appeals also rejected various other challenges to the district court proceedings, including claims that the district court exhibited bias by reconsidering some of the rulings it had rendered in the prior 2005 trial, Pet. App. 72a; that the Double Jeopardy Clause prohibited the prosecution of Minor and Whitfield on mail- and wire-fraud charges because of their prior acquittals on one related charge each at the 2005 trial, *id.* at 73a-80a; that the mailings underlying three mail-fraud counts against Whitfield were not a reasonably foreseeable result of the scheme to defraud, *id.* at 41a-43a; and that the district court violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, Pet. App. 45a-50a.

ARGUMENT

Petitioners contend that the district court erred in failing to instruct the jury that petitioners could not be convicted of honest-services fraud unless, at the time money or other things of value changed hands, Minor had already identified the specific case in which he

wanted the judicial defendants to render a corrupt decision. Petitioners also challenge the instructions on alternative grounds, and Whitfield raises several additional claims regarding the district court proceedings. The court of appeals correctly rejected all of those arguments, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. As an initial matter, this Court's review is unwarranted at this time because the court of appeals vacated petitioners' sentences and remanded to the district court for resentencing, so the case is still in an interlocutory posture. This Court routinely denies petitions by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings. See, *e.g.*, *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (describing the interlocutory nature of a decision as "a fact that of itself alone furnishe[s] sufficient ground for the denial of" certiorari). That practice ensures that all of a defendant's claims will be consolidated and presented in a single petition. Here, the interests of judicial economy would be best served by denying review now and allowing petitioners to reassert all of their claims, including any claims that might arise upon resentencing, at the conclusion of the proceedings, if they still wish to do so at that time.

2. Petitioners argue (Pet. 10-26; Teel Pet. 13-17; Whitfield Pet. 10-16) that an honest-services fraud charge involving bribery cannot rest on a "campaign contribution" to an elected official unless it was offered in exchange for a specific official act identified at the time of the payment. They rely on *McCormick* v. *United*

States, 500 U.S. 257 (1991), in which this Court stated that a public official's receipt of campaign contributions may be prosecuted as extortion under the Hobbs Act, 18 U.S.C. 1951 *et seq.*, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273; see also *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (stating that the offense of extortion "is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts"). Petitioners appear to recognize that, in bribery cases that do not involve campaign contributions, courts applying the *quid pro quo* requirement have not required the heightened degree of specificity that petitioners say is required in the campaign context.[3] Instead, they argue that bribery involving campaign contributions is subject to a special rule. That argument does not warrant this Court's review because it was not properly preserved below and, in any event, it lacks merit.

a. Contrary to petitioners' assertion, this case does not present the question whether "the government must prove that a campaign contribution was offered in ex-

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[3] In the district court, Minor argued that *all* bribes require proof of a specific *quid pro quo* in the mind of the briber at the time money changes hands. See p. 8, *supra*. The district court correctly rejected that argument, which conflicts with a large body of precedent. See *United States* v. *Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996); *United States* v. *Ganim*, 510 F.3d 134, 141-142 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008); *United States* v. *Kemp*, 500 F.3d 257, 282 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008); *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998); *United States* v. *Abbey*, 560 F.3d 513, 519 (6th Cir.), cert. denied, 130 S. Ct. 739 (2009); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 943 & n.15 (9th Cir.), cert. denied, 130 S. Ct. 795 (2009). Petitioners do not renew it here.

change for a specific official act" (Pet. i), because petitioners never asked the district court to find that any of Minor's payments to Whitfield and Teel were "campaign contributions." Petitioners also did not seek instructions defining the term "campaign contribution," asking the jury to determine whether any "campaign contributions" had been made, or directing the jury to apply a different definition of bribery to any "campaign contributions" it found.

Moreover, contrary to his assertion (Pet. 8), Minor did not argue that *McCormick* "mandated" his proposed instruction requiring the jury to find a precise agreement as to the particular official act to be performed. Instead, while acknowledging that *McCormick* was not directly applicable, Tr. 4705 ("[W]e are not under that statute [*i.e.*, the Hobbs Act]"), Minor argued that "some of the * * * values" of *McCormick* supported his claims about "the code of Mississippi," *ibid.* That tepid suggestion failed to alert the district court to any "campaign contribution" defense. See Fed. R. Crim. P. 30(d) ("A party who objects to * * * a failure to give a requested instruction must inform the court of the *specific objection* and the grounds for the objection before the jury retires to deliberate.") (emphasis added).

