Nos. 09-167 and 09-182

In the Supreme Court of the United States

RICHARD M. SCRUSHY, PETITIONER

v.

UNITED STATES OF AMERICA

DON EUGENE SIEGELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. In *McCormick* v. *United States*, 500 U.S. 257, 273 (1991), the Court held that, to sustain Hobbs Act extortion convictions based on an official's receipt of campaign contributions in exchange for official action, the payments must be "in return for an explicit promise or undertaking by the official to perform or not to perform an official act." The question presented is whether petitioners' convictions for honest-services mail fraud, bribery, and conspiracy are valid absent an instruction requiring the jury to find, and absent direct proof of, an express agreement to exchange campaign contributions for specific official action.

2. Whether the jury could rationally conclude from the evidence that petitioner Siegelman obstructed justice.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 561 F.3d 1215.[1]

[1] Citations to "Pet." and "Pet. App." refer to the petition and petition appendix in No. 09-167.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2009. Petitions for rehearing were denied on May 14, 2009 (Pet. App. 70a). The petitions for a writ of certiorari were filed on August 10, 2009. 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 Middle District of Alabama, petitioners were convicted of one count of federal-funds bribery, in violation of 18 U.S.C. 666; one count of conspiring to commit honest-services mail fraud, in violation of 18 U.S.C. 371; and four counts of honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner Siegelman was also convicted of one count of obstructing justice, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 2a. The district court sentenced Siegelman to 88 months of imprisonment, to be followed by three years of supervised release, and sentenced petitioner Scrushy to 82 months of imprisonment, to be followed by three years of supervised release. The court also ordered Scrushy to pay a $150,000 fine and $267,000 in restitution. Siegelman Judgment 2-3; Scrushy Judgment 2-5. The court of appeals affirmed Scrushy's convictions, reversed Siegelman's convictions on two mail fraud counts, affirmed his remaining convictions, vacated Siegelman's sentence, and remanded his case for resentencing. Pet. App. 67a.

1. a. In 1998, Siegelman was elected Governor of Alabama. He had campaigned in favor of establishing a state lottery to help fund education. After his election, Siegelman established the Alabama Education Lottery Foundation (AELF) to raise money to campaign for

approval of the lottery by ballot initiative. The initiative appeared on the October 1999 ballot and was defeated. Pet. App. 4a.

Scrushy is the founder and former Chief Executive Officer of HealthSouth Corp., a major hospital corporation with operations throughout Alabama. Under previous governors, Scrushy had served on a state health-care panel—the Certificate of Need Review Board (CON Board)—that determines the number of health-care facilities in the State and therefore was important to Scrushy, HealthSouth, and its competitors. The governor has the sole discretion to appoint and remove members of the CON Board. Pet. App. 2a, 5a; Gov't C.A. Br. 4, 6-7.

Nick Bailey was Siegelman's closest confidential assistant. After the 1998 election, Bailey was present when Siegelman met with Eric Hanson, an outside lobbyist for HealthSouth. Pet. App. 5a-6a. Siegelman told Hanson that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the election, Scrushy needed to "do" at least $500,000 in order to "make it right" with the Siegelman campaign. *Id.* at 6a. Bailey testified that Siegelman was referring to the lottery campaign and that Hanson was to relay this conversation to Scrushy. *Id.* at 5a-6a; Gov't C.A. Br. 8. Bailey also testified that Hanson subsequently told Bailey that Scrushy wanted control of the CON Board and "made it clear to him that if Mr. Scrushy gave the $500,000 to the lottery campaign that [they] could not let him down" with respect to the CON Board seat. Pet. App. 6a. Bailey periodically reminded Siegelman of their conversations "with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board." *Id.* at 7a.

Scrushy told Mike Martin, then Chief Financial Officer of HealthSouth, that to "'have some influence or a spot on the CON Board,'" they would have to help Siegelman raise money for the lottery campaign. Pet. App. 6a. If they did so, Scrushy said, "[they] would be assured a seat on the CON Board." *Ibid.* (brackets in original). Martin testified that "'[they] were making a contribution . . . in exchange for a spot on the CON Board.'" *Ibid.*

Scrushy, however, did not want the contribution to come directly from himself or HealthSouth, so he instructed Martin to ask HealthSouth's investment banker, Bill McGahan of UBS, to make the contribution. Pet. App. 7a. McGahan did not want UBS to make the requested contribution because its size was "out of the norm," but he was pressured into doing so by Martin and Scrushy. *Ibid.* Accordingly, McGahan arranged for one of UBS's clients—Integrated Health Services of Maryland (IHS)—to pay $250,000 to the AELF in exchange for a reduction of $267,000 in the fee that IHS owed UBS. IHS then issued a check payable to the AELF (the IHS check). Scrushy told Martin that it was important that he, Scrushy, hand-deliver the check to Siegelman, so Martin gave the IHS check to Scrushy. *Id.* at 7a-8a.

Siegelman and Scrushy subsequently met in Siegelman's office. Bailey testified that, at some point after the meeting, Siegelman showed Bailey the IHS check and said that Scrushy was "'halfway there.'" Pet. App. 8a. Bailey asked, "'what in the world is he [Scrushy] going to want for that?'" *Ibid.* (brackets in original) . Siegelman replied, "'[T]he CON Board.'" *Ibid.* Bailey responded, "'I wouldn't think that would be a problem,

would it?'" *Ibid.* Siegelman replied, "'I wouldn't think so.'" *Ibid.*; see also Gov't C.A. Br. 12-13, 70 n.18.

On July 26, 1999—one week after the date on the IHS check—Siegelman appointed Scrushy to the CON Board. Through Bailey, Siegelman informed the chair-designate of the CON Board that he wanted Scrushy appointed vice-chair, and the CON Board complied. Pet. App. 8a-9a. Bailey testified that Siegelman made Scrushy vice-chair "'[b]ecause [Scrushy] asked for it.'" *Ibid.* (brackets in original).

