No. 99-141

In the Supreme Court of the United States

JACKIE R. MATTISON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in excusing a juror it observed sleeping during closing argument.

2. Whether the district court committed plain error in instructing the jury regarding the requirements for establishing a violation of a New Jersey illegal gratuity statute, N.J. Stat. Ann. § 2C:27-6 (West 1995).

3. Whether the jury was properly instructed on the charge of extortion under color of official right (18 U.S.C. 1951).

4. Whether, in a prosecution of a public official on charges of mail fraud and wire fraud involving a scheme to defraud the public of its intangible right to honest services, the district court erred in declining to instruct the jury that the government must show that "actual harm or injury" was contemplated by the public official.

5. Whether the district court erred in admitting evidence that $157,000 in cash was found in the home of petitioner's girlfriend.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 173 F.3d 225. The memorandum opinions and orders of the district court (Pet. App. 18a-25a, 35a-38a, 39a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a-46a) was entered on April 19, 1999. The petition for a writ of certiorari was filed on July 19, 1999. 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 District of New Jersey, petitioner was convicted of four counts of bribery concerning programs receiving federal funds, in violation of 18 U.S.C.

666(a)(1)(B), of conspiring to commit that offense, in violation of 18 U.S.C. 371, of extortion under color of official right, in violation of 18 U.S.C. 1951, of six counts of using a facility in interstate commerce to distribute the proceeds of an unlawful activity and to carry on an unlawful activity, in violation of 18 U.S.C. 1952(a)(1) and (a)(3), and of seven counts of wire fraud and mail fraud, in violation of 18 U.S.C. 1341 and 1343. Pet. App. 26a-27a; C.A. App. 26-52. Petitioner was sentenced to 41 months' imprisonment, to be followed by a term of three years' supervised release, and fined $25,000. Pet. App. 26a-33a. The court of appeals affirmed. *Id.* at 1a-17a.

1. Petitioner was Chief of Staff for Sharpe James, the Mayor of the City of Newark, between 1987 and early 1996; he was also a New Jersey State Assemblyman during that period. Pet. App. 2a. As Chief of Staff, petitioner acted as the Mayor's liaison between the City's Business Administrator and its department heads, ran the Mayor's office and agencies, served as liaison with the city council, boards and commissions, and acted as the Mayor's representative at business meetings. *Ibid.*

This case arises out of petitioner's decision to provide co-defendant William Bradley, an insurance broker and financial consultant, with official favors in connection with Bradley's role as a consultant for two companies, Great West Assurance Company (Great West) and Corroon & Black (Corroon), that were seeking contracts with the City. Pet. App. 3a. In return for those favors, petitioner received a series of corrupt payments from Bradley. *Ibid.* The City chose Great West as a provider of deferred compensation plans for City employees, and the Newark Board of Education chose

Corroon to provide insurance with Bradley as its minority subcontractor. *Ibid.*

The evidence at trial showed that, when Great West was seeking a contract to provide the City's deferred compensation plan, petitioner referred Bradley to Great West; Bradley then became Great West's consultant. Bradley indicated to Great West that petitioner would aid it in winning the contract, which he did. Petitioner furnished Bradley with information useful to Great West in seeking the contracts and acted to ensure that a potential competitor would not offer a competing deferred compensation plan to the City. Pet. App. 4a.

The pattern with respect to Corroon was similar. The Newark Board of Education was selecting an insurance plan to cover its buildings and other property. Under the applicable rules, proposed bidders were required to have a minority contractor participating with it. Petitioner recommended Bradley to Corroon for that role. Corroon paid Bradley an unusually high commission, but Bradley did little work to earn it. A search of Bradley's office revealed correspondence addressed to petitioner, some confidential, pertaining to the Board of Education contract. Corroon secured the contract in 1990. After Corroon obtained the contract, however, it became apparent that Bradley was unable to obtain minority certification and lacked malpractice insurance necessary for him to comply with the contract; Corroon stopped payment on a check to Bradley as a result. Petitioner intervened in the matter and Corroon paid Bradley his commission. Pet. App. 5a.

