No. _____

In The
Supreme Court of the United States

MAHMOUD THIAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a foreign statute is used as a predicate for prosecution in an American court, must that statute be construed in accordance with American constitutional limitations, including but not limited to the vagueness doctrine?

2. Where a defendant is charged with an offense that requires, as a predicate, violation of a foreign statute that requires a quid pro quo in exchange for official action, must the jury be instructed consistently with the definition of "official act" set forth in McDonnell v. United States, 136 S. Ct. 2355 (2016)?

3. Did the petitioner's conduct, as testfied to at trial, amount to an official act pursuant to McDonnell?

PARTIES TO THE PROCEEDING

The parties to the instant case are the United States of America and petitioner Mahmoud Thiam. There were no co-defendants in the courts below..

LIST OF RELATED CASES

None known.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) because this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit, in a criminal case.

This petition is timely because the Second Circuit's decision affirming the petitioner's conviction was issued on August 5, 2019, and this petition is filed within 90 days of that date.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1956(a)(1):

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a

transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment

> for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

18 U.S.C. § 1956(c)(7)(B)(iv):

> (7) the term "specified unlawful activity" means... (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving... (iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official.

18 U.S.C. § 1956(f):

> (f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

> (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
>
> (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000,

18 U.S.C. § 1957 (in pertinent part):

> (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b)
>
> [...]
>
> (d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

[...]

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term

> does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;
>
> (2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and
>
> (3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title.

Guinea Penal Code § 192 (in pertinent part):

> Whoever has solicited or accepted offers or promises, solicited or received donations or gifts in order to: (1) being an elected public official, a public official of the administrative order, agent or official of a public administration or citizen in charge of a public service ministry, to perform or refrain from performing an act within the scope of his/her functions or job, fair or not, but not subject to salary, shall be

guilty of a crime.

Guinea Penal Code § 194 (in pertinent part):

> Whoever, to obtain, either performance of an act or the refraining from performance of an act or one of the favors or advantages set forth in Article 192, having employed assaults or threats, promises, offers, donations or gifts or given in to entreaties aimed at bribery, even if he/she has not taken the initiative, whether or not the force or bribery has had an effect, shall be guilty of a crime.

STATEMENT OF THE CASE

A. The Charges and Trial.

On January 18, 2017, petitioner Mahmoud Thiam was charged in a two-count indictment with conducting transactions in criminally derived property (18 U.S.C. § 1957) and money laundering (18 U.S.C. § 1956(a)(1)(B)). (A26-32).[1] The gravamen of the charges was that between 2009 and 2011, while Thiam was the Minister of Mines and Geology of the Republic of Guinea, he (a) accepted bribes totaling $8.5 million from a Chinese consortium, the China International Fund ("CIF"), that was bidding for mining concessions, and then (b) transferred bribe money to American bank accounts and spent some of the money in the United States for his personal benefit. (A26-30).

Both the transaction count and the money laundering count required proof that, when Thiam accepted money from the Chinese investors, this constituted an offense under Guinean law. In particular, the Government alleged that defendant

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[1] Citations to "A." refer to the appendix submitted to the Second Circuit, a copy of which will be provided upon request.

violated Sections 192 and/or 194 of the Guinean Penal Code. The relevant part of Article 192, entitled "Passive Corruption," provided as follows:

> Whoever has solicited or accepted offers or promises, solicited or received donations or gifts in order to: (1) being an elected public official, a public official of the administrative order, agent or official of a public administration or citizen in charge of a public service ministry, to perform or refrain from performing an act within the scope of his/her functions or job, fair or not, but not subject to salary, shall be guilty of a crime.

(A1308). The relevant part of Article 194, entitled "Active Corruption," stated:

> Whoever, to obtain, either performance of an act or the refraining from performance of an act or one of the favors or advantages set forth in Article 192, having employed assaults or threats, promises, offers, donations or gifts or given in to entreaties aimed at bribery, even if he/she has not taken the

> initiative, whether or not the force or bribery has had an effect, shall be guilty of a crime.

(A1309-10).

It was undisputed that both Article 192 and Article 194 require proof of a quid pro quo agreement between the government official and the payor, and that money that is not received pursuant to a quid pro quo doesn't amount to an offense under either section of the code. (A870-71). Additionally, the affidavit of Professor Zogbelemou Togma, a former Guinean Minister of Justice, attested that the elements of the crime included agreeing, in exchange for a quid pro quo, to engage or refrain from engaging in "an act" (A82) and that the act must be within the scope of the petitioner's function (A83).

The issues at trial were narrow. Petitioner did not dispute that he received several million dollars from persons associated with the CIF, nor did he deny that some of this money was moved into American bank accounts that he controlled and used to make purchases in the United States. The disputed issue was whether the monies received by Thiam were in fact a bribe paid in contemplation of, or in exchange for, an official act as Minister of

Mines and Geology.

The government's proof on this issue consisted primarily of the testimony of two witnesses: Daouda Camara, who was Senior Adviser to the Prime Minister of Guinea during the relevant period, and Mamadou Sande, who was Minister of Economy and Finance. In addition, several emails between Thiam and Sam Pa, the president of CIF, were introduced into evidence. There was no testimony from Pa (who was incarcerated in China) or from any other individual associated with CIF.

Camara testified in pertinent part that beginning in December 2008, Guinea had a government that had been installed following a military coup. (A476-77). The National Council for Democracy (CNDD), which was constituted by the military (A470), appointed a president, Captain Moussa Dadis Camara ("President Dadis"). (A462-63, 476). Under President Dadis was Prime Minister Kabine Komara, and under Komara were the members of the government. (A462-63, 476). The minister of mines and geology was part of the government and was part of the council of ministers. (A470-71). The minister of mines, along with the defense minister, the minister of public works, and the minister of urbanism and habitat, held the rank

of minister of state. (A471).

Thiam became minister of mines on or about January 14, 2009. (A478). His role was to effectuate government policy and promote development of the mining sector. (A479). Under the Guinean mining code, he had power to grant licenses for research and exploration, but significantly, couldn't grant concessions such as the CIF was seeking, because concessions were under the authority of the president. (A480, 482, 562-63). Thus, defendant's authority regarding negotiation of mining concessions was strictly limited. (A559).

Camara learned of the CIF, not from Thiam, but from Prime Minister Komara, who "gave [Camara] a file regarding… the Chinese investors, and asked [him] to take care of that." (A483). Camara, not Thiam, was "in charge of the followup of all of these activities." (A483). It was Camara who studied the file and made the first presentation to a group which included defendant as well as the prime minister, certain other ministers, and representatives of CIF including its principal Sam Pa. (A483-85).

Thiam, Minister Boubacar Barry, and Prime Minister Komara also spoke at this presentation

regarding infrastructure improvements that could be made with the CIF investment. (A487-88). According to Camara, defendant didn't "give specific details," but said that the investment would help balance the budget and "bring some benefits to the mining sector." (A491).

Notably, the government "didn't need any particular promotions for the project," because all sectors were enthusiastic about it and the need was obvious. (A492, 602-03). Due to the coup, Guinea was under international sanction (A556), and thus desperately needed investment.

Later, a second meeting was held with the entire council of ministers and the Chinese investors. (A493-94). Thiam "play[ed] the same role" in "explain[ing] the project." (A495).