Siegelman gave the IHS check to Darren Cline, the AELF's fundraising director, and said that it was from Scrushy. Cline expressed concern about the size of the donation (which he saw as "'colossal'" coming from one person); Siegelman, who "called the shots" on the lottery campaign, told Cline to hold the check. Gov't C.A. Br. 15-16; Pet. App. 4a. After the election, however, at Siegelman's direction, Bailey retrieved the check and, without telling Cline, deposited it in a newly opened checking account in the name of the Alabama Education Foundation (AEF), the AELF's successor. *Id.* at 9a; see also Gov't C.A. Br. 16.

On March 9, 2000, the AEF took out a loan, from the same bank that provided the checking account, in order to pay off debt incurred by the Alabama Democratic Party for get-out-the-vote expenses in connection with the lottery referendum; Siegelman and another individual personally and unconditionally guaranteed the loan to the AEF. At that time, the AEF had over $447,000 in its account, $250,000 of which came from the IHS check. On March 13, 2000, the AEF withdrew $440,000 from the account to pay down its loan. Pet. App. 9a; Gov't C.A. Br. 17-18.

In May 2000, Siegelman and Bailey met privately with Scrushy in Scrushy's office. Scrushy gave Siegelman a HealthSouth check for $250,000 payable to the AEF (the HealthSouth check). On May 23, 2000, the HealthSouth check was applied directly against the balance on the AEF's loan. Pet. App. 10a.

In January 2001, Scrushy resigned from the CON Board. Siegelman immediately appointed HealthSouth Vice-President Thom Carman to serve the remainder of Scrushy's term. He subsequently reappointed Carman to a full term. While Carman was serving on the Board, HealthSouth applied for and obtained Certificates of Need for a mobile PET scanner and a rehabilitation hospital. Pet. App. 9a.

The AEF did not timely disclose receipt of either the IHS or the HealthSouth check. Neither the AEF's preelection disclosure statements for the period including July 19, 1999, nor the AEF's annual report for 1999 disclosed the IHS check, and the AEF filed no disclosure statements for 2000 at all. Thereafter, an Alabama newspaper questioned whether the AEF had properly reported its financial dealings with the state Democratic Party, and the Secretary of State's Office contacted the state Attorney General's Office about the AEF's failure to disclose the payoff of the state party's loan. Subsequently, in July 2002, the AEF filed an amended annual report for 1999 and an annual report for 2000, which disclosed the IHS and HealthSouth checks (and other previously undisclosed contributions). Pet. App. 10a; Gov't C.A. Br. 18-20.

b. Lanny Young was a long-time friend of Siegelman's with various business dealings. Young and Bailey testified that, for many years, Young, Bailey, Siegelman, and Paul Hamrick (Siegelman's chief of staff) had a pay-

for-play agreement whereby Young would provide the others with money, campaign contributions, and other benefits in return for official action, as needed, to benefit Young's business interests. Pet. App. 10a-11a; Gov't C.A. Br. 24-25.

In January 2000, Siegelman asked Young to give him $9200 to buy a motorcycle; Siegelman, in fact, had already purchased the motorcycle for $12,173.35. Siegelman told Young to work out the details of the $9200 payment with Bailey. Young then obtained a cashier's check for $9200 made payable to Bailey and gave it to him. Bailey, in turn, gave Siegelman's secretary a $9200 check payable to Siegelman's wife, which was deposited into Siegelman's account that day. But for the deposit, Siegelman's fourth-quarter income-tax payment would not have cleared. Pet. App. 11a; Gov't C.A. Br. 26-27.

In June 2001, Siegelman was aware that federal and state authorities were investigating his dealings with Young. On June 5, 2001, Bailey wrote Young a check for $10,503.39 bearing the notation "repayment of loan plus interest." Gov't C.A. Br. 28; see Pet. App. 11a. Young and Bailey each testified that the purpose of that check was "to cover it [the $9200 payment] up" by making it appear that Bailey earlier had borrowed the $9200 from Young. Gov't C.A. Br. 28. Bailey testified that he had no intention of buying the motorcycle when he wrote the $10,503.39 check to Young, of which Siegelman knew and approved. *Ibid.* Bailey also wrote a check for $2973.35 to Siegelman bearing the notation "balance due on m/c" to provide a reason for Bailey having borrowed money from Young—to purchase a motorcycle from Siegelman. Pet. App. 11a; see Gov't C.A. Br. 28-29.

Bailey gave Siegelman the $2973.35 check in the presence of his own attorney and Siegelman's. Siegel-

man accepted Bailey's check and gave Bailey a bill of sale for the motorcycle, which the attorneys helped finalize. Neither lawyer was told that the purpose of the transaction was to help cover up the $9200 payment from Young to Siegelman. Bailey testified that he lied about the transaction to the attorneys, that he and Siegelman were aware of the investigation at this time, and that he later lied about the transaction to federal investigators to protect himself and Siegelman. Pet. App. 12a.

2. A grand jury sitting in the Middle District of Alabama returned a second superseding indictment against Siegelman, Scrushy, and others. Of the 34 counts alleged, several related to the CON Board scheme: Siegelman and Scrushy were charged with federal-funds bribery, in violation of 18 U.S.C. 666(a)(1)(B) (Siegelman in Count 3, Scrushy in Count 4);[2] conspiracy to commit honest-services mail fraud, in violation of 18 U.S.C. 371 (Count 5); and honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346 (Counts 6-9). Siegelman was also charged with obstructing justice, in violation of 18 U.S.C. 1512(b)(3) (Counts 16-17), for his role in covering up the $9200 payment from Young to Siegelman. Pet. App. 12a-13a; Second Superseding Indictment 29-36, 39-40. The remaining counts against Siegelman charged him and others with RICO offenses and various other offenses arising from conduct unrelated to the CON Board scheme or the cover-up of the payment. *Id.* at 2-29, 36-39, 41-43.