During the relevant time period, Bradley paid petitioner a total of $16,872.50. Pet. App. 4a. Bradley made two payments directly to petitioner—a check for $4457.50 in September 1990 and a check for $1640 in

January 1991. *Id.* at 3a. Bradley also made three indirect payments to petitioner between 1992 and 1994, each in the amount of approximately $3600, by writing checks to petitioner's long-term girlfriend, Janice Williams. *Id.* at 3a-4a. Petitioner did not reveal his receipt of any of Bradley's payments on the financial forms he was required to file by reason of his public positions. *Id.* at 4a.

2. After the jury found him guilty and the court sentenced him, petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-17a.

a. On appeal, petitioner argued that the district court abused its discretion in allowing the government to impeach the testimony of Janice Williams, petitioner's girlfriend, by introducing evidence that $157,000 in cash was found in her attic in 1995. Pet. App. 8a-10a. The government had called Williams as a witness after granting her immunity. *Id.* at 9a. Williams, however, testified favorably for petitioner. She claimed that the checks Bradley wrote her were loans to her, not payments to petitioner; she further testified that, in 1991, she loaned her father the proceeds of Bradley's first $3600 loan. *Id.* at 5a, 9a. Williams also testified that she had found the $157,000 in her father's house a year after his 1994 death. Gov't C.A. Br. 20.

The court of appeals held that the government "had a legitimate reason to offer the evidence" of the $157,000 "to attack Williams' credibility." Pet. App. 10a. It noted: (1) that if Williams' father had so much money, he would not have borrowed money from Williams in 1991; (2) that the evidence of the money impeached Williams' testimony that Bradley's three payments to her were loans because Williams did not repay Bradley when she found the $157,000; and (3) that the $157,000 suggested that Williams had testified falsely when she

claimed that she had withdrawn $3500 in cash from her bank account for her father in February 1992. *Id.* at 9a-10a. The prosecution, moreover, did not suggest to the jury that there was a connection between petitioner and the $157,000, and the jury was instructed that the evidence of the $157,000 was admitted only to impeach Williams. Under those circumstances, the court of appeals concluded, the admission of the evidence was not an abuse of discretion. *Id.* at 10a.

b. The court of appeals also rejected petitioner's argument that the district court erred in dismissing juror Ella Jefferson after the court and its law clerk saw Jefferson sleeping during the summations of counsel. Pet. App. 10a-12a. Noting that a trial court may dismiss jurors pursuant to Rule 24(c) of the Federal Rules of Criminal Procedure if they "become or are found to be unable or disqualified to perform their duties," the court of appeals agreed that it was not an abuse of discretion to dismiss the sleeping juror as unable to serve. *Ibid.*

c. The court also rejected petitioner's argument that the instruction pertaining to the Hobbs Act charge of extortion under color of official right, in violation of 18 U.S.C. 1951, was incorrect. Pet. App. 12a-16a. Petitioner argued that the instruction erroneously omitted a requirement that the government prove the existence of an "express agreement." The instruction given by the district court, the court of appeals held, was consistent with *Evans* v. *United States*, 504 U.S. 255 (1992). There, this Court held that proof of extortion under color of official right under the Hobbs Act requires "only" a "show[ing] 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." Pet. App. 14a (quoting *Evans*, 504 U.S. at 268).

d. Finally, the court of appeals rejected petitioner's additional arguments, without further discussion, as clearly without merit. Pet. App. 16a-17a.

ARGUMENT

1. Petitioner first contends that the district court violated his due process rights by removing alternate juror Ella Jefferson from the jury before deliberations.[1] Pet. 5-15. That fact-bound claim does not warrant further review.