Petitioners's failure to raise the "campaign contribution" issue was strategic and well advised. As the court of appeals explained, Minor provided financial assistance to both Whitfield and Teel that had nothing to do with their political campaigns. Pet. App. 38a; see, *e.g.*, Tr. 1908 (Whitfield's counsel assured the district court that "neither Mr. Minor's counsel nor me on behalf of John Whitfield would take a position contrary to the fact that the $100,000 was not used for the campaign"). Thus, instructions that asked the jury to distinguish

between "campaign contributions" and other payments would not have aided the defense. To the contrary, claiming that the loans or loan payments were intended to be "campaign contributions" would have conflicted with petitioners' claim that Teel and Whitfield intended to repay the loans, as well as with Minor's denial that he supplied cash used to make loan payments. Tr. 4853-4854, 4877-4879, 4913, 4932-4935. Finally, making that argument would have focused the jury's attention on unhelpful facts, including petitioners' failure to treat Minor's payments as "campaign contributions," Pet. App. 3a, 9a, and it could have opened the door to harmful proof regarding just how far petitioners' behavior strayed from lawful campaign activity. See, *e.g.*, Miss. Code of Judicial Conduct Canon 7(B)(2) (1995) ("A candidate * * * for judicial office * * * should not himself solicit or accept campaign funds.").

Petitioners' deliberate decision to advance only a general argument about Mississippi bribery law rather than an argument specific to campaign contributions—together with their express concession that *McCormick* was not applicable—constituted a waiver of the theory they now seek to advance. See Gov't C.A. Br. 70-72. But even if petitioners' theory were regarded as forfeited rather than waived, it would be reviewable only for plain error. See Fed. R. Crim. P. 52(b). Under that standard, a defendant may obtain reversal of his conviction only if he establishes (1) error (2) that is "clear" or "obvious," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993) (internal quotation marks omitted). The court of appeals did not apply the plain-error standard in its review of petitioners' arguments,

but petitioners' failure to satisfy that standard would constitute an alternative ground for affirming the judgment.

b. Even if petitioners' arguments for a heightened *quid pro quo* requirement in the context of campaign contributions had been properly preserved, those arguments lack merit. Petitioners rely heavily on *McCormick* and *Evans*, but the Court's decision in those cases rested on an interpretation of the Hobbs Act, which employs language different from that of the honest-services fraud statute. *McCormick*, 500 U.S. at 266 (noting that the Court was resolving a disagreement among the courts of appeals "regarding the meaning of the phrase 'under color of official right' as it is used in the Hobbs Act"); accord *Evans*, 504 U.S. at 256. Moreover, the Court in *McCormick* also emphasized its concern that, under a contrary interpretation of that statute, ordinary campaign activity would be criminalized. *Id.* at 272. The honest-services fraud statute contains a different scienter element, requiring intent to defraud. 18 U.S.C. 1346 ("[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."). That requirement is responsive to *McCormick*'s concern that behavior that is "unavoidable" in election campaigns may result in a criminal conviction. 500 U.S. at 272. There is therefore no need to construe the honest-services fraud statute to require, in a prosecution based on a bribery scheme involving campaign contributions, not only that there was a *quid pro quo* involving an intent to exchange something of value for an official act, but also that the defendant

had settled upon a precise official act to be rendered or received at the time of the exchange.[4]