Camara described Thiam as the "primary point of contact" with the Chinese investors because they spoke English and Thiam was the best English speaker among the ministers. (A496). However, the person in charge of negotiating with the CIF was Barry, who chaired the project steering committee and was directly responsible to the Council of Ministers regarding the decisions and orientations of the CIF. (A497). Barry participated in all meetings

with the CIF in Conakry and also traveled to Singapore and Hong Kong to negotiate the deal. (A497-98). Barry had privileged access to the president, who as noted above, had authority over mining concessions under Guinean law. (A498).

At some point after the initial meetings, Camara was asked to participate in a technical committee to examine the documents relating to the CIF deal. (A496-97). There were 15 to 17 people in this committee. (A497). The committee was to report its results to the cabinet. (A497).

During its work, the committee received draft agreements regarding the CIF deal, including a preliminary memorandum, a framework agreement, and a shareholder agreement. (A497-98). Each agreement was conveyed to the committee by the prime minister's office. (A498). The prime minister told Camara that the documents "came from our Chinese friends" and that Thiam's role was to transmit them. (A499).

The memorandum was executed on June 6, 2009 and was signed on behalf of Guinea by Mamadou Sande, the finance minister. (A500-02). The person who signed for CIF was Jimmy Leung, who drafted the documents on his computer.

(A502-03). The fact that a memorandum was signed indicates that, by this time, both parties had a firm understanding of their intentions. (A568-69).

The framework agreement, executed on June 12, 2009, was drafted by Jimmy Leung and given to the prime minister via the minister of mines. (A503-05). This agreement called for a holding company, of which CIF would hold 75 percent and Guinea would hold 25 percent, which would invest in various infrastructure projects in exchange for a mining concession. (A505-07). This agreement was again signed by Sande on behalf of Guinea. (A507-08).

The committee then received a draft of the shareholder agreement via the same channels, i.e., CIF to the ministry of mines to the prime minister's office. (A509). The agreement was dated October 10, 2009, and established a company called the Africa Development Company (ADC) in which the shareholders were the Republic of Guinea, CIF, and China Sonangol International Singapore which was a subsidiary of CIF. (A509-10). This was pursuant to a collective decision that the project needed more investors. (A510, 522, 576-78). It was initialed by four ministers including Thiam. (A511).

China Sonangol, and certain additional mining and mineral sectors, had also been included in another version of the framework agreement dated July 2009, which was apparently not seen by the technical committee. (A529-32). Notably, there was no indication that this second version of the framework agreement was drafted, signed and/or advocated for by Thiam, and indeed, Camara acknowledged that Thiam didn't sign any of the draft documents. (A573, 605). Instead, the revised framework agreement was signed by Boubacar Barry on behalf of Mamadou Sande. (A581-82).

Under the shareholder agreement, Guinea was to receive 150 of 1000 shares of the ADC. (A513). In addition, however, the agreement created a company called the Guinea Development Company (GDC), part of which was also directly owned by the Republic of Guinea and which would be a subsidiary of the ADC. (A514). This was done to ensure Guinea the 25 percent share that had been previously agreed. (A515). In exchange, the ADC would obtain diamond, iron, bauxite, gold, oil and gas concessions. (A515-17).

According to Camara, the technical committee was concerned that the language of the agreement might sacrifice too much of Guinea's sovereign rights

over its natural resources. (A518). Notably, however, the concession was subject to "the regulations in force," i.e. the Guinean mining code. (A523, 546, 584). It also contained a severability clause providing that any provision illegal under Guinean law would be nullified while maintaining the rest of the agreement. (A581, 584). Moreover, Camara acknowledged that mining investors had to be granted broad rights or else they would reject the opportunities. (A524-25).

The committee presented these concerns to the council of ministers including Thiam. (A518, 526-27). Thiam stated that the concerns would be discussed at a higher level: the president, the prime minister, or Barry. (A528).

The prime minister indeed discussed these concerns at meetings on October 7 and 8, 2009. (A533). At the October 7 meeting, Camara again presented the concerns on behalf of the committee. (A534). The committee recommended that the original June framework agreement be the final agreement. (A537-38). Then, on October 8, the full council of ministers met, and Camara again expressed his concerns. (A538-39). The council of ministers, presumably including Thiam, recommended that the exclusivity clause be stricken.

(A540). The prime minister drafted a letter to this effect, which was addressed to Barry. (A596).

The final October 10, 2009 agreement nevertheless contained the exclusivity clause. (A540-41). However, there is no indication that Thiam had anything to do with drafting the final language, and indeed, the final version of the agreement was then approved and signed by Ministers Sande and Loholamou. (A592). Both of these ministers were present at the October 8 meeting and were therefore fully aware of the concerns. (A628-29). Again, Thiam wasn't a signatory. (A605).

Camara never witnessed Thiam do anything inappropriate with respect to the CIF agreement. (A605).

Mamadou Sande, the other principal government witness, testified that he was a former colonel in the Guinean military (A672-73) who became minister of finance after the 2008 coup and who later, in February 2010, became minister of energy (A673). After the coup, the country was in a bad financial situation due to long-term mismanagement under the former president. (A688).

Pursuant to the country's need for investment, CIF approached President Dadis early in 2009, following which the government was instructed to prepare relevant agreements. (A689). Sande wasn't present at the meetings with the president. (A690). He believes that Sam Pa and another Chinese investor named Jack were there. (A690, 701-02). Notably, he didn't testify that Thiam took part in any of the meetings with the presidency and couldn't recall Thiam being there (A734), although he identified Thiam in a photograph of a February 2010 meeting with the prime minister's office. (A705-06, 735).

A commission was set up to handle the CIF deal which consisted of Sande, petitioner Thiam, and Barry. (A674). Barry was the chair of the commission. (A674, 686-87, 716). The president wanted Barry as chair. (A731). In addition, the CIF deal was discussed at meetings of the full council of ministers which were chaired by the prime minister. (A704-05).

Sande wasn't a specialist in mining. (A705). He testified that although he signed the memorandum of understanding on behalf of the government, he didn't negotiate it. (A707). The president asked him to sign. (A708). He likewise

signed the framework agreement on the president's instructions. (A709-10, 714). He additionally signed an agreement for a $78 million loan from CIF which Guinea did receive. (A711-13).

Sande didn't attend or take part in the actual negotiations with CIF (A713, 716) and didn't know who did the negotiating (A716). At one point, however, a trip to China was arranged to meet with CIF, and the president asked Sande to sign a power of attorney so that Barry, not Thiam, could negotiate on his behalf. (A717-20). Barry signed the document resulting from that trip. (A722-23). Neither Barry nor Thiam discussed the trip with Sande. (A723).

As to the final shareholder agreement, Sande testified that he had no role in negotiating it and signed it on the president's direct instructions. (A724-25, 740). Thiam was "not one of the signatories." (A726). Sande didn't attend any meetings regarding this agreement, including the October 8, 2009 Council of Ministers meeting. (A727). Significantly, however, he testified that before signing the document, he consulted with the president, who said that the document was correct. (A740-41). In addition, all three agreements had the approval of the council of ministers. (A742).

Notably, Sande testified that ministers were required to obey the government's discipline, meaning that when decisions were adopted by the government, individual ministers had to follow them. (A685-86). Guinea had a strong presidential system in which the president was the most powerful figure (A729) and it was the duty of ministers to obey the president (A739-40). As noted above, he was firm throughout his testimony that his orders came directly from the president and that it was the president's desire to have all three CIF agreements implicated (A736), and didn't testify that Thiam pressured or advocated with him at any point.