As the court of appeals held, the fact that Jefferson was sleeping during closing arguments was "a legitimate basis to dismiss Jefferson." Pet. App. 11a. Rule 24(c) of the Federal Rules of Criminal Procedure permits a district court to excuse jurors who "become or are found to be unable or disqualified to perform their duties." Courts have agreed that Rule 24(c) authorizes the removal of jurors who sleep through important portions of the trial. Pet. App. 11a-12a. See, *e.g.*, *United States* v. *Warner*, 690 F.2d 545, 555 (6th Cir. 1982); *United States* v. *Smith*, 550 F.2d 277, 285 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Cameron*, 464 F.2d 333, 335 (3d Cir. 1972).

a. Petitioner does not dispute that a district court may properly exercise its discretion to excuse a juror who has slept during closing arguments. Nor does he dispute that, in a detailed memorandum explaining its reasons for dismissing juror Jefferson, the district court expressly stated that it was dismissing her for sleeping

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[1] Jefferson is identified by petitioner as "Alternate Juror Number 1." Pet. 5-11. Although Jefferson was an alternate juror, other jurors were excused and the court of appeals decided the case under the assumption that she would have deliberated if she had not been removed by the district court. See Pet. App. 8a.

during the trial.[2] Petitioner argues, however, that the trial court's real reason for disqualifying juror Jefferson was that she may have "expressed an opinion and had discussed her view of the case with other jurors." Pet. 10-11. If Jefferson's opinions or statements were the real ground for her removal, petitioner argues, the district court was required to conduct an inquiry into those alleged statements. Pet. 10-15 (citing *United States* v. *Resko*, 3 F.3d 684 (3d Cir. 1993)). That fact-bound claim of pretext, however, was properly rejected by the court of appeals, Pet. App. 11a, in light of the abundant record evidence and specific factual findings showing that juror Jefferson was removed for sleeping during trial, see note 2, *supra*.

b. Petitioner also suggests (Pet. 12) that the district court erred in relying on its law clerk's observation that Jefferson slept during closing arguments. The district court, however, did not base its decision on ex parte communications with its law clerk. Rather, the law clerk testified at a hearing and was subject to cross-

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[2] In its memorandum opinion, the district court noted that government counsel had reported seeing Jefferson sleeping during the trial, and that the court's law clerk had testified that she too saw Jefferson sleeping and snoring during the government's closing argument. Pet. App. 37a. The district court reported that it observed Jefferson sleeping during the summations of defense counsel later on. *Ibid.* The district court expressed concern that Jefferson "may very well not have been following the testimony" and found that "[t]here is no question that she was not following the closing arguments." *Ibid.* The district court therefore ruled that Jefferson would be excused pursuant to Rule 24(c) as "unable to effectively perform her duty as a juror due to her napping during the argument." *Id.* at 38a. Because Jefferson was excused on that ground, the district court expressly declined to address "whether Ms. Jefferson had previously made up her mind on any of the issues in this case." *Ibid.*

examination. Pet. App. 11a. Moreover, as the court of appeals recognized, the district court itself observed Jefferson sleeping, and it could properly take judicial notice of the conduct of a juror in open court. *Ibid.* (citing *United States* v. *Carter*, 433 F.2d 874, 876 (10th Cir. 1970)).

2. Petitioner next contends that the district court erroneously instructed the jury on a New Jersey statute governing gifts to public servants, N.J. Stat. Ann. § 2C:27-6 (West 1995). Pet. 15-19.[3] The propriety of

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[3] The New Jersey statute was relevant to petitioner's convictions under 18 U.S.C. 1952 on counts seven through twelve. Those counts charged the use of a facility in interstate commerce to distribute the proceeds of an unlawful activity and to carry on an unlawful activity. The unlawful activity here was the acceptance of a benefit not allowed by state law (N.J. Stat. Ann. § 2C:27-6(a)) to influence the performance of petitioner's official duties. C.A. App. 46-49. The New Jersey statute provides in pertinent part:

2C:27-6. Gifts to public servants—

> a. A public servant commits a crime if he, knowingly and under color of his office, directly or indirectly solicits, accepts or agrees to accept any benefit not allowed by law to influence the performance of his official duties.
>
> b. A person commits a crime if he, directly or indirectly, confers or agrees to confer any benefit not allowed by law to a public servant to influence the performance of his official duties.
>
> c. In any prosecution under this section, the capacity to influence a public servant in the performance of his official duties may be presumed when the value of the benefit involved, the interests of the person who offers, confers or agrees to confer such benefit, and the duties of the public servant are such as to create a reasonable likelihood that the public servant would perform his official duties in a biased or partial manner.

instructions on the content of a *state* gratuity law does not warrant this Court's review. See *Salve Regina College* v. *Russell*, 499 U.S. 225, 235 n.3 (1991). Moreover, because petitioner did not object to the instructions in the district court (see Gov't C.A. Br. 47 n.10; C.A. App. 5508, 5549-5554, 6652-6656), the claim is reviewable only for plain error. See *United States* v. *Olano*, 507 U.S. 725 (1993). Here, there was no error, plain or otherwise.

Petitioner's primary concern seems to be the instruction that the government "does not have to produce express testimony from the giver, taker, or another, that the benefit was given to influence official duties." Pet. 16. He likewise objects to the instruction that "when the benefit's value is great enough, and the taker is in a position to act in his official capacity to help or hurt the giver of the benefit, * * * you may infer that the benefit was accepted to influence the public servant with respect to his duties." *Ibid.* Those instructions, however, correctly state New Jersey law. The language of Section 2C:27-6 does not require "express testimony" regarding a public official's intent or agreement. To the contrary, Section 2C:27-6(c) authorizes the very inference the jury instructions mention.

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d. This section shall not apply to:

(1) Fees prescribed by law to be received by a public servant, or any other benefit to which he is otherwise legally entitled; or

(2) Gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the recipient; or

(3) Trivial benefits the receipt of which involve no risk that the public servant would perform his official duties in a biased or partial manner.

"[T]he capacity to influence a public servant * * * may be presumed when the value of the benefit involved, the interests of the person who offers [or] confers * * * such benefit, and the duties of the public servant are such as to create a reasonable likelihood that the public servant would perform his official duties in a biased or partial manner." N.J. Stat. Ann. § 2C:27-6(c) (West 1995).

Nor does New Jersey case law require testimony that the purpose of the gift was to influence the public servant. *State* v. *Savoie*, 341 A.2d 598 (N.J. 1975), on which petitioner relies, involved a prosecution under a different statute, now-repealed N.J. Stat. Ann. § 2A:105-1, rather than Section 2C:27-6. Moreover, the conviction in *Savoie* itself was reversed because, unlike here, the trial court's instructions would have allowed the defendant to be convicted even if the jury believed that the payment was "a pure gift," *i.e.*, that it was not intended to influence, and was not perceived as being intended to influence, the public officer's performance of his duties. *Savoie*, 341 A.2d at 605.[4]

Petitioner also argues (Pet. 18-19) that the district court's instructions regarding Section 2C:27-6 were inconsistent with this Court's interpretation of the federal illegal gratuity statute at issue in *United States* v. *Sun-Diamond Growers*, 119 S. Ct. 1402 (1999). In *Sun-Diamond*, this Court found that 18 U.S.C. 201(c)

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[4] Petitioner suggests (Pet. 17) that a citation to *Savoie* in the commentary to Section 2C:27-6 supports his interpretation of the statute, but the commentary in fact suggests that Section 2C:27-6 should not be interpreted to require an explicit quid pro quo. *Cannel*, New Jersey Criminal Code Annotated, comment 4 on N.J. Stat. Ann. § 2C:27-6 (West 1995) (noting that it better serves the purpose of the section "to read 'under color of office' as meaning related to the office sufficiently to influence public duties").

(1)(A) requires the government to prove a link between the thing of value conferred on the public official and a specific "official act" for or because of which that thing was given. 119 S. Ct. at 1411. But the statutory interpretation question resolved in *Sun-Diamond* turned on the specific language of Section 201(c)(1)(A), which proscribed giving anything of value to a public official "for or because of any official act performed or to be performed by such public official." The New Jersey statute at issue here contains different language, and nothing in *Sun Diamond* suggests that federal law somehow imposes additional proof requirements with respect to such state laws. See *United States* v. *Frega*, 179 F.3d 793, 805 & n.11 (9th Cir. 1999) (observing that California law differs from the statute discussed in *Sun-Diamond* because California bribery law does not require a link between the gift and a specific official act).