Contrary to Minor's assertion (Pet. 17 n.2), the Ninth Circuit did not hold in *United States* v. *Inzunza*, 580 F.3d 894, 900 (2009), that *McCormick* and *Evans* "apply with equal force in the context of honest services fraud." *Inzunza* merely reaffirmed *United States* v. *Kincaid-Chauncey*, 556 F.3d 923 (9th Cir.), cert. denied, 130 S. Ct. 795 (2009), which held that honest-services fraud in the form of bribery requires "at least an implicit *quid pro quo*." *Id.* at 943; see *id.* at 941 ("*McCormick* and *Evans*, while instructive, are clearly not controlling."). In fact, *Inzunza* rejected the claim that a heightened *quid pro quo* requirement applies to campaign-contribution bribery cases prosecuted as honest-services fraud. See 580 F.3d at 902 (explaining that, in an honest-services bribery case involving campaign contributions, the "*quid pro quo* need not be tied to a specific official act, so long as evidence shows a pattern of gifts in exchange for official action").

c. Even if the question whether there is a heightened *quid pro quo* requirement in honest-services bribery cases involving campaign contributions otherwise

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[4] As Minor notes (Pet. 19), the government has argued elsewhere that an instruction similar to that provided in *Evans*—*i.e.*, an instruction calling for the jury to identify an acceptance of money by a public official "in exchange for [a] specific requested exercise of his or her official power," 504 U.S. at 258 (brackets in original), will satisfy *McCormick*'s *quid pro quo* requirement. The government has not contended, however, that such an instruction is the only means of ensuring that a public official who receives a campaign contribution, knowing only that it was given with an "expectation" of favorable future action, is not convicted for accepting a bribe. Nor does anything in *Evans* suggest that such an instruction is required outside of the context of the Hobbs Act.

warranted review, this case would be a poor vehicle for considering that question because the case arises in the unusual context of judicial bribery. In *McCormick*, the Court emphasized that "[s]erving constituents and supporting *legislation* that will benefit the district and individuals and groups therein is the everyday business of a *legislator*." 500 U.S. at 272 (emphasis added). Because "campaigns must be run and financed," the Court found it "unrealistic" to assume that extortion exists when legislators "act for the benefit of constituents . . . shortly before or after campaign contributions are solicited and received from those beneficiaries." *Ibid.* More recently, in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), the Court noted that "[f]avoritism and influence are not . . . avoidable in *representative politics*," and that politicians are presumed to be "responsive[]" to their supporters by providing the "political outcomes" they favor. *Id.* at 910 (quoting *McConnell* v. *FEC*, 540 U.S. 93, 297 (opinion of Kennedy, J.)) (emphasis added).

The same observations, however, do not apply to the judicial branch. To the contrary, judges (even when elected) do not "act for the benefit" of the litigants that appear before them. Instead, they are expected to decide individual cases based on principles of law, without favoring the "outcomes" sought by campaign supporters. Accordingly, while "favoritism" towards supporters may be "[un]avoidable" in "representative politics," *Citizens United*, 130 S. Ct. at 910, judicial proceedings require "neutrality." *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2260 (2009); see *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). Because of those unique features of judicial elections, a grant of certiorari in this case would be unlikely to decide any "frequently recurring First Amendment question[s]" (Pet. 12) left open by *McCormick* and

Evans. See *Republican Party of Minn.* v. *White*, 536 U.S. 765, 783 (2002) (noting that the First Amendment does not necessarily "require[] campaigns for judicial office to sound the same as those for legislative office").

d. Petitioners assert that the decision below conflicts with various decisions of other courts of appeals, but that is incorrect. Pet. 18 (citing *United States* v. *Siegelman*, 561 F.3d 1215, 1226 (11th Cir. 2009), vacated, Nos. 09-182 and 09-167 (June 29, 2010); *United States* v. *D'Amico*, 496 F.3d 95, 101 (1st Cir. 2007), vacated, 552 U.S. 1173 (2008); *United States* v. *Giles*, 246 F.3d 966, 973 (7th Cir. 2001); *United States* v. *Evans*, 30 F.3d 1015, 1018-1019 (8th Cir. 1994), cert. denied, 514 U.S. 1028 (1995)); see also Whitfield Pet. 12, 14 (citing *Siegelman*); Teel Pet. 11, 14 (citing *Siegelman*). None of the cases involved judicial-bribery schemes, and in three of them, the relevant portion of the court's opinion addressed the Hobbs Act only. *D'Amico*, 496 F.3d at 98; *Giles*, 246 F.3d at 970-973; *Evans*, 30 F.3d at 1018-1019. In the remaining case, *Siegelman*, the district court had instructed the jury that it could not find the defendants guilty of honest-services bribery without determining that an official and a private party had "*agree[d]* that the official [would] take *specific* action in *exchange* for the thing of value." 561 F.3d at 1227. The court of appeals did not decide whether honest-services bribery requires an "explicit promise" similar to that discussed by *McCormick* and *Evans* in the context of the Hobbs Act. *Id.* at 1225. Instead, "*assuming* a *quid pro quo* instruction was required," the court held that the instruction that was given "would satisfy *McCormick*'s requirement for an explicit agreement involving a *quid pro quo*." *Id.* at 1227. The decision below therefore does not conflict with *Siegelman*.