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[2] The Second Superseding Indictment originally charged Siegelman and Scrushy in both bribery counts (Counts 3 and 4), but before verdict, the district court ordered the government to proceed on only one bribery count as to each defendant. Gov't C.A. Br. 3 n.1.

3. At trial, petitioners requested a *quid pro quo* instruction on, *inter alia*, the counts related to the CON Board scheme. They based their request on *McCormick* v. *United States*, 500 U.S. 257 (1991), in which the Court held that a public official's receipt of campaign contributions is subject to prosecution under the Hobbs Act, 18 U.S.C. 1951, as extortion "under color of official right," 18 U.S.C. 1951(b)(2), "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. "In such situations," the Court explained, "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Ibid*.

The district court supplemented its instructions on the bribery counts as follows: "A defendant does not commit a crime by giving something of value to a governmental official unless the defendant and the official agree that the official will take specific action in exchange for the thing of value." 09-182 Pet. App. 64a. The district court also supplemented its instructions on the honest-services fraud counts by instructing the jury that to convict "you must find not only that the defendants intended to deprive the public of their honest services, but also that they intended to deceive the public and that they intended to alter their official actions as a result of the receipt of campaign contributions or other benefits." *Id.* at 63a. Petitioners objected that the supplemental instructions were inadequate because they did not require the jury to find an express agreement. Trial Tr. 7320-7324, 7329.

On June 29, 2006, the jury found both petitioners guilty on all of the bribery, fraud, and conspiracy to commit fraud counts related to the CON Board scheme,

and it found Siegelman guilty on the obstruction count relating to the $2973.35 check (Count 17). The jury acquitted Siegelman on the remaining counts and acquitted the other two defendants on all counts. Pet. App. 13a. The district court denied petitioners' post-verdict motions for judgment of acquittal and for a new trial. 09-182 Pet. App. 65a-72a.

4. The court of appeals affirmed Scrushy's convictions, reversed Siegelman's convictions on two fraud counts, affirmed his remaining convictions, vacated Siegelman's sentence, and remanded his case for resentencing. Pet. App. 1a-69a.

a. Petitioners contended that the holding of *McCormick*, interpreting the Hobbs Act to require proof of a *quid pro quo*, was equally applicable to their prosecution for bribery, conspiracy, and honest-services mail fraud. They further contended that the district court failed to give an adequate *quid pro quo* instruction. The court of appeals did not definitively resolve whether *McCormick* applies in this context, because "whether or not a quid pro quo instruction was legally required, such an instruction was given." Pet. App. 18a.

The court of appeals noted that the bribery instructions had required the jury to find that petitioners had "*agree[d]*" to exchange "specific action" (the CON Board appointment) for the "thing of value" ($500,000 to the lottery campaign). Pet. App. 18a. The court held that instruction to be adequate and rejected petitioners' contention that the "agreement had to be *express*." *Ibid.* The court relied on *Evans* v. *United States*, 504 U.S. 255 (1992), in which this Court held that a jury instruction that did not require an "express" *quid pro quo*, but did require that acceptance of the campaign contribution be in return for specific official action, satisfied *McCor-*

mick. Pet. App. 18a-19a (discussing *Evans*, 504 U.S. at 258, 268). Here, the instruction that required an agreement covering specific action, the court of appeals explained, prevented prosecution of a campaign contribution based on only a "generalized expectation of some future favorable action." *Id.* at 19a. The court rejected a requirement that the agreement be memorialized in writing or, as petitioners had suggested, "overheard by a third party"; "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*." *Id.* at 20a. The court also stated that "an explicit agreement may be 'implied from [the official's] words and actions.'" *Ibid.* (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment) (brackets in original)).

As to the conspiracy and substantive honest-services counts, the court concluded that any failure to adequately instruct the jury on a *quid pro quo* requirement was harmless in light of the *quid pro quo* instruction on the bribery counts. Pet. App. 21a n.17.

b. The court held that the evidence was sufficient to prove an explicit *quid pro quo*. Pet. App. 22a-26a. The court found that Bailey's testimony about his July 1999 conversation with Siegelman, in which Siegelman showed him the IHS check and stated, *inter alia*, that Scrushy was halfway to $500,000 and wanted an appointment to the CON Board, see p. 4, *supra*, "was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board." Pet. App. 24a. The court also found probative evidence of petitioners' illicit *quid pro quo* in: Bailey's repeated testimony that petitioners had an explicit agreement to exchange money for

a seat on the CON Board; Bailey's testimony about Siegelman's solicitation of the $500,000 payment through Hanson; Martin's corroborating testimony that the contribution was in exchange for the CON Board seat; Martin's testimony that Hanson once bragged about getting HealthSouth a CON Board seat with the help of the IHS check; Cline's testimony that the IHS check was from Scrushy, that "another $250,000 * * * would be coming," and that receipt of the checks was not reported until after the AEF's finances came under scrutiny; McGahan's testimony about Scrushy's solicitation of the first contribution from him; testimony from the HealthSouth lawyer responsible for HealthSouth political contributions that she was told nothing about the $500,000 in contributions; and "the close relationship in time between the first check and Siegelman's appointment of Scrushy" to the CON Board. *Id*. at 25a, 26a; see *id.* at 24a-26a.

c. The court held that the evidence was insufficient to support Siegelman's mail fraud convictions on Counts 8 and 9, which were based on Scrushy's use of the corruptly obtained CON Board seat to further HealthSouth's interests. The court found no evidence from which the jury could infer that Siegelman knowingly had agreed to a scheme to defraud that included, not only his appointment of Scrushy to the CON Board for $500,000, but also Scrushy's self-dealing once on the CON Board. Pet. App. 26a-33a.

d. The court held that the evidence was sufficient to support Siegelman's conviction for obstructing justice. Count 17 alleged two separate bases for Siegelman's violation of 18 U.S.C. 1512(b)(3): that, with intent to hinder, delay, or prevent the communication of information to the FBI about offenses related to the $9200 pay-

ment, Siegelman corruptly persuaded Bailey to write and give him a check for $2973.35 with the false notation "balance due on m/c"; and that Siegelman engaged in misleading conduct toward another person. The court found the evidence sufficient to support conviction under either prong. Pet. App. 36a-44a.