In addition to Camara's and Sande's testimony, the Government presented evidence of eight emails via FBI agent Patrick Killeen:

* An email from Thiam to Bao Wen Chen dated June 6, 2009, stating that a CIF delegation headed by Sam Pa and Lo Fung Hung was visiting Conakry (the Guinean capital) and asking if Bao Wen Chen knew them (A757-58);

* An email from Thiam to Baker Al-Sadi dated June 13, 2009,

stating in pertinent part that defendant had "developed [a] great relationship" with the CIF and Sonangol chairmen and that there were "great prospects" (A759);

* An email from Jimmy Leong to defendant dated July 2, 2009, forwarding documents to him for implementation by the government (A762);

* An email from Thiam to the prime minister dated July 9, 2009, reporting on what happened during the visit to Singapore. In pertinent part, the email reports that documents were signed and that "the different corporate partners of the [investment] group… gave a presentation of their respective capacities and their views on the task to be completed in Guinea as well." The Guinean and Chinese parties postponed the signing of other documents pending "the

arrival of the minister of state [Barry]." Further, an issue arose regarding whether Guinea's share of the project would be 15, 20, or 25 percent, and that when Thiam brought this up, the CIF board indicated that it would "assess" the proposal that "ADC not own 100 percent of these local GDC subsidiaries but only up to 80 or 90 percent." (A763-65);

* An email chain of July 13, 2009 in which Lamine Fofana passed on certain proposed amendments to Thiam, who in turn passed them on to Jimmy Leong (A767-68);

* An email from Madame Lo (Lo Fung Hung), dated August 4, 2009 and addressed to a number of people including defendant, indicating that the press was interested in CIF's work in Guinea, which defendant followed up by extending a social invitation to her and inviting her

to select a bedsheet designed by his wife (A769-70);

* An email chain of August 30-31, 2009, in which Thiam passes on an inquiry from the president about why Sam Pa had not communicated in a while, and upon learning that Pa's father had died, expressing personal condolences (A771-73, 1195-96); and

* An email from Thiam to Barry on September 22, 2009, indicating that Thiam was in Istanbul and on his way to meet Barry in Hong Kong and that he "hope[d] everything [was] going well there." (A773).

Agent Killeen further testified that Thiam established an account at HSBC Hong Kong on September 24, 2009 (A773), that $3 million was wired from Sonangol to Sam Pa and then from Sam Pa to defendant on September 25-26 (A777-82, 791-96), that $3 million more was wired from Sonangol to Wang Xiang-Fei and then to Thiam to be

received on March 15, 2010 (A797-804), that a further $2 million was sent from Sam Pa and Lo Fung Hung (who had earlier received the sum of $20 million from Sonangol) to Thiam on June 2, 2010 (A806-12), and that $500,000 was deposited from the Lo/Pa account (which had earlier received approximately $10.6 million from Sonangol) into the Thiam account on November 29, 2010 (A813-18). In total, Thiam received $8.5 million. (A818-19).

Further evidence was adduced concerning banking transactions made with the funds at issue, none of which were disputed, as well as various purchases made by Thiam including a house in Dutchess County, and representations allegedly made by him to bank officials.

On the defense case, petitioner called Momo Sakho, who at the relevant time was the adviser in charge of national resources for the Guinean military government. (A1023). He testified that as minister of mines, Thiam was under the president's direct authority (A1040). President Dadis was strong-willed and easily provoked, and "didn't entertain contrary opinions" or listen to advice from members of the government. (A1024-26). At one time, Dadis went so far as to arrest advisors who gave him advice he didn't like. (A1025).

Boubacar Barry had been Dadis' personal friend from childhood and was thus someone the president trusted. (A1028). Only the minister of defense was more powerful within the cabinet than Barry. (A1040-41).

Sakho stated that the mining code in force in Guinea in 2009 required 15 percent participation by the government in any deal with a foreign mining company. (A1032).

He recalled that Thiam was on the commission that dealt with the CIF investment but wasn't the head of it; instead, that role belonged to Barry. (A1037, 1041). Sakho didn't negotiate the CIF deal and didn't know what role, if any, defendant had in negotiating it. (A1038).

Petitioner Thiam took the stand in his defense. He testified that he grew up in exile from age five because the dictator of Guinea at the time killed most of his family (A1050) and, after coming to the United States in his late teens, graduated from Cornell University and amassed an extensive and successful background in finance, including finance in the mining sector. (A1050-57, 1062-63), During this time, he began doing business with Baker

al-Sadi. (A1057).

About a week after the 2008 coup, Prime Minister Komara, who knew Thiam, asked him to be minister of mining in light of his finance background. (A1058-61, 1063-64). After hesitating due to the state of his personal finances and concern about his safety in Guinea, he agreed to accept the post. (A1065-67). He met with al-Sadi, who agreed to make funds available for Thiam's and his family's use. (A1067-68, 1069-71).

Thiam described his role in the CIF deal consistently with Camara's and Sande's testimony. In particular, during his first meeting with President Dadis, Thiam was asked to recommend the five most promising projects for the mining sector, of which CIF wasn't one. (A1071-74). The first months of his tenure was spent developing projects other than CIF, which were considered urgent due to the effect of poverty and international sanctions on Guinea. (A1075-77). Instead, he only heard of CIF months later, in May or June 2009, when Barry ordered him to meet the Chinese investors in a hotel downtown. (A1074-75).

That meeting consisted of a "getting to know you" session in which Thiam talked with the CIF

investors about what their company was and what it might do. (A1078-79). The CIF delegates told Thiam that they had already had a series of meetings with Dadis and Barry. (A1079). They told Thiam they had partnered successfully with Angola and wanted to do the same in Guinea. (A1080-81).

Defendant asked them to bring their Angolan partner for a meeting, and also sent messages out to friends in the finance sector to check CIF out. (A1081-82). The president said he would wait to meet Manuel Vicente, the Angolan partner, but that he had "pretty much decided" to do business with CIF. (A1083-84). About ten days later, Sam Pa brought Vicente and an assistant to Conakry and Thiam took them to meet with the president, who spoke directly with them and gave a reception for them. (A1084-85). This meeting was what Thiam referred to in the "great relationships" email to Al-Sadi. (A1179-80).

It was then decided that the prime minister would take over and that a team headed by Barry would go to Singapore to meet with CIF. (A1085-86). Thiam also arrived in Singapore but had to wait until Barry got there because Barry was the only one authorized to negotiate and sign documents. (A1087, 1093). The technical teams from Guinea and CIF, of

which Thiam wasn't part, drafted the documents, including but not limited to the July 2009 version of the framework agreement. (A1087-88, 1126). Thiam's only contribution to the framework was to make sure Guinea got paid in advance and that it would only have to repay CIF if the venture was profitable. (A1090-92).

Thiam reported back to the prime minister concerning the Singapore meeting, which was the fourth email testified to by Agent Killeen. (A1093). Defendant's testified consistently with the email, specifically that he raised an issue concerning Guinea obtaining a 15 rather than 25 percent share and that, in response to this issue, it was suggested that Guinea also receive a share of the local development company, which would increase Guinea's effective share of the profits to 27 percent. (A1093-94, 1183). This proposal was subject to approval by the CIF board and the Guinean cabinet; defendant couldn't agree to it on his own authority. (A1096-97, 1184, 1226-27). The suggestion was accepted. (A1185). Thereafter, Barry signed the documents. (A1097).