Nor does the decision below conflict with this Court's decision in *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999). See Teel Pet. 10; Whitfield Pet. 14; see also Pet. 16-17. In *Sun-Diamond*, the Court interpreted 18 U.S.C. 201(c)(1)(A) to require that an illegal gratuity be given in connection with "some particular official act." 526 U.S. at 406. The Court reasoned, in part, that to hold otherwise would cause "peculiar results," such as criminalizing "token gifts to the President based on his official position and not linked to any identifiable act." *Ibid.* *Sun-Diamond* does not govern here because, as this Court specifically noted, bribery statutes contain a mens rea different from gratuity statutes, requiring an "intent 'to influence' an official act or 'to be influenced' in an official act," *i.e.*, a "*quid pro quo*." *Id.* at 404. Accordingly, as the Second Circuit has concluded, no "principled reason" exists to extend *Sun-Diamond* "beyond the gratuity context." *United States* v. *Ganim*, 510 F.3d 134, 146-147 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008). Moreover, *Sun-Diamond* did not involve, and thus did not address, the question whether bribery can be established by an intent to exchange something of value for official acts, even where the official acts to be undertaken have not been determined with precision. As previously noted, see note 3, *supra*, the courts of appeals have upheld bribery convictions in such cases, and petitioners do not contend otherwise in this Court.

e. Because petitioners failed to preserve their "campaign contributions" argument in the district court, they had the burden on appeal of demonstrating that the alleged error affected the jury's verdict. *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010); see *United States* v. *Vonn*, 535 U.S. 55, 62 (2002). They have failed to

make such a showing. Indeed, at least as to Minor, any failure to instruct the jury that "campaign contributions" require some additional proof of a specific *quid pro quo* was harmless even under the ordinary harmless-error principles that would apply to a preserved claim of error. See Fed. R. Crim. P. 52(a).

As the court of appeals concluded, neither the $100,000 loan to Whitfield nor Minor's assistance to Teel in connection with his criminal defense had "anything to do with their respective electoral campaigns." Pet. App. 38a. Thus, if the honest-services fraud convictions rest, at least in part, on those payments, *McCormick* is not implicated. 500 U.S. at 268. See *Neder* v. *United States*, 527 U.S. 1, 35 (1999) (Scalia, J., concurring in part and dissenting in part) ("Where the facts *necessarily found* by the jury * * * support the existence of the element omitted or misdescribed in the instruction, the omission or misdescription is harmless."). Because petitioners failed to raise a "campaign contribution" defense, the verdict form did not require the jury to identify which payments underlay the convictions. On the racketeering count, however, the jury returned a special verdict finding that the government had proved "[b]ribery involving $100,000 loan to John Whitfield." Minor C.A. R.E. Tab 4, at 4. Because that loan had nothing to do with any campaign—Whitfield used it to buy a house—that finding eliminates any possibility that Minor's convictions for honest-services fraud involving Whitfield rested exclusively on "campaign contributions." Likewise, with regard to the Teel scheme, the racketeering verdict indicated that the government had *not* proved "[b]ribery involving $24,500 loan to [Teel]." *Ibid.* That finding demonstrates that the jury's verdict on the related honest-services fraud counts must have rested, at least

in part, on Minor's non-campaign related assistance in connection with Teel's criminal proceeding.