With respect to corrupt persuasion, the court stated that the evidence showed that "Siegelman knew and agreed that Bailey would disguise Young's payment to Siegelman as a loan to Bailey to buy the motorcycle by 'paying back' Young with his own check," and that Siegelman had accepted and cashed the $2973.35 check with the notation that it was the final payment on the motorcycle. Pet. App. 42a. The jury also heard testimony that "Bailey always did what Siegelman asked him to do." *Ibid.* The court found that the jury's decision to acquit Siegelman on Count 16, which charged him with corruptly persuading Bailey to write the $10,503.39 check, showed that the jury had carefully considered the obstruction charges, and had concluded that "by the time Bailey wrote the check to Siegelman for $2793.35 [*sic*], just over four months later, as a final step in the coverup," Siegelman "was directing the coverup by persuading Bailey to write the check to him." *Ibid.*

With respect to misleading conduct, the court found "the evidence * * * more than sufficient to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to 'finalize' the sale of the motorcycle to Bailey was an attempt to 'create witnesses as part of a coverup and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth.'" Pet. App. 43a (quoting *United States* v. *Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998), cert. denied, 526

U.S. 1147 (1999)). The jury reasonably could infer, the court explained, that Siegelman "intended to mislead the lawyer into believing that the transaction was legitimate," *i.e.*, that Bailey had, all along, been purchasing the motorcycle from Siegelman. *Id.* at 44a. "As the 'unwitting third party,'" the court concluded, "the lawyer would be in a position factually to support the cover up since Siegelman clearly knew that there was a 'possibility' that the federal investigators would come asking." *Ibid.*[3]

ARGUMENT

1. Petitioners, supported by Siegelman's amici, renew their argument (Pet. 10-17; 09-182 Pet. 11-23) that *McCormick* v. *United States*, 500 U.S. 257 (1991), requires proof of an "express" *quid pro quo* and that the *quid pro quo* may not be implied from circumstantial evidence. Those contentions lack merit, and the court of appeals' resolution of those issues does not warrant further review.

a. Contrary to petitioners' contentions (Pet. 13-17; 09-182 Pet. 13-16, 20, 22), the decision below does not conflict with that of any other circuit. None of the decisions that petitioners cite supports the proposition that a heightened standard of "explicit" proof is required in campaign-contribution cases. Indeed, as Siegelman effectively concedes (09-182 Pet. 22), the cases on which petitioners rely did not involve campaign contributions at all.

The Ninth Circuit has long since rejected the requirement of a "verbally explicit" *quid pro quo* that peti-

[3] The court of appeals also denied relief on petitioners' remaining claims, none of which petitioners present here. See Pet. App. 34a-35a, 44a-66a.

tioners urge here. *United States* v. *Carpenter*, 961 F.2d 824, 827 (9th Cir.), cert. denied, 506 U.S. 919 (1992). In reviewing the sufficiency of the evidence supporting a state senator's conviction for accepting and soliciting campaign contributions, *id.* at 825, the Ninth Circuit explained (even before *Evans* v. *United States*, 504 U.S. 255 (1992)) that "what *McCormick* requires is that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain." *Id.* at 827. Moreover, "[t]he jury may consider both direct and circumstantial evidence, including the context in which a conversation took place, to determine if there was a meeting of the minds on a quid pro quo." *Ibid.* *Carpenter* makes clear that in the Ninth Circuit, the understanding between official and contributor "need not be verbally explicit." *Ibid.*

Since the petitions were filed, the Ninth Circuit has confirmed that it adheres to *Carpenter*. That court recently reiterated: "An official may be convicted without evidence equivalent to a statement such as: 'Thank you for the $10,000 campaign contribution. *In return for it*, I promise to introduce your bill tomorrow.'" *United States* v. *Inzunza*, 580 F.3d 894, 900 (2009). Rather, "the proof may be circumstantial." *Id.* at 901. The Eleventh Circuit's holding that an explicit agreement for a public official to exchange specific action for a campaign contribution can be established even if not shown to be express, Pet. App. 17a, is fully consistent with the Ninth Circuit's description of the requirements for an explicit *quid pro quo*.

The decision in *United States* v. *Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), petition for cert. pending, No. 09-5076 (filed June 29, 2009), does not announce a different rule for campaign-contribution cases. In-

deed, as noted above, *Kincaid-Chauncey* did not involve campaign contributions at all. See *id.* at 927-929.[4] Siegelman's suggestion (09-182 Pet. 22) that dictum in *Kincaid-Chauncey* could nonetheless justify review on the theory that it might deter prosecution in future campaign-contribution cases is without merit, as the subsequent decision in *Inzunza* illustrates.

Similarly, the Second and Sixth Circuit decisions that petitioners cite do not establish any conflict. Those cases, like *Kincaid-Chauncey*, did not involve campaign contributions. See *United States* v. *Abbey*, 560 F.3d 513, 515, 518 (6th Cir. 2009), petition for cert. pending, No. 09-5496 (filed July 20, 2009); *United States* v. *Ganim*, 510 F.3d 134, 137-140 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 128 S. Ct. 1911 (2008). Although each case made passing references to the campaign-contribution context, those references were dicta; neither case can be read to establish a heightened "express" standard in that context. And both cases seemed to base the contrast between campaign-contribution cases and cases involving other types of payments on whether there must be an explicit promise to perform a "particular act" (*Ganim*, 510 F.3d at 144) or "particular, identifiable act" (*Abbey*, 560 F.3d at 518) at the time of payment in a campaign-contribution context, as opposed to the official's understanding that he was expected to benefit the payor "as specific opportunities arose" (*Ganim*, 510 F.3d at 144; *Abbey*, 560 F.3d at 518) in cases involving other types of gifts or payments. There can be no doubt in