During later stages of the process, Thiam forwarded documents from the Guinean government to CIF and vice versa as reflected in the emails.

(A1098-99, 1124-25, 1189-91). He didn't determine what documents were necessary, but simply sent each side what it asked for. (A1125). He also made three or four trips which most often involved visiting factories in China which would supply the project as well as social lunches, dinners and sightseeing trips. (A1100, 1128-29).

Thiam didn't draft or sign the final agreement. (A1126, 1129). He testified, as to the concerns raised by Camara, that the government collectively determined that these concerns were based on a misreading of the document because the severability clause and the clause making the agreement subject to Guinean mining law protected Guinea. (A1126-28). These concerns were discussed with Barry, the prime minister, and the president, because they were "way over [defendant's] head." (A1127). The president instructed the prime minister to proceed. (A1128).

Thiam testified that he didn't receive bribes from any one associated with CIF or Sonangol. (A1129-30). He stated that he received $8.5 million from Sam Pa as a personal loan, and that he asked Pa for the loan because Pa was the only person he knew who had essentially unlimited funds. (A1134). He was badly in need of money because his

pre-existing income ran out and he wasn't being paid a salary for his Guinean government service. (A1135-36). He spent the money on expenses including housing and travel, much of which was official. (A1229-31).

The loan was based on a verbal agreement with no set terms. (A1170). The money was deposited in the Hong Kong account, which he opened with Pa's help due to the sanctions regime. (A1138, 1173). He believes that the transfers from persons other than Sam Pa, such as Wang Xiang-Fei who was an employee of Sam Pa, were done on Pa's instructions. (A1225). The loan from Sam Pa wasn't a quid pro quo. (A1136-37). The loan has since been forgiven. (A1173).

On the advice of tax professionals, Thiam declared the payments as income on his tax returns because it was an undocumented loan. (A1232).

Defendant further testified that he didn't advise bank officials of his Guinean position because this would render him a "PEP," or politically exposed person, and result in the bank closing his account. (A1139, 1141-42, 1143-44, 1152). Nor did he state that the money was an informal personal loan because this too would lead to questions being asked

and the account being closed. (A1157-58). This indeed happened once his position came to light. (A1140, 1142).

The Dutchess County house was purchased together with a partner in Mozambique with the intent of renovating and renting it. (A1144-47). Peitioner had received informal loans from this partner and from other acquaintances on a similar basis to his testimony regarding the payments received from Sam Pa. (A1147-50).

The district court, rejecting petitioner's proposed jury instruction (A294), charged the jury that an offense under Section 192 of the Guinean Penal Code involved the following elements:

> (1) At the time of the alleged offense, the defendant was an agent or official of a public administration or a citizen in charge of a public service ministry…
>
> (2) The defendant knowingly solicited or received something of value outside of or beyond the defendant's government salary.

> (3) The defendant's solicitation or receipt of the thing of value was in return for engaging in an act or refraining from engaging in an act. It is irrelevant whether the act in question was "fair... or not." In other words, it is irrelevant whether the defendant might have lawfully and properly engaged (or refrained from engaging) in the act. It is also irrelevant whether the defendant was the final or only decision maker or even able to achieve the objective of the bribe.
>
> (4) The act fell within the scope of the defendant's job or function as the minister of mines.

(A1308-09). Regarding Article 194, the district court charged the jury in pertinent part that the offense required that "[a] thing of value was offered or given to the public official to influence that public official to engage in an act or to refrain from engaging in an act," and that "[t]he act in question was within the scope of the public official's job function or position." (A1310).

At no point during the charge did the district

court instruct the jury, pursuant to McDonnell v. United States, 136 S. Ct. 2355, 2371-72 (2016), that the act or contemplated act for which the bribe is paid must constitute a "formal exercise of governmental power" and/or that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)-without more" doesn't constitute an official act.

Petitioner made an oral motion for acquittal, which the district court denied. (A1349-81). At the conclusion of trial, the jury convicted petitioner on both counts (A1344-45) and he was subsequently sentenced to 84 months' imprisonment.

B. The Appeal.

Petitioner timely appealed to the Second Circuit Court of Appeals (A1389) and, in his brief to that Court, argued *inter alia* that when the Guinean Penal Code is used as a predicate for prosecution in an American court, it must be construed in conformance with American constitutional limitations, including the prohibition against prosecution based on vague criminal laws. Petitioner further argued that, in the case of the Guinean statutes at issue, the relevant constitutional limitation was set forth in McDonnell, supra,

because those statutes required acts comparable to the "official act" element of the statute construed by the McDonnell Court. Petitioner contended both that the trial evidence was insufficient under McDonnell and that the jury instructions were defective because a McDonnell charge was not given.

Respondent submitted a brief in opposition, to which petitioner replied, and argument was held in due course.

By decision issued August 5, 2019, the Second Circuit affirmed petitioner's conviction. (App. 1-18).[2] As to the McDonnell issue, the court stated that "[p]rinciples of international comity... counsel against applying the 'official act' definition set forth in McDonnell to... Gunea's Penal Code because this would require us to interpret Guinean law and, in doing so, limit conduct that Guinea has chosen to criminalize." (App. 9). The court indicated that although Thiam had not been prosecuted in Guinea, "presumably he could have been, and our interpretation of Guinean statutes at issue here should not vary depending on that event." (App. 10).

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[2] Citations to "App." refer to the appendix to this Petition.

The Second Circuit stated further that its own precedents did not support application of McDonnell beyond the context of honest services fraud and Hobbs Act extortion (App. 10-11), and that although the Guinean statutes at issue bore "some similarity" to 18 U.S.C. § 201, "this is unremarkable given that all three statutes relate to bribery" and "Articles 192 and 194... plainly cover more than official acts." (App. 11-12).

Finally, the Second Circuit rejected petitioner's argument that the McDonnell Court's "concern that a broad definitoin would chill legitimate activities of government officials and... nod toward federalism," applied in the context of offenses predicated upon Guinean law. (App. 12-13). "Putting aside the fact that Thima did not hold elected office," the court stated that the nature of his relationship with a Chinese company, "constituent or not, does not concern a United States court," and there was no concern with federalism "where the conduct at issue is one that another country has chosen to criminalize and has no bearing on state law." (App. 13).

Now, petitioner seeks certiorari as to all grounds raised before the Second Circuit, and for the

reasons set forth below, his petition should be granted.

REASONS FOR GRANTING THE WRIT

POINT I

WHERE A FOREIGN BRIBERY STATUTE IS A PREDICATE TO PROSECUTION IN A UNITED STATES COURT, THE LIMITATIONS OF McDONNELL APPLY

1. Since at least the 1970s, the federal penal code has targeted American citizens who allegedly performed corrupt acts outside the United States. In some cases, such as the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 *et. seq.*, the prohibited acts are written into the federal legislation. In others, such as the instant case, the prohibited conduct involves transactions in the proceeds of "an offense against a foreign nation," see 18 U.S.C. § 1956(c)(7) which must be determined with reference to that nation's own laws.