3. Petitioners also argue (Pet. 21, Teel Pet. 10-11, 15, Whitfield Pet. 13-14) that the instructions given in the district court "did not require any *quid pro quo* at all," let alone the more particularized *quid pro quo* they claim is required in campaign-contribution cases. The court of appeals assumed "that a *quid pro quo* instruction was required in this case," Pet. App. 38a, and it went on to hold that "the jury charge in this case sufficiently fulfilled that requirement." *Ibid.*; see *id.* at 38a-40a. Petitioners' challenge to that case-specific determination does not warrant this Court's review.

Petitioners focus (Pet. 21) on the instruction informing the jury that the crime of bribery did not require "mutual intent on the part of both the giver and the offeree or accepter of the bribe." Pet. App. 85a. That is a correct statement of the law, because offering a bribe—which does not necessarily result in any agreement or mutuality of intent—is itself a crime. See 18 U.S.C. 201(b)(1); *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 89 n.6 (1990) (Stevens, J., concurring) ("[T]he person who attempts to bribe a public official is guilty of a crime regardless of whether the official submits to temptation.").[5]

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[5] The district court based that part of its instructions on "the bribery laws of the State of Mississippi," which petitioner urged it to apply. Pet. App. 84a. The court's reliance on state law was incorrect because the honest-services statute "establish[es] a uniform national standard." *Skilling* v. *United States*, 130 S. Ct. 2896, 2933 (2010) (brackets in original). But as explained above, the offering of a bribe is also a crime under federal law. The district court's erroneous reliance on Mississippi law therefore was not prejudicial to petitioners.

The court of appeals was correct to hold that the jury instructions, the evidence at trial, and the jury's verdicts eliminated any risk that petitioners were convicted on the basis of the exchange of a thing of value accompanied merely by a vague hope or expectation of future benefit, as opposed to an actual *quid pro quo*. Pet. App. 38a-40a. The honest-services fraud instructions specifically required the jury to find that "the particular defendant entered into a *corrupt agreement*" to commit bribery. *Id.* at 84a-86a (emphasis added). The instructions also required the jury to find that the judges' rulings "were based upon 'a corrupt purpose' rather than an 'honest belief in the law and facts.'" *Id.* at 39a. And the evidence showed that Minor provided ongoing benefits—*i.e.*, repeatedly renewing short-term loans to Whitfield and Teel—while cases were pending, and that he took steps to ensure that Whitfield and Teel would be in a position to take specific actions in those cases. *Id.* at 3a-6a, 9a-13a. Likewise, the evidence also showed that Whitfield and Teel concealed their receipt of benefits from Minor, both before and while Minor's cases were pending before them, thereby ensuring that they would be in a position to render favorable rulings on his behalf. *Id.* at 3a-4a, 9a-10a. Finally, the jury necessarily found an agreement by finding all three defendants guilty on the honest-services fraud counts. Although a bribe can be offered without being accepted, or (at least in theory) accepted without being offered, it cannot be both offered and accepted without an agreement ensuing. Likewise, by finding Minor and Whitfield guilty of conspiring to commit mail and wire fraud, the jury necessarily found an agreement between them.

4. Whitfield (Whitfield Pet. 16-22) and Teel (Teel Pet. 12, 17-19) contend that the honest-services fraud

statute, 18 U.S.C. 1346, is unconstitutionally vague. See Pet. 13. No petitioner raised that claim on appeal, and it is foreclosed by *Skilling* v. *United States*, 130 S. Ct. 2896 (2010). In *Skilling*, this Court held that, as applied to "fraudulent schemes to deprive another of honest services through bribes or kickbacks," Section 1346 "presents no vagueness problem." *Id.* at 2928. That holding governs here because, as the court of appeals emphasized, this case involved "bribery schemes." Pet. App. 2a; see *id.* at 3a, 28a (jury instructed on Mississippi offense of bribery); 69a ("[T]he jury found appellants guilty on a theory of bribery."). There is therefore no need for further consideration in light of *Skilling*.