[4] Kincaid-Chauncey testified at trial that one of the four cash payments she received was a campaign contribution to pay debts incurred by her son's unsuccessful campaign for city council, but she appealed only the district court's treatment of payments that were *not* contributions. See 556 F.3d at 928, 938, 944 n.16.

this case that petitioners had to "*agree* that the official will take *specific* action in *exchange* for the thing of value," Pet. App. 18a-19a, thus satisfying any specificity requirement that *Ganim* or *Abbey* might imply.[5]

Thus, because the Ninth Circuit agrees with the Eleventh Circuit that an explicit agreement can be inferred from circumstantial evidence, and because the statements by the Second and Sixth Circuits on which petitioners rely are dictum and appear to address a distinct issue, this case presents no conflict that might warrant review by this Court.

b. The court of appeals correctly concluded that the district court was not required to instruct the jury that it could convict only if the government proved an "explicit *quid pro quo*," by which petitioners mean "an actual communication from the official, promising the action in exchange for the contribution," 09-182 Pet. 7, or "articulated commitments, not inferences or implications," Pet. 10. That decision is consistent with this Court's decisions and does not warrant further review.

Petitioners rely entirely on a single word in the Court's opinion in *McCormick*: the reference to a political contribution "made in return for an *explicit* promise

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[5] Siegelman's amici (Former AGs' Br. 17) also cite *United States* v. *Antico*, 275 F.3d 245, 257 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002), and *United States* v. *Taylor*, 993 F.2d 382, 385 (4th Cir.), cert. denied, 510 U.S. 891 (1993). *Antico*, like the Second and Sixth Circuit decisions discussed above, did not involve campaign contributions, see 275 F.3d at 249-254, 258, and the court of appeals "echo[ed] the Supreme Court's satisfaction with an implicit *quid pro quo* requirement." *Id.* at 258. In *Taylor*, which did involve campaign contributions, the jury had been instructed that "'[t]here need be no specific *quid pro quo*'" at all, which was erroneous under *McCormick* without regard to the standards by which the government *might* have proved a *quid pro quo*. 993 F.2d at 385.

or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273 (emphasis added). Even read in isolation, that sentence does not address the manner in which an agreement is to be proved at trial. Indeed, in *McCormick* there had been no instruction to find a *quid pro quo* at all, "explicit" or otherwise, *id.* at 274, and the government agreed that if the payments to McCormick were properly regarded as campaign contributions (as the lower court had held they should not be, *id.* at 271-272, 274-275) then proof of a *quid pro quo* would be required. *Id.* at 273. Thus, as the Court has subsequently made clear, *McCormick* does not impose petitioners' desired requirement (Pet. 9) that the *quid pro quo* be proved by "direct evidence."

One year after *McCormick*, this Court elaborated on the *quid pro quo* requirement in *Evans*, *supra*. Evans, a county commissioner, accepted $8000 purportedly as a contribution to his reelection campaign, "knowing that it was intended to ensure that he would vote in favor of the [donor's] rezoning application and that he would try to persuade his fellow commissioners to do likewise." *Id*. at 257. The Court held that Evans's violation of the Hobbs Act was complete when Evans "receive[d] a payment in return for his agreement to perform specific official acts," *id.* at 268; the government did not have to prove that Evans initiated the transaction or that he carried out his part of the *quid pro quo*. *Id.* at 265-268.

Evans had also challenged a jury instruction on the ground that it failed to "properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." 504 U.S. at 268. The Court held that the instruction, similar to the one here, "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Ibid.* The instruction provided:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258 (second brackets in original). The Court upheld the instruction because "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Ibid.*

The court of appeals correctly concluded (Pet. App. 18a-21a) that the bribery instructions comported with *McCormick* and *Evans* by requiring the jury to find that petitioners "agree[d]" that Siegelman would take "specific action" in exchange for the $500,000 contribution from Scrushy. 09-182 Pet. App. 64a. That language materially tracked the instruction approved in *Evans*. By requiring a meeting of the minds covering the specific terms of the exchange, the instruction prevented conviction based on a finding that the $500,000 was given or received with only an *expectation* of future official action by Siegelman benefitting Scrushy—a scenario allowed by the flawed instructions in *McCormick*, 500 U.S. at 261 n.4.[6] As the court of appeals explained, under *Evans*, "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no

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[6] In light of the court of appeals' holding that an agreement covering specific action is required, amici's contention (Former AGs' Br. 13) that the standard applied below would permit conviction "whenever [an official] performs an official act and the prosecution presents evidence that he accepted a contribution from a donor who desired that such act take place" is wrong.

requirement that it be *express*." Pet. App. 20a; accord, *e.g.*, *United States* v. *Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("Explicit, as explained in *Evans*, speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated."), cert. denied, 514 U.S. 1095 (1995).

The court of appeals was likewise correct in concluding that the jury could rely on circumstantial evidence of an agreement to exchange money for specific official action. See Pet. App. 24a ("Inferring actors' states of mind from the circumstances surrounding their conversation, from their actions, and from their words spoken at the time is precisely the province of the jury."). As Justice Kennedy stated in *Evans*:

> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Evans, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment); accord *McCormick*, 500 U.S. at 270 ("It goes without saying that matters of intent are for the jury to consider."). In rejecting a vagueness challenge to a statute, this Court recently reaffirmed that "courts and juries every day pass upon knowledge, belief and intent—the state of men's minds —having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008) (quoting

American Commc'ns Ass'n v. *Douds*, 339 U.S. 382, 411 (1950)).

Petitioners' and amici's attempts to distinguish *Evans* (Pet. 11-12; 09-182 Pet. 12-13, 17; Former AGs' Br. 13-14) are unavailing. First, Scrushy incorrectly asserts (Pet. 11) that "*Evans* was not a campaign contribution case." In fact, Evans contended that all of the payments were contributions (even reporting one as such); the instructions required the jury to apply the same standard regardless of whether they were contributions; and this Court assessed the adequacy of the instruction under *McCormick*. See *Evans*, 504 U.S. at 257-258, 267-268; see also *id*. at 278 (Kennedy, J., concurring in part and concurring in the judgment) ("Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies *not only* in campaign contribution cases, but in all § 1951 prosecutions.") (emphasis added).