Several categories of "offense against a foreign nation" may serve as predicates for prosecution, including, as relevant here, violation of foreign

statutes involving bribery of public officials. See 18 U.S.C. § 1956(c)(7)(iv). The foreign bribery statutes included in this category are of varying scope, and some of them are worded with comparable breadth to federal statutes, such as 18 U.S.C. §§ 201 and 1346, that this Court has cabined due to overbreadth and vagueness concerns. This raises the question of whether, when such foreign statutes are used as predicates for prosecution in an American court, such statutes must be construed in accordance with American constitutional limitations. The Fifth Circuit in United States v. McClain, 593 F,2d 658, 670 (5th Cir. 1979), held that they must; the Second Circuit in this case held that they need not.

The defendant in McClain was prosecuted under the National Stolen Property Act, 18 U.S.C. § 2314, for importing artifacts in violation of Mexican antiquities law. The court noted that, during a certain part of the period in which the artifacts were imported, Mexican law was ambiguous as to whether the government of Mexico laid claim to all antiquities as public property. The Fifth Circuit found that reversal was required as to the convictions encompassing this period, because "under th[e broad] view of Mexican law [advocated by the Government], we believe the defendants may have suffered the prejudice of being convicted pursuant to laws that

were too vague to be a predicate for criminal liability under *our* jurisprudential standards." Id. (emphasis added); see also United States v. One Tyrannosaurus Bataar Skeleton, 2012 WL 5834899, *8 & n.7 (S.D.N.Y. 2012) (in National Stolen Property Act prosecution involving dinosaur skeleton imported from Mongolia, the defendant "may ultimately prevail by demonstrating that [the underlying] Mongolian law is improperly vague").

Petitioner submits that the McClain court properly held that, when a foreign statute is used as a predicate for prosecution in an American court, it must be construed and limited in accordance with American principles of due process, vagueness, and overbreadth. Moreover, petitioner submits that the Second Circuit's contrary conclusion in this case rests upon a flawed foundation. In particular, the Second Circuit invoked the doctrine of international comity in support of its conclusion that the American courts should not "limit conduct that Guinea has chosen to criminalize" (App. 9) – but construing Guinean law in accordance with American constitutional limitations *when used as part of a criminal prosecution in an American court* would not "limit" Guinea in the least. As this Court recently recognized in Animal Science Prods., Inc. v. Hebei Welcome Pharmaceutical Co., Ltd., 138 S. Ct. 1865

(2018), foreign governments' interpretation of their own laws are not binding on American courts or vice versa. The Guinean courts would not be bound by American courts' construction of Guinean law, and in any bribery prosecution in Guinea, those courts could administer domestic law as they see fit, subject to whatever due process provisions may exist in the Guinean constitution.

Indeed, if anything, the principle of international comity requires that the American courts tread with caution in cases such as this. As the Second Circuit stated, this doctrine calls upon American courts to "refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries." (App. 9). In this case, Guinea chose not to prosecute Thiam, even though the military government in which he served is no longer in office and the successor government was elected on a promise to make a clean break from military rule. If the American courts are to "refuse to review acts of foreign governments," then deference is due to Guinea's decision *not* to prosecute Thiam (notwithstanding the circuit court's suggestion that he "presumably" could have been – the deference in question is to foreign governments' actual, not their hypothetical, acts), and the courts in this country should be chary of construing Guinean law so

broadly as to reach conduct that Guinea itself has not prosecuted.

But in any event, international comity is not really the issue here. Thiam was prosecuted in an American court under American law for which the Guinean statute served as a predicate, and as a defendant in an American court, he was entitled to the protections of the United States Constitution. As the McClain court recognized, the Constitution should not countenance a system in which defendants charged with crimes involving predicate foreign offenses are entitled to less due process than those who are not. "Our jurisprudential standards" – those of the United States Constitution – should apply to all statutes submitted to a jury as part of an American prosecution, whether those stautes are American or foreign. See McClain, 593 F.2d at 670.

2. In connection with Sections 192 and 194 of the Guinean Penal Code, the relevant constitutional limitations are those set forth by this Court in McDonnell v. United States, 136 S. Ct. 2355 (2016). McDonnell, a former governor of Virginia, was prosecuted for Hobbs Act extortion, honest services fraud, and related conspiracy statutes, with the duty of honest services defined with reference to the federal bribery statute. Id. at 2365. This

statute, 18 U.S.C. § 201, required proof that McDonnell accepted or agreed to accept something of value "in return for being influenced in the performance of any official act." Id.

This Court held that the term "official act" included only "formal exercise[s] of governmental power," and that an official act must be "something within... the function conferred by the authority of [the defendant's] office." Id. at 2368-69. Meetings, phone calls, and the like do not rise to the level of an official act. Id. at 2370-71. Indeed, even "expressing support for [a proposed act] at such a meeting, event or call" does not qualify as an official act so long as the defendant does not exert pressure or advocate for another official to perform an official act. Id. at 2371.

This Court's holding was based on both textual and extra-textual factors. In addition to the specific text of 18 U.S.C. § 201, this Court stated that the same holding was required by "significant constitutional concerns." Id. at 2372. These included the fact that "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time," and therefore, a broad interpretation of the bribery statute might leave officials "wonder[ing]

whether they could respond to even the most commonplace requests for assistance." Id.

Moreover - and critically - a broader conception of official act "is not defined with sufficient definiteness that ordinary people can understand what conduct is prohibited, or in a manner that doesn't encourage arbitrary and discriminatory enforcement." Id. at 2373. In other words, such a broad conception would be vague and wouldn't comport with constitutional due process. Id. "[The Court's] more constrained interpretation… avoids this vagueness shoal." Id.

Furthermore, a broad interpretation of "official act" which leaves its outer boundaries ambiguous would "involve[] the Federal Government in setting standards of good government for local and state officials." Id.

These concerns apply with no less force in cases involving foreign officials. Notwithstanding the Second Circuit's statement that there are "obviously" no federalism concerns where the conduct at issue "has no bearing on state law" (A13), the federal courts have no more business – and perhaps even less business – setting standards of good government for foreign officials as for state and local

officials. Moreover, in Animal Science Prods., supra, this Court expressed a preference for foreign statutes to be interpreted analogously to the laws of American states, see Animal Science Prods., 138 S. Ct. at 1874 (finding Second Circuit's method of interpreting foreign law "inconsistent with... this Court's treatment of analogous submissions from States of the United States"), and thus, it is apparent that quasi-federalist concerns exist where the American courts extend their reach to interpretations of foreign law.

Moreover, the Second Circuit's suggestion to the contrary notwithstanding, this Court should have at least ss much concern with chilling the constituent-service activities of foreign officials as with chilling the activities of state and local officials. Foreign officials, exercising their responsibilities and powers outside the United States, should not do so under the threat of having their conduct examined microscopically by an American court. Moreover, there is nothing in McDonnell limiting this Court's concern to elected officials; appointed officials also perform vital governmental functions, and they, too, are entitled to arrange meetings, make calls, and speak up at conferences without having to wonder whether they could lawfully "respond to even the most commonplace requests for assistance."

Thiam, as Minister of Mines and Geology, was responsible for promoting economic development in Guinea's mining sector. Doing so was a service to his constituents, and his meetings with CIF were undertaken as part of the type of service contemplated by McDonnell. Although the Second Circuit blithely dismissed Thiam's interaction with CIF as a relationship that "does not concern a United States court" (App. 12), it clearly *does* concern the American courts when that relationship is used as a predicate for prosecution in the United States.