5. Whitfield raises a variety of additional challenges to his conviction, but his claims lack merit.

a. Whitfield argues (Whitfield Pet. 24-28) that the district court changed some of its evidentiary rulings and jury instructions from the earlier 2005 trial, "result-[ing] in a grossly uneven playing field." *Id.* at 25. Whitfield makes no effort to show that the court's rulings were erroneous; that they may have differed from earlier rulings does not mean that they violated Whitfield's rights.[6] In any event, after "thoroughly reviewing the

[6] Moreover, Whitfield's argument—which lacks any record citations—does not accurately portray the district court proceedings. For example, Whitfield claims (Whitfield Pet. 26) that the district court excluded "testimony from his divorce proceedings" in 2005 but "admitted this evidence" in 2007. In fact, the district court ruled in 2005 that the jury could not infer, from the divorce decree alone, that Whitfield concealed the $100,000 loan. By 2007, the government had located Whitfield's actual testimony in his divorce proceeding, which the district court correctly admitted as direct proof of his perjury. Gov't C.A. Br. 129-130; see Pet. App. 61a-62a (rejecting challenge to the admission of Whitfield's perjured testimony); see also Gov't C.A. Br. 127-133 (responding to petitioners' other claims regarding the 2005 trial).

trial transcripts," the court of appeals was "convinced that [the district court] conducted the trial in a fair and impartial manner." Pet. App. 72a. That factbound determination does not merit further review.

b. Next, relying on *Yeager* v. *United States*, 129 S. Ct. 2360 (2009), Whitfield contends (Whitfield Pet. 28-31) that the Double Jeopardy Clause prohibited his prosecution on mail- and wire-fraud charges because of his acquittal on one wire-fraud charge in 2005. The court of appeals rejected that claim—which was raised only after oral argument—for two reasons. First, it found it to be "clearly either waived or forfeited." Pet. App. 74a-76a. Second, assuming that the claim had only been forfeited, and not waived, the court of appeals found no plain error because it was "certainly *not* clear or obvious" that the jury in 2005 "*necessarily* found that Whitfield engaged in no honest services deprivation scheme with Minor respecting the *Marks* case." *Id.* at 78a; see *id*. at 80a (concluding that there was "no error at all"). Instead, after "reviewing the record of the prior trial, including the evidence * * * , jury charge, and argument of counsel," the court of appeals concluded that the 2005 jury may merely have failed to find beyond a reasonable doubt that the particular wire transfer charged in the count on which Whitfield was acquitted was "reasonably foreseeable" to him. *Id*. at 78a-79a (noting that Whitfield's counsel has specifically urged that conclusion in closing argument). Whitfield's acquittal therefore did not bar a subsequent prosecution based on different mailings and wire transfers. The court of appeals' factbound conclusion regarding a claim that was not properly preserved below does not warrant further review.

c. Whitfield also argues (Whitfield Pet. 35-37) that the mailings underlying three mail-fraud counts (Counts 4-6) were not a reasonably foreseeable result of the scheme to defraud. The court of appeals correctly rejected that factbound claim, noting that the mailings had occurred in the course of litigation in Whitfield's court, and observing that it is "difficult to believe that, as a trial judge, Whitfield would have been unaware that litigants commonly use the mail to serve responsive motions on one another." Pet. App. 42a. Whitfield also contends (Whitfield Pet. 33-35) that the mailings served no material purpose in executing the fraudulent scheme. That claim is also factbound, and it was not raised in the court of appeals.

d. Finally, Whitfield contends (Whitfield Pet. 37-38) that the district court violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, when, with his consent, it granted a continuance to allow Minor's new counsel adequate time to prepare for trial. The court of appeals concluded that the district court acted properly under 18 U.S.C. 3161(h)(8)(B), which permits a continuance when the "ends of justice" so require. Pet. App. 47a-48a. Contrary to Whitfield's claim (Whitfield Pet. 37), that conclusion does not conflict with *United States* v. *Theron*, 782 F.2d 1510 (10th Cir. 1986), a case where an incarcerated defendant objected to any continuance and demanded an immediate trial. *Id.* at 1511. (Whitfield remained free throughout the trial court proceedings.) Nor, contrary to Whitfield's suggestion (Whitfield Pet. 37), did the court below hold that a defendant who consents to one continuance is foreclosed from objecting to any later continuances. Whitfield's real objection is to the court of appeals' factbound determination that the district court's ends-of-justice finding was sufficient to

satisfy Section 3161(h)(8)(B). That claim does not warrant this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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