Nor can petitioners distinguish *Evans* on the theory that the primary question presented was whether an affirmative act of inducement (such as a demand) by a public official is an element of extortion under color of official right. See Pet. 12; 09-182 Pet. 12-13; Former AGs' Br. 14. Evans directly challenged the adequacy of the jury instructions under *McCormick* on the ground that passive acceptance of a campaign contribution based on a specific requested exercise of official power is not a *quid pro quo* unless the official complies or attempts to comply with the request. Pet. Br. at 23, 46-47, *Evans*, *supra* (No. 90-6105). Rejecting that challenge, the Court concluded that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Evans*, 504 U.S. at 268. It is doubtful that the Court would have so clearly approved the instruction in *Evans* if, in fact, the

instruction was flawed under the standard announced just one Term earlier in *McCormick*. And, by clarifying that "knowing that the payment was made in return for official acts" is enough," *Evans* "gave content to what the *McCormick quid pro quo* entails." *Blandford*, 33 F.3d at 696.

c. Contrary to the suggestions of petitioners and amici (Pet. 12-13; 09-182 Pet. 19-20; Former AGs' Br. 19-20), the decision below does not "open to prosecution" the ordinary giving and receiving of campaign contributions. *McCormick*, 500 U.S. at 272. The requirement that the official and payor *agree* to exchange a contribution for *specific* action precludes liability from attaching to contributions made and received with only a generalized expectation of future official action; it therefore "defines the forbidden zone of conduct with sufficient clarity." *Id*. at 273; see *Carpenter*, 961 F.2d at 827 ("When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond 'anticipation' and into an arrangement that the Hobbs Act forbids."). Moreover, as discussed above, a jury is fully capable of determining, based on direct or circumstantial evidence, whether a public official and a payor have entered into an agreement to exchange specific action for a contribution. See, *e.g.*, *Inzunza*, 580 F.3d at 901 ("The circumstances of the promises, including their covert nature, their detail, and the deception in carrying them out, were such that the jury could connect them causally to campaign contributions privately made at or near the same time.").

By contrast, a rule requiring an "express" promise or undertaking between the payor and the official would allow the evasion of criminal liability through "knowing

winks and nods," *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment), even where (as the jury found here) the parties had a meeting of the minds and agreed to exchange money for official action. See also, *e.g.*, *Carpenter*, 961 F.2d at 827. Under a standard that requires not just a *quid pro quo*, but one that is verbally spelled out with all "i"s dotted and "t"s crossed, all but the most careless public officials will be able to avoid criminal liability for exchanging official action for campaign contributions.

Finally, the facts of this case do not bear out Siegelman's and amici's concerns that without an express *quid pro quo* standard, First Amendment activity will be chilled or arbitrary or unjust prosecutions will result. 09-182 Pet. 19-20; Former AGs' Br. 19-27. The evidence amply proved not only that petitioners (through Hanson) negotiated an agreement to exchange $500,000 in contributions to the lottery campaign for membership on the CON Board, but that they understood and faithfully executed the agreement's terms. See Pet. App. 22a-26a; see also pp. 2-7, *supra*. Petitioners also took steps to conceal their corrupt agreement. For example, Scrushy structured the first $250,000 payment to come from a third party (ultimately, an out-of-state corporation) and hid both payments from the HealthSouth lawyer responsible for political donations, while Siegelman had Bailey deposit the first $250,000 check into a secretly opened bank account (unbeknownst to the lottery fundraising director), and failed to report either payment until the AEF's finances came under scrutiny. See Pet. App. 7a-10a, 25a-26a. Those acts of concealment corroborate the jury's finding that petitioners acted with corrupt intent and knowledge that their conduct was

illegal. See, *e.g.*, *United States* v. *McDowell*, 250 F.3d 1354, 1366-1367 (11th Cir. 2001).[7]

d. Even if this case otherwise warranted review to address the courts of appeals' interpretation of *McCormick*, this case would present a poor vehicle because it would require this Court to decide a threshold question, and to answer that question in a way that no court of appeals has yet done, including the court below. The court of appeals assumed, but did not decide, that *McCormick*'s *quid pro quo* standard, announced under the Hobbs Act's proscription of extortion under color of official right, 18 U.S.C. 1951(a) and (b)(2), applies to prosecutions under the federal-funds bribery and honest-services fraud statutes. See Pet. App. 18a ("[W]hether or not a quid pro quo instruction was legally required, such an instruction was given"); *id.* at 21a ("*assuming* a *quid pro quo* instruction was required in this case, we find no reversible error").

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[7] Siegelman also challenges (09-182 Pet. 23 n.6) the sufficiency of the *quid pro quo* evidence. This Court ordinarily will not review the fact-bound question whether the evidence was sufficient in a particular case, particularly once that claim has been rejected by both the trial court and the court of appeals. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). Regardless, the court of appeals correctly held that the evidence was sufficient to prove petitioners' *quid pro quo*. See Pet. App. 22a-26a. Indeed, the care with which the court of appeals undertook its sufficiency review is evidenced by its reversal of two of Siegelman's counts of conviction. See *id.* at 26a-33a. And the court of appeals applied the correct standard of review—"whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt," *United States* v. *Powell*, 469 U.S. 57, 67 (1984)—contrary to Siegelman's unsupported contention (09-182 Pet. 23 n.6) that the First Amendment requires both reading an explicit *quid pro quo* element into each statute *and* reviewing the sufficiency of proof of that element *de novo*.