In sum, foreign officials perform the same governmental functions as state and local officials, and their exercise of their functions and powers should not be chilled by the threat of American prosecution any more than state and local officials should be – which means that, where a foreign bribery statute is used as a predicate for prosecution under 18 U.S.C. § 1956 or any other federal criminal statute, it should be construed *in pari materia* with Section 201 and should be limited in the same way that Section 201 was limited in McDonnell.

And finally, the text of the Guinean statutes in question provides further support for construing them in accordance with McDonnell. As defined at trial, Section 192 refers to "perform[ing] or

refrain[ing] from performing an act within the scope of [a public official's] functions or job," and Section 194 refers to "the favors or advantages set forth in Article 192." Thus, both statutes require (a) an act; (b) within the scope of an official's functions. An act in a public servant's official capacity is simply another way to say "official act." Moreover, Section 192 requires the act to be "within" an official function, thus incorporating a similar limitation of punishable conduct to exercises of official power.

Thus, contrary to the Second Circuit's holding, the Guinean statutes in question are not broader than Section 201, much less "plainly" so (App. 12). The Guinean Penal Code, like Section 201, requires "something within the specific duties of an official's position - the function conferred by the authority of his office," see McDonnell, 136 S. Ct. at 2369, and should thus be subject to the same construction.

3. Application of McDonnell to this case requires reversal, both because the jury was not instructed in accordance with McDonnell's limitations and because the proof at trial was insufficient to overcome those limitations. As discussed in the Statement of Facts, not only was there no direct evidence of a quid pro quo – mere temporal proximity between conduct and payments

does not a quid pro quo make, see United States v. Menendez, 291 F. Supp. 3d 606, 624 (D.N.J. 2018),; United States v. Siegelman, 640 F.3d 1159, 1171 (11th Cir. 2011) – but much of the proof at trial consisted of Thiam arranging and attending meetings, making calls, and forwarding emails – precisely the type of conduct that this Court found not to rise to the level of an official act. At most, Thiam "express[ed] support for" the CIF deal at the meetings, which is also not an official act. McDonnell, 136 S. Ct. at 2371; United States v. Jefferson, 289 F. Supp. 3d 717, 738-39 (E.D. Va. 2017) (making "encouraging statements" about a product to be tested, and sending letters to embassy officials expressing support for granting a visa to a Kenyan national, were not official acts). There was no evidence whatsoever that Thiam's statements regarding the benefits of the deal constituted official pressure or even that Thiam was in a *position* to exercise such pressure over ministers higher ranking than himself.

This in itself is enough to require a new trial. In its summation, the government urged the jury to convict Thiam on the basis that he was "the one sending emails" (A1249), that he "admit[ted] sending emails back to clarify different points of the deal" (A1250), and that his culpable acts included

"standing up and making statements in support of pursuing the deal" at the "early meetings" (A1248-49). Since the jury delivered a general verdict, it is not possible to determine whether it convicted Thiam based on the emails and meetings or based on the other conduct he was alleged to have committed. Thus, while a properly instructed jury arguably *might* have convicted Thiam, that does not mean that such a jury necessarily *would* have convicted him. As in McDonnell itself, and as in such cases as Skilling v. United States, 561 U.S. 358 (2010), the absence of proper instructions requires a new trial.

But this Court may go farther than that and dismiss the charges against Thiam outright for insufficiency, because his alleged acts *other* than meetings and emails – initialing the final agreement and "heading" the delegation to Singapore – were also not official acts. It is undisputed that Thiam wasn't a signatory to the agreement, nor was he the one to approve its terms. (A592, 605, 726-27, 740-42). His initials simply mean that he was present when the agreement was approved by others. They added nothing to the approval that had already been executed by the president and prime minister. To characterize an acknowledgment of presence as an official act would render McDonnell a nullity.

Similarly, with respect to the government's contention that Thiam "headed" the delegation that attended the July 2009 Singapore meeting and "suggested" a compromise which was incorporated in a revised Framework Agreement, the word "suggest" says it all. As the government did not dispute, Thiam had no power to approve the compromise or even to exert pressure for its approval, because the officials who would have to approve ranked higher than he did. Indeed, this wasn't even a situation where Thiam could anticipate that the president and prime minster would rely on his suggestion, because as the government's own witnesses testified, (a) the president was an autocratic figure who followed his own desires and was determined to push the project through (A729, 736, 739-40), and (b) the power of attorney to negotiate on behalf of the president was given to Boubacar Barry, not to Thiam (A717-20).

Thiam's role in the events underlying this case was that of a functionary – albeit a functionary with the title of "minister" – and nothing he did involved an act of official authority or official pressure. The acts he allegedly committed are not acts that McDonnell allows the government to punish. This Court should accordingly grant certiorari to review the applicability of McDonnell to the Guinean statutes at issue and to grant appropriate relief.

CONCLUSION

In light of the foregoing, this Court should grant certiorari on all issues raised in this Petition. Upon granting certiorari, this Court should reverse the decisions of the Second Circuit and dismiss the charges or remand for a new trial.

Dated: New York, NY
November 4, 2019

Respectfully Submitted,

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DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AUGUST 5, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUGUST TERM, 2018

ARGUED: OCTOBER 9, 2018
DECIDED: AUGUST 5, 2019

No. 17-2765

UNITED STATES OF AMERICA,
Appellee,

v.

MAHMOUD THIAM,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York

No. 17-cr-0047 (DLC) - Denise L. Cote, *Judge*.

Before: WALKER and LOHIER, *Circuit Judges*, and PAULEY, *District Judge.**

Defendant Mahmoud Thiam ("Thiam") appeals from a judgment entered in the United States District Court for the Southern District of New York following a jury trial before Denise L. Cote, *Judge*, convicting him of money laundering and conducting transactions in property criminally derived through bribery in the Republic of Guinea. On appeal, Thiam challenges his conviction, arguing (i) that the district court's jury instructions were erroneous because they failed to include the definition of "official act" relative to a bribery conviction, as set forth in *McDonnell v. United States*, —— U.S. ——, 136 S. Ct. 2355, 195 L.Ed.2d 639 (2016); (ii) that there was insufficient evidence (a) to support a finding of a quid pro quo exchange necessary for his conviction and (b) to support a finding that he committed an "official act"

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* Judge William H. Pauley III, United States District Judge for the Southern District of New York, sitting by designation.

as defined in *McDonnell*; and (iii) that several evidentiary rulings by the district court were erroneous. For the reasons set forth below, we AFFIRM the judgment of the district court.

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ELISHA J. KOBRE (Christopher J. DiMase, Daniel B. Tehrani, *on the brief*), Assistant United States Attorneys, Lorinda I. Laryea, Trial Attorney, Fraud Section, Criminal Division, United States Department of Justice, *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY, *for Appellee*.

JONATHAN I. EDELSTEIN, Edelstein & Grossman, New York, NY, *for Defendant-Appellant.*

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JOHN M. WALKER, JR., *Circuit Judge*:

Defendant Mahmoud Thiam ("Thiam") appeals from a judgment entered in the United States District Court for the Southern District of New York following a jury trial before Denise L. Cote, *Judge*, convicting him of money laundering and conducting transactions in property criminally derived through bribery in the Republic of Guinea. On appeal, Thiam challenges his conviction, arguing (i) that the district

court's jury instructions were erroneous because they failed to include the definition of "official act" relative to a bribery conviction, as set forth in *McDonnell v. United States*, —— U.S. ——, 136 S. Ct. 2355, 195 L.Ed.2d 639 (2016); (ii) that there was insufficient evidence (a) to support a finding of a quid pro quo exchange necessary for his conviction and (b) to support a finding that he committed an "official act" as defined in *McDonnell*; and (iii) that several evidentiary rulings by the district court were erroneous. For the reasons set forth below, we AFFIRM the judgment of the district court.