3. Petitioner contends (Pet. 19-26) that the district court failed to instruct the jury that proof of a quid pro quo was required to convict petitioner under the Hobbs Act.

a. The Hobbs Act bars extortion "induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). In *McCormick* v. *United States*, 500 U.S. 257 (1991), this Court held that, where a campaign contribution is alleged to have been obtained "under color of official right," the government must show a quid pro quo. Petitioner claims that such proof also should be required in cases not involving campaign contributions. Whether or not petitioner is correct,[5] that question is not

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[5] In *Evans* v. *United States*, 504 U.S. 255 (1992), another campaign contributions case, the Court held that an affirmative act of inducement by a public official, such as a demand, is not an element

presented by this case because the district court in fact required the jury to find a quid pro quo here. The court instructed the jury that it could convict only if it found that petitioner had "agree[d] explicitly or implicitly to take or withhold some action for the purpose of obtaining money from someone else,"; the court also referred to the public official's "promise to the payor to do or not to do an official act," and instructed the jury that the crime was completed only "when the public official knowingly accepts the benefit *in return for his agreement to perform* or not to perform an act related to his office." C.A. App. 6269-6270 (emphasis added). The instruction concluded by underscoring the government's obligation to prove that "the public official understands that he is expected, as a result of the payment, to exercise particular kinds of influence or to do certain things connected with his office as specific opportunities arise." *Id.* at 6270.

b. The court of appeals correctly rejected petitioner's further argument, Pet. 22-23, that the government was required to prove an "express agreement" between petitioner and Bradley relative to the quid pro quo. Pet. App. 14a-16a. As this Court made clear in

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of the offense of extortion under color of official right. Rather, 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." *Id.* at 268. Since *Evans*, several courts of appeals have held that proof of a quid pro quo is required in all prosecutions for extortion under color of official right, even those which, like this case, do not involve campaign contributions. See, *e.g.*, *United States* v. *Collins*, 78 F.3d 1021, 1034 (6th Cir.), cert. denied, 519 U.S. 872 (1996); *United States* v. *Hairston*, 46 F.3d 361, 365 (4th Cir.), cert. denied, 516 U.S. 840 (1995); *United States* v. *Martinez*, 14 F.3d 543, 553 (11th Cir. 1994); *United States* v. *Garcia*, 992 F.2d 409, 414 (2d Cir. 1993).

Evans, the government need only show that petitioner received the payment "knowing that [it] was made in return for official acts." *Evans*, 504 U.S. at 268. See also *id.* at 274 (Kennedy, J., concurring) ("[A] quid pro quo with the attendant corrupt motive can be inferred from an ongoing course of conduct," and "[t]he official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods."); *United States* v. *Tucker*, 133 F.3d 1208, 1215 (9th Cir. 1998) (to support a Hobbs Act conviction the government must show that the official received the payment knowing it was in return for official acts; it need not show an explicit agreement).

The cases cited by petitioner are not to the contrary. In *United States* v. *Hairston*, 46 F.3d 361, cert. denied, 516 U.S. 840 (1995) (cited Pet. 20, 21), the Fourth Circuit expressly held that the quid pro quo need not be stated in express terms, or be manifested in an express agreement. In *United States* v. *Martinez*, 14 F.3d 543 (11th Cir. 1994) (cited Pet. 20), the court of appeals reversed the conviction not because an express agreement had not been proved, but rather because the district court "failed to instruct the jury on the *quid pro quo* requirement" at all, a fact the government conceded. 14 F.3d at 553.[6] Similarly, in *United States* v. *Davis*, 30 F.3d 108 (11th Cir. 1994), the district court defined a quid pro quo in its instructions, but did not