Both of the substantive statutes at issue here contain a scienter element different from the Hobbs Act's: federal-funds bribery required proof that petitioners acted "corruptly," 18 U.S.C. 666(a)(1)(B), and honest-services fraud required proof that petitioners acted with the intent to defraud, *i.e.*, "knowingly and with the specific intent to deceive someone," Gov't C.A. Br. 62. No court has specifically addressed whether *McCormick* applies to those statutes. The Ninth Circuit has specifically held that *McCormick* does not apply to a state bribery statute, and it rejected the contention that the First Amendment invariably requires an explicit *quid pro quo* instruction in campaign contribution cases. *United States* v. *Jackson*, 72 F.3d 1370, 1374-1376 (1995), cert. denied, 517 U.S. 1157 (1996); see also, *e.g.*, *United States* v. *Ford*, 435 F.3d 204, 209, 212-213 & n.5 (2d Cir. 2006) (contrasting the mens rea requirements under the federal-funds bribery statute and the Hobbs Act).[8]

At a minimum, *McCormick*'s application to the federal funds bribery and honest-services fraud statutes presents a significant threshold question. The court of appeals properly did not address that question in affirming petitioners' convictions; to win *reversal* based on the

[8] Siegelman cites (09-182 Pet. 20 n.4) the Seventh Circuit's observation in *United States* v. *Allen*, 10 F.3d 405 (7th Cir. 1993), that extortion and bribery are "different sides of the same coin." *Id.* at 411. But the Seventh Circuit did not even consider the federal bribery statute, much less decide that *McCormick* controlled its interpretation: the defendant had been charged with a RICO violation with a *state* bribery offense as a predicate act, but he was acquitted, mooting the questions whether Indiana law would apply the same statutory-construction principle as *McCormick* and, if so, whether it would do so in the bribery context. The court of appeals specifically noted that it was not answering those questions. *Id.* at 411-412.

lack of a *quid pro quo* jury instruction, however, petitioners would have to prevail both on the question presented and on the threshold question. And in the absence of any conflict on either question, further review is not warranted.[9]

2. Siegelman contends (09-182 Pet. 23-29) that the evidence was insufficient to support his conviction for obstructing justice because it allegedly did not prove his intent to "hinder, delay, or prevent the communication to a law enforcement officer * * * of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(b)(3). That fact-bound contention lacks merit.

a. As a preliminary matter, this case stands in an interlocutory posture as to Siegelman.[10] The court of

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[9] Siegelman cursorily contends (09-182 Pet. 23 n.6) that, even if this Court agrees with the *quid pro quo* standard applied below, it should reverse his convictions "based on due process fairness and notice concerns" because "he could not have known that the law allowed conviction without an actually-stated express *quid pro quo*." See also Law Professors' Br. 14-15. The evidence of concealment, and hence of scienter, factually undermines Siegelman's claim. See, *e.g.*, *Williams*, 128 S. Ct. at 1846 (scienter element refutes claim that statute is indeterminate and vague). Furthermore, to the extent Siegelman now contends that the federal-funds bribery statute is unconstitutionally vague, he failed to preserve any such claim below. See Siegelman C.A. Br. 43-47.

Although the Court is considering a vagueness challenge to the honest-services statute in *Skilling* v. *United States*, cert. granted, No. 08-1394 (Oct. 13, 2009), the petitioner's contention in that case is that a private-gain requirement is necessary to save the statute from unconstitutional vagueness. Because the element of private gain is unquestionably met here, there is no need to hold Siegelman's petition pending the disposition of *Skilling*.

[10] Because the court of appeals affirmed all of Scrushy's convictions, and because both petitioners raise issues concerning *McCormick*, the

appeals reversed Siegelman's conviction on two fraud counts, vacated his sentence, and remanded his case to the district court for resentencing on the remaining five counts. And Siegelman has filed a new-trial motion in the district court attacking his convictions, including the obstruction count. Following the district court's final disposition of the case, petitioner will be able to raise his current obstruction claim—together with any other claims that may arise during resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Review at this time is not warranted.

b. In any event, the court of appeals correctly concluded that the evidence was sufficient to support Siegelman's conviction. That fact-bound determination does not warrant further review. See 09-182 Pet. 28 (conceding that court of appeals' alleged error "was perhaps" not "a conscious disagreement on a reasonably disputable point of law").

The crux of Siegelman's claim in his opening brief on appeal was that the evidence did not prove either that he corruptly "persuaded" Bailey to write the $2973.35 check to Siegelman with the notation "balance due on m/c," or that he engaged in "misleading" conduct toward a third party. See Siegelman C.A. Br. 61-68. Only at the end of, and in connection with, his misleading-conduct argument did Siegelman challenge the evidence proving his intent to hinder, delay, or prevent the communication of information to law enforcement. *Id.* at 68-69; see also *id.* at 25-26 (omitting any contention in summary of

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interlocutory posture of Siegelman's case does not present an obstacle to this Court's review of the first question presented.

the argument that evidence was insufficient to prove statutory intent element).[11] Rejecting his sufficiency claim, the court of appeals held, first, that "[a] reasonable juror could have concluded that Siegelman persuaded Bailey (he asked and Bailey agreed) to take the final step in the cover up by giving him a $2793.35 [*sic*] check with the notation that it was final payment for the motorcycle." Pet. App. 41a. The court also found sufficient evidence "to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to 'finalize' the sale of the motorcycle to Bailey" satisfied the misleading-conduct prong of Section 1512(b)(3), because it proved "an attempt to 'create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth.'" *Id.* at 43a (quoting *United States* v. *Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999)).[12]

The court's reference to the evidence that Siegelman and Bailey were engaged in a "cover up" and were using third parties "to deflect" the efforts of investigators reflects the court's conclusion that the evidence was suffi-

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[11] In his reply brief, Siegelman argued in more detail that the evidence did not prove his intent to "hinder, delay, or prevent" communications to law enforcement, but did so almost exclusively in connection with the misleading-conduct prong of the statute. See Siegelman C.A. Reply Br. 30-36 (misleading-conduct argument); *id.* at 28 (corrupt-persuasion argument; summarily contending that there was no evidence of "the intent that the statute proscribes").