BACKGROUND

Thiam appeals from a judgment, after a jury trial, convicting him of money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B) and 1956(f) and of conducting transactions in criminally derived property in violation of 18 U.S.C. § 1957. Both statutes prohibit certain transactions involving proceeds of "specified unlawful activity."[2] In relevant part, both 18 U.S.C. §§ 1956(c)(7)(B)(iv) and 1957(f)(3) define "specified unlawful activity" as "an offense against a foreign nation involving ... bribery of a public official," in violation also of the laws of.

[2] 18 U.S.C. §§ 1956(a) and 1957(a).

that foreign nation.

Thiam, a United States citizen, was Minister of Mines and Geology of the Republic of Guinea in 2009 and 2010, in which capacity he received an $ 8.5 million bribe from a Chinese entity in return for supporting a Chinese joint venture with Guinea. Specifically, in the spring of 2009, Guinea entered into negotiations with the China International Fund ("CIF"), a Chinese company, to form a joint venture that would invest in various projects in Guinea, including mining concessions. As Guinea's Minister of Mines and Geology, Thiam bore responsibility for negotiating many of the terms of the joint venture, which was documented by a Memorandum of Understanding, a Framework Agreement, and a Shareholder's Agreement.

Approximately two weeks before the Shareholder's Agreement was executed, Sam Pa ("Pa"), the head of CIF, transferred $ 3 million into a bank account in Thiam's name at HSBC in Hong Kong. Five days later, a conglomerate associated with CIF reimbursed Pa. Between March and November 2010, the conglomerate transferred another $ 5.5 million to Thiam's Hong Kong account by funneling the funds through Pa and other executives. Starting in September 2009, Thiam

transferred cash from his Hong Kong account to accounts in the United States and to other transferees, including vendors of various luxury items. Thiam also lied to banks about his employment, nationality, and income when opening accounts in Hong Kong and the United States. In his defense, Thiam testified at trial that the money he received from Pa was an undocumented personal loan with no interest rate or repayment date. The jury rejected this defense and convicted Thiam on both counts. This appeal followed.

At trial, the government proved violations of Articles 192 and 194 of Guinea's Penal Code as the predicate "offense against a foreign nation involving ... bribery of a public official," as required by 18 U.S.C. §§ 1956(c)(7)(B)(iv) and 1957(f)(3). Articles 192 and 194 of Guinea's Penal Code criminalize "passive corruption," or the receipt of bribes by a public official, and "active corruption," or the payment of bribes to a public official, respectively. The government presented a sworn affidavit from a former Guinean Minister of Justice and law professor at the University of Conakry in Guinea explaining the meaning and elements of a violation of Articles 192 and 194. With the consent of both parties, the jury was instructed regarding Articles 192 and 194 in accordance with this affidavit.

DISCUSSION

On appeal, Thiam attacks his conviction, arguing (i) that the district court's jury instructions were erroneous because they failed to include the definition of "official act" relative to a bribery conviction, as set forth in McDonnell v. United States, —— U.S. ——, 136 S. Ct. 2355, 195 L.Ed.2d 639 (2016); (ii) that there was insufficient evidence (a) to support a finding of a quid pro quo exchange necessary for his conviction and (b) to support a finding that he committed an "official act" as defined in McDonnell; and (iii) that several evidentiary rulings by the district court were erroneous. For the reasons set forth below, none of these arguments has merit.

I. Jury Instructions

"Generally, the propriety of jury instructions is a matter of law that is reviewed de novo," under a harmless error standard if the defendant objected to the jury instructions at trial and a plain error standard if he did not.[3] On appeal, Thiam argues that the jury instructions were erroneous because

[3] *United States v. Botti*, 711 F.3d 299, 307–08 (2d Cir. 2013).

they failed to apply *McDonnell*'s definition of "official act" to Articles 192 and 194 of Guinea's Penal Code, violations of which were the "specified unlawful activity" underlying Thiam's convictions. We reject this assertion and hold that *McDonnell* does not apply to Articles 192 and 194 of Guinea's Penal Code. Therefore, regardless of whether our review is governed by the harmless error or plain error standard, the jury instructions were not erroneous for failing to include *McDonnell's* "official act" language.

The defendant in *McDonnell*, a former Governor of Virginia, was indicted on bribery charges stemming from his acceptance of gifts, loans, and other benefits from a Virginia businessman in exchange for arranging for universities in Virginia to conduct tests on a nutritional supplement produced by the businessman.[4] To obtain a conviction on the bribery charges—honest services fraud and Hobbs Act extortion charges—the government was required "to show that Governor McDonnell committed (or agreed to commit) an 'official act' in exchange for the loans and gifts,[5] and the parties agreed to use the definition of "official act" found in the federal bribery

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[4] *McDonnell*, 136 S. Ct. at 2361.

[5] *Id.*

statute, 18 U.S.C. § 201(a)(3).[6] On appeal, the Supreme Court focused on the definition of "official act," and concluded that this term *should be interpreted narrowly, such that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit [the] definition of 'official act.' "[7]

Principles of international comity, however, counsel against applying the "official act" definition set forth in *McDonnell* to Articles 192 and 194 of Guinea's Penal Code because this would require us to interpret Guinean law and, in doing so, limit conduct that Guinea has chosen to criminalize. The doctrine of international comity "is best understood as a guide where the issues to be resolved are entangled in international relations.[8] "Under the principles of international comity, United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to

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[6] *Id.* at 2365.

[7] *Id.* at 2372.

[8] *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) (quoting *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

have extraterritorial effect in the United States."[9] Although Thiam was not prosecuted in Guinea for his actions, presumably he could have been, and our interpretation of the Guinean statutes at issue here should not vary depending on that event. We therefore decline to undertake any such interpretation.

Moreover, Thiam's arguments to the contrary notwithstanding, Second Circuit precedent provides no support for applying *McDonnell* to Articles 192 and 194 of Guinea's Penal Code. Thiam claims support from *United States v. Silver*, a case in which the defendant was charged with honest services fraud and Hobbs Act extortion and to which we applied McDonnell's limitations.[10] Although the parties in *Silver* did not define "official act" by reference to 18 U.S.C. § 201(a)(3),[11] the defnedants in both *Silver* and *McDonnell* were charged with honest services fraud and Hobbs Act extortion, and the

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[9] *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 742–43 (2d Cir. 2016) (internal quotation marks omitted).

[10] 864 F.3d 102, 117–19 (2d Cir. 2017), *cert. denied*, —— U.S. ——, 138 S. Ct. 738, 199 L.Ed.2d 605 (2018).

[11] *Id.* at 111.

definition of "official act" at issue in *McDonnell* related to those charges.[12] *Silver* therefore provides no support for applying *McDonnell* beyond honest services fraud and Hobbs Act extortion charges. Likewise, in *United States v. Boyland*, we applied the *McDonnell* standard to honest services fraud and Hobbs Act extortion, but not to violations under the "more expansive" 18 U.S.C. § 666.[13] Thiam also points us to *United States v. Skelos*.[14] But *Skelos* presents a straightforward application of *Silver* to convictions including honest services fraud conspiracy and Hobbs Act extortion.[15] Therefore, none of these cases provides support for applying *McDonnell* to Articles 192 and 194 of Guinea's Penal Code.