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[6] The jury was instructed in *Martinez* that "passive acceptance of a benefit by a public official is sufficient to form the basis of an extortion violation, if the official knows he had been offered the payment in exchange for the exercise of his official power, *or that such payment is motivated by hope of influence*." 14 F.3d at 552 (emphasis added).

require the jury to find a quid pro quo in order to convict. Rather, the court "informed the jury that 'a specific quid pro quo is not always necessary for a public official to be guilty of extortion.'" *Id.* at 109. Although the Eleventh Circuit in *Davis* also indicated that "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion," *ibid.*, that reasoning was not essential to the decision, and this Court in any event made clear in *Evans* that such an "explicit promise or undertaking" may be proved by evidence that a public official received a payment "knowing that [it] was made in return for official acts," 504 U.S. at 268.

4. Petitioner claims (Pet. 23-26) the district court erred in declining to instruct the jury that, to convict him of mail and wire fraud, "[t]he government must show that some actual harm or injury was contemplated" by petitioner. C.A. App. 6668 (requested instruction). The mail fraud and wire fraud counts against petitioner, however, alleged that, as a public official, he defrauded the State of New Jersey, the City of Newark, and their citizens, of their intangible right to his honest services.[7] The instruction requested by

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[7] The mail and wire fraud statutes, 18 U.S.C. 1341, 1343, proscribe mailings and wire transmissions in furtherance of "any scheme or artifice to defraud." In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that Section 1341 was "limited in scope to the protection of property rights" and did not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights." *Id.* at 358, 360. The following year, Congress enacted 18 U.S.C. 1346, which provides that, for purposes of the mail fraud and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

petitioner is not required in such a case. See 18 U.S.C. 1346 (for purposes of mail fraud and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services"). To the contrary, the district court's instructions—which informed the jury that the government needed to prove beyond a reasonable doubt that (1) there was a scheme or artifice to defraud another of the right to honest services, (2) that petitioner knowingly and willfully participated in the scheme to defraud, with the specific intent to defraud another of the right to honest services, and (3) that the mail or interstate wires were used in furtherance of the scheme, C.A. App. 6283—correctly described the law. See *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). Accordingly, the court of appeals properly concluded that petitioner's claim was "clearly without merit." Pet. App. 16a-17a.

Petitioner points out (Pet. 23-24) that in *United States* v. *Jain*, 93 F.3d 436 (1996), cert. denied, 520 U.S. 1273 (1997), the Eighth Circuit required proof of "actual harm or injury contemplated by the schemer." *Id.* at 441. But *Jain* did not involve a public official. Instead, it involved a doctor alleged to have defrauded his patients of his "honest services" by receiving kickbacks. The *Jain* court distinguished private sector cases under Section 1346 from prosecutions of public officials. *Id.* at 441-442. The other decisions cited by petitioner involving alleged fraud in the private sector (Pet. 25) are similarly inapposite. See *United States* v. *D'Amato*, 39 F.3d 1249 (2d Cir. 1994) (lobbyist who allegedly defrauded corporation); *United States* v. *Dowling*, 739 F.2d 1445 (9th Cir. 1984), (alleged scheme by record manufacturer to defraud copyright owners of royalty fees), reversed in part on other grounds, 473

U.S. 207 (1985); *United States* v. *Von Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981) (trader of bonds who allegedly breached fiduciary duty to employer); *United States* v. *Dixon*, 536 F.2d 1388 (2d Cir. 1976) (corporate officer who allegedly defrauded stockholders by failing to follow proxy reporting rules).