[12] Siegelman contends that the evidence was insufficient to prove that he "persuaded" Bailey to write the check or misled Bailey's lawyer, but does not contend that the sufficiency of that evidence independently warrants a grant of certiorari. See 09-182 Pet. 24.

cient to permit the jury to find that Siegelman intended to hinder, delay, or prevent the communication of information about the $9200 payment to law enforcement. The purpose of any cover-up is to frustrate ascertainment of the truth about a crime. And here, the jury heard testimony that Siegelman was aware of the criminal investigation into his dealings with Young when he persuaded Bailey to write the $2973.35 check and that the $2973.35 check was the final step in the plan to make the $9200 payment from Young appear legitimate. Pet. App. 38a-39a. As the court of appeals found, "Siegelman clearly knew that there was a 'possibility' that the federal investigators would come asking." *Id.* at 44a. The jury reasonably could have found that, by creating false exculpatory evidence (the $2973.35 check with the notation "balance due on m/c") and an unwitting alibi witness (Bailey's lawyer), Siegelman intended to hinder, delay, or prevent the communication by Young, Bailey, or Bailey's lawyer of information related to the $9200 payment to investigators.[13] Indeed, Bailey testified that he later lied to investigators about the motorcycle transaction in order "to protect [him]self and [his] boss." *Id.* at 40a-41a.[14]

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[13] The indictment alleged that Siegelman intended to hinder, delay, and prevent the communication of information by Young, Bailey, and Bailey's lawyer.

[14] Contrary to Siegelman's contention (09-182 Pet. 23), the government did argue on appeal that the evidence supported a finding of intent within the language of the statute. See Gov't C.A. Br. 94-95 ("Siegelman's intent was to hinder, delay, or prevent the communication to law enforcement concerning a potential federal offense because, as Bailey testified, Siegelman was then aware of the federal-state investigation and the $2,973.35 transaction was the final step in the cover-up.").

Siegelman contends that the intent prong of Section 1512(b)(3) is limited to a defendant's "efforts to stop or keep people * * * from providing information to law enforcement, or at least to slow them down," 09-182 Pet. 25, and that the jury allegedly heard no evidence that Bailey or his lawyer would have been willing to provide inculpatory information to law enforcement, *id.* at 26-27. Those arguments are misplaced. First, Siegelman effectively reads the term "hinder" out of Section 1512(b)(3). Whether or not Siegelman believed that Young or Bailey (or Bailey's lawyer, on behalf of Bailey) would have communicated information about the $9200 payment on his own initiative, the jury reasonably could have found that, by engaging with Young and Bailey in a cover-up, Siegelman intended to hinder their communication of information to law enforcement, because the $2973.35 transaction locked in Siegelman's, Bailey's, and Young's cover story about the $9200 payment. Indeed, Siegelman even tried to use the cover-up to his advantage at trial by introducing the bill of sale for the motorcycle. Pet. App. 44a n.25.

Second, even under Siegelman's view of the statute, the jury reasonably could have found that he was aware of the possibility that Young or Bailey might become a cooperating witness—as each one ultimately did—and might (with the support of a lawyer) provide inculpatory information to investigators. See *United States* v. *Romero*, 54 F.3d 56, 62 (2d Cir. 1995) (holding that under Section 1512(a)(1)(C), which criminalizes murder with intent to prevent communication to law enforcement, government need only show defendant's "intent to frustrate the individual's *possible* cooperation with federal authorities"; "victim need not have agreed to cooperate with any federal authority or even to have evinced

an intention or desire to so cooperate") (emphasis added), cert. denied, 517 U.S. 1149 (1996); cf. *Veal*, 153 F.3d at 1251-1252 (requiring only a "*possibility* or *likelihood* that * * * false and misleading information would be transferred to federal authorities").

Finally, with respect to Siegelman's use of an unwitting third party (Bailey's lawyer) as a conduit for the false evidence, the jury reasonably could have found that Siegelman intended to "hinder, delay, or prevent" the lawyer from communicating information about the $9200 payment to law enforcement by giving the lawyer a false understanding of events so that he "would be in a position factually to support the cover up" when investigators came calling. Pet. App. 44a. See *United States* v. *Applewhaite*, 195 F.3d 679, 683, 686-688 (3d Cir. 1999) (upholding Section 1512(b)(3) conviction that was based on attempt to hinder communication to law enforcement by persuading third party who was not involved in underlying crime to provide false alibi); see also *Veal*, 153 F.3d at 1247 (holding that Section 1512(b)(3) covers "activities designed to create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement"). The court of appeals' fact bound conclusion that the evidence was sufficient to support Siegelman's conviction was correct and does not warrant review.

c. Neither case cited by Siegelman conflicts with the decision below. See 09-182 Pet. 26, 28 (citing *United States* v. *Genao*, 343 F.3d 578 (2d Cir. 2003), and *United States* v. *Hertular*, 562 F.3d 433 (2d Cir. 2009)). In *Genao*, the court stated that Section 1512(b)(3) "requires a specific intent to interfere with the communication of information," and it held that the indictment was deficient for failing to allege "why [the defendant] lied

to the investigators." 343 F.3d at 586. Here, the indictment (which Siegelman does not challenge) tied the statutory intent element to the $9200 payment, and the evidence proved Siegelman's intent as alleged. In *Hertular*, the court found sufficient evidence to support the defendant's conviction under Section 1512(b)(3) because it proved his "specific intent * * * to hinder or prevent not simply the filing of an indictment but any communication to or among federal law enforcement officials that could lead to his indictment." 562 F.3d at 433. The same conclusion applies here. Siegelman's intent was not generally to avoid indictment for the $9200 payment from Young; the purpose of creating false evidence and an alibi witness was to hinder, delay, or prevent the communication of *any* incriminating information if "the federal investigators [came] asking." Pet. App. 44a. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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