Thiam's remaining arguments for applying the

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[12] *McDonnell*, 136 S. Ct. at 2365.

[13] 862 F.3d 279, 290-92 (2d Cir. 2017).

[14] 707 F. App'x 733 (2d Cir. 2017) (summary order).

[15] *Id.* at 736–37. While *Skelos* did apply *McDonnell's* definition of "official act" to federal program bribery under 18 U.S.C. § 666, it was only because both the government's theory of the case and the jury instructions were based on "official acts." *Id.* at 738.

reasoning in *McDonnell* to Articles 192 and 194 of Guinea's Penal Code are also unavailing. Thiam argues that the texts of Articles 192 and 194 are sufficiently similar to the text of 18 U.S.C. § 201 so as to "favor[ ]" incorporation of the *McDonnell* limitations. Appellant's Br. at 35. Although the texts of Articles 192 and 194 bear some similarity to the text of 18 U.S.C. § 201(a)(3), this is unremarkable, given that all three statutes relate to bribery. Nothing in *McDonnell* or in the language of Articles 192 and 194, which plainly cover more than official acts, compels us to apply the *McDonnell* official act standard to those foreign provisions.

Thiam also argues that two of the reasons motivating the Supreme Court's narrow reading of "official act" in *McDonnell* – a concern that a broad definition would chill legitimate activities of government officials and a nod toward federalism – apply in this case as well. We disagree. In *McDonnell*, the Supreme Court focused on the nature of the relationship between government officials and their constituents, pointing out that "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time" and explaining that a broad interpretation of "official act" could lead officials to "wonder whether they could respond to

even the most commonplace requests for assistance" and cause "citizens with legitimate concerns [to] shrink from participating in democratic discourse."[16] Putting aside the fact that Thiam did not hold elected office, the nature of his relationship in Guinea to the Chinese company – constituent or not – does not concern a United States court. Also, there is obviously no concern for federalism here where the conduct at issue is one that another country has chosen to criminalize and has no bearing on state law.

For these reasons, we hold that McDonnell does not apply to Articles 192 and 194 of Guinea's Penal Code.[17] As a result, Thiam's argument that the jury instructions were improper necessarily fails.

II. Sufficiency of the Evidence.

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[16] *McDonnell*, 136 S. Ct. at 2372.

[17] Our holding in this case is limited to Articles 192 and 194 of Guinea's Penal Code. We do not address McDonnell's application to prosecutions under other bribery statutes or reach any conclusions regarding whether McDonnell applies to all 18 U.S.C. § 201, honest services fraud, or Hobbs Act extortion prosecutions.

‘ Thiam also argues that there was insufficient evidence (i) to support a finding of a quid pro quo exchange and (ii) to support a finding that he committed an "official act" as defined in McDonnell. We review challenges to the sufficiency of evidence de novo, "but must uphold the conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[18] "Moreover, the jury's verdict may be based on circumstantial evidence, and the Government is not required to preclude every reasonable hypothesis which is consistent with innocence."[19]

Thiam argues that there was insufficient evidence to support a finding of a quid pro quo exchange because there was no "advance agreement to trade things of value for governmental action" and the "making of a gratuitous payment as an after-the-fact reward for a job well done" is not a crime. Appellant's Br. at 42. But given (i) the timing of the payments, with the first coming just two weeks before the Shareholder's Agreement was

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[18] *Silver*, 864 F.3d at 113 (quoting *United States v. Vernace*, 811 F.3d 609, 615 (2d Cir. 2016)).

[19] *United States v. Ogando*, 547 F.3d 102, 107 (2d Cir. 2008) (internal quotation marks and citations omitted).

executed and others following soon thereafter, (ii) Thiam's efforts to conceal both his true employment and the source of the payments, and (iii) Thiam's implausible explanation at trial that the payments constituted an undocumented and interest-free personal loan, there is sufficient evidence to support a finding by the jury of a quid pro quo exchange. And there is no merit to Thiam's argument that the evidence was insufficient to support a finding that he committed an "official act" as defined in *McDonnell* in light of our holding that this definition is inapplicable to the Guinean statutes at issue.

III. Evidentiary Challenges

Finally, Thiam challenges evidentiary rulings made by the district court that (i) precluded him at trial from playing certain excerpts of his post-arrest interview with the FBI; (ii) admitted into evidence a summary chart showing his luxury purchases and a text exchange between Thiam and a third party regarding Pa's incarceration; and (iii) permitted government cross-examination based on Thiam's noncompliance with foreign reporting requirements, his knowledge of Pa's other bribes, and his knowledge of corruption in Africa. We find no error with respect to these rulings, all of which are

reviewable under an abuse of discretion standard.[20]

Thiam argues that the district court should have admitted certain excerpts of his post-arrest interview under the "rule of completeness." The "rule of completeness" doctrine under Rule 106 of the Federal Rules of Evidence provides that an "omitted portion of a statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion."[21] But it does not "require introduction of portions of a statement that are neither explanatory of nor relevant to the admitted passages."[22] Thiam argues that the district court erred when it precluded statements he made in the interview about the role that other members of the Guinean government played in the negotiations

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[20] *United States v. Dupre*, 462 F.3d 131, 136 (2d Cir. 2006).

[21] *United States v. Castro*, 813 F.2d 571, 575–76 (2d Cir. 1987), *cert. denied*, 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987).

[22] *U.S. v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982); *see also United States v. Williams*, No. 17-3741-cr, 930 F.3d 44, ——— – ———, 2019 WL 2932436, at *8–10 (2d Cir. July 9, 2019).

with CIF and about personal loans he received from other third parties. Because the rule of completeness "is violated only where admission of the statement in redacted form distorts its meaning or excludes information substantially exculpatory of the declarant,"[23] it was within the district court's discretion to exclude these statements. In any event, Thiam testified at trial about both matters, so the jury had before it the information Thiam claims was improperly excluded. Therefore, any potential error was harmless.

Thiam next challenges the admission into evidence of the summary chart showing his luxury purchases and of the text exchange regarding Pa's incarceration, arguing that the district court erred in finding this evidence to be more probative than prejudicial.[24] "On review of a district court decision to admit evidence, we generally maximize its probative value and minimize its prejudicial effect."[25] Because this evidence was useful to the jury in understanding

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[23] *United States v. Benitez*, 920 F.2d 1080, 1086–87 (2d Cir. 1990) (internal quotation marks omitted).

[24] *See* Fed. R. Evid. 403.

[25] *United States v. Coppola*, 671 F.3d 220, 245 (2d Cir. 2012) (internal quotation marks omitted).

Thiam's motivation for accepting bribes and his consciousness of guilt respectively, the district court did not abuse its discretion in admitting it.

Finally, Thiam argues that the district court erred in permitting cross-examination that pertained to his noncompliance with foreign reporting requirements, knowledge of Pa's other bribes, and general knowledge of corruption in Africa. Because each of these lines of questioning related to Thiam's state of mind, the district court did not abuse its discretion in permitting this cross-examination.

CONCLUSION

We have considered Thiam's other arguments and conclude that they are without merit. For these reasons, we AFFIRM the judgment of the district court.