Petitioner also cites the First Circuit's decision in *United States* v. *Sawyer*, 85 F.3d 713 (1996), a case involving a lobbyist who provided a legislator with "free meals, entertainment, and golf." *Id.* at 730. The *Sawyer* court reversed the fraud convictions because it concluded that the instructions allowed the jury to find that the defendant's violation of a state gift limitation statute, without more, established an intent to defraud under the federal mail fraud statute. *Id.* at 729 ("Allowing the jury to find that Sawyer intended to defraud the public of its right to honest services based upon proof of gift statute violations alone constituted reversible error."). While the *Sawyer* decision further suggested that, in the circumstances of that case, proof of an intent to harm was required, it did not say that the required intent must be to cause tangible loss, but rather that it must be an intent "to deprive of honest services." *Id.* at 729 n.12; see also *id.* at 724 ("undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services").[8]

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[8] Moreover, the *Sawyer* decision involved the limited context of a lobbyist's gifts of entertainment to legislators, and the court noted the "longstanding and pervasive" practice of "using hospitality, including lavish hospitality, to cultivate business or political relationships." 85 F.3d at 741; see *United States* v. *Woodward*, 149 F.3d 46, 55 (1st Cir. 1998) (noting limited context of *Sawyer*), cert. denied, 119 S. Ct. 1026 (1999); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am.

Finally, petitioner errs in asserting (Pet. 24-25) that the result reached below conflicts with *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert denied, 489 U.S. 1116 (1979). In *Rabbitt*, the court found no deprivation of honest services where a state representative introduced a friend's firm to the public officials responsible for awarding architectural contracts. *Id.* at 1025-1026. In *Rabbitt*, however, the defendant played no role in the awards, which were granted on merit. *Id.* at 1026. Moreover, the defendant in *Rabbitt* "was under no affirmative duty to disclose his interest." *Ibid.* (noting that the government had cited no standard of conduct applicable to legislators that clearly required disclosure). Here, petitioner misused his authority to assist Bradley and his clients in obtaining contracts—by keeping other potential competitors out of the bidding and by passing along information—and petitioner "did not reveal his receipt of [the Bradley] payments on financial forms he was required to file by reason of his public positions." Pet. App. 4a.

5. Petitioner's final claim is that the district court should have, under Federal Rule of Evidence 403, excluded evidence that the FBI found $157,000 in cash when it searched the residence of petitioner's girlfriend, Janice Williams, in November 1995. He argues that the evidence of the cash was inflammatory and that its probative value was substantially outweighed

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Crim. L. Rev. 427, 460 (1998) (observing that "decisions such as *Sawyer* are best viewed as cases in which the gratuities received (i.e., meals and drinks and golf rounds) were too inconsequential to amount to a fiduciary breach"). In addition, the First Circuit has made it clear that a public official can "steal his honest services" from his public employer by "fail[ing] to disclose a conflict of interest, resulting in a personal gain." *Woodward*, 149 F.3d at 56 (citing *Sawyer*, 85 F.3d at 724).

by the danger of unfair prejudice. Pet. 26-30. That claim involves only the application of established legal principles to the specific facts of this case, and was correctly resolved by the court of appeals in any event.

As the court of appeals observed, the government "had a legitimate reason to offer the evidence to attack Williams' credibility." Pet. App. 10a. Williams claimed that she had found that cash in her father's house in October 1995, and had taken it to her residence. *Id.* at 8a-10a. The evidence that her father had that much cash, however, undercut Williams' assertion that she had loaned her father the proceeds of Bradley's first $3600 check to her. *Id.* at 9a. Moreover, evidence that Williams had that much money impeached her testimony that Bradley's three payments to her were loans, as Williams did not repay Bradley for the supposed loans when she found the $157,000. *Ibid.*

While that evidence thus was highly relevant to Williams' credibility, it was also presented in a manner that minimized the possibility of undue prejudice. The government made no effort at trial to link the cash to petitioner. Pet. App. 9a. And the district court gave explicit limiting instructions to the jury regarding the permissible uses of that evidence. *Id.* at 10a. Petitioner offers no reason to depart from "the almost invariable assumption of the law that jurors follow their instructions." *Shannon* v. *United States*, 512 U.S. 573, 585 (1994). See also *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) (limiting instruction regarding purposes for which evidence of prior convictions may be used); *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967) (same). Under those circumstances, the court of appeals correctly found no reason to overturn as an abuse of discretion the district court's decision to admit the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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