NO._____

In The
Supreme Court of the United States

ROBERT JAMES MCCABE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Sheriff McCabe was convicted of honest services mail fraud and Hobbs Act extortion based on bribery as defined by 18 U.S.C. § 201(b) which prohibits a public official from accepting anything of value in return for being influenced in the performance of any official act. The Indictment charged a retainer-style bribery with campaign contributions and gifts accepted in exchange for official acts on an "as-needed basis." At trial there was no instruction on corrupt intent and rather than instructing on the statutory language "in return for," the jury was instructed that "a given thing of value need not be correlated with a specific official action" rather items of value "may be given with the intent to retain a public official's services on an as-needed basis so that as the opportunities arise the public official would take specific official action on the payor's behalf." Pet.App.A43, and A85-86. The court of appeals affirmed finding the instructions to be a "correct statement of the applicable law." Pet.App. A41.

The question presented is:

Whether the federal bribery statute, 18 U.S.C. § 201(b), through its use of the term "in return for" requires some nexus or correlation between the unlawful benefit accepted and a specific official act to be performed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert James McCabe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. McCabe*, 103 F. 4th 259 (4th Cir. 2024), No. 22-4309, U.S. Court of Appeals for the Fourth Circuit, Judgment entered June 3, 2024, and amended August 14, 2024 (affirming conviction and sentence).

- *United States v. McCabe,* No. 2:19cr171, U.S. District Court for the Eastern District of Virginia, Judgment entered May 24, 2022.

There are no other proceedings in state of federal trial or appellate court, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

JURISDICTIONAL STATEMENT

The court of appeals entered judgment on June 3, 2024. Pet.App.A1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 201(a)(3) -

> the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(b)(2)(A) –

> Whoever—
>
> being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to

receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act; shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 1341 –

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1346 –

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1349 –

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 1951(a) and (b)(2) –

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in

violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

Robert McCabe ("McCabe") petitions for certiorari review by the United States Supreme Court of the court of appeals' 49-page published Opinion affirming his conviction and sentence. The decision of the court of appeals raises substantial concerns about the federal government's use of federal corruption statutes to regulate the conduct of state and local elected officials and is in conflict with relevant decisions of this Court. This Court is extremely familiar with the federal public corruption statutes, including 18 U.S.C. § 201, because the Court is regularly called on to resolve issues arising from federal prosecutor's aggressive use of the honest services fraud and Hobbs Act extortion statutes often as applied to state and local officials. Whether the federal bribery statute, 18 U.S.C. § 201(b), through its use of the term "in return for" requires some nexus or correlation between the unlawful benefit accepted and a specific official act to be performed is a recurring issue in the courts of appeal and is exceptionally important.

This case involves the federal prosecution of a duly elected local Sheriff for accepting campaign contributions and gifts from the owners of two businesses that held contracts for food services and medical services at the local jail. When Sheriff McCabe was elected the Norfolk Jail was under federal oversight due to deplorable

conditions in one of the largest correctional facilities in Virginia. Sheriff McCabe turned the situation around, improving safety for inmates and staff, he dramatically reduced incidents of suicide at the jail, improved medical care for all inmates, and implemented programs allowing prisoners a chance for rehabilitation before reentry into the community. The citizens of Norfolk signaled their overwhelming support for Sheriff McCabe by reelecting him over six election cycles.

1. Proceedings Before the District Court

Sheriff McCabe was elected in 1993 in Norfolk, Virginia and was reelected every four years over six election cycles. His statutory duties as a sheriff in the Commonwealth included providing for the custody, care and feeding of all inmates in the city jail. Pet.App.A4. Following his retirement, in 2019 federal prosecutors charged Sheriff McCabe with honest services mail fraud and Hobbs Act extortion under color of official right based on the theory that during his 24-year tenure he had accepted a stream of campaign contributions and gifts from two vendors at the jail in exchange for officials acts to be undertaken on an "as-needed" basis as the opportunities arose. Each count relies on this retainer-style theory of bribery. The parties agreed pretrial that bribery as defined by 18 U.S.C.§ 201(b) applied to each count of the Indictment.

The Indictment

In 2019, federal prosecutors charged Sheriff McCabe with seven counts of conspiracy and honest services mail fraud, in violation of 18 U.S.C. §§ 1341, 1346 and 1349; three counts of conspiracy and Hobbs Act extortion, in violation of 18

U.S.C. § 1951; and a single count of conspiracy to commit money laundering in connection with a campaign contribution he received during his bid for mayor on the theory that the funds donated represented the proceeds of honest services fraud, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and (h). Pet.App.A15.

The Indictment charged Sheriff McCabe with accepting a stream of benefits consisting of campaign contributions and gifts from two vendors at the jail in exchange for official acts on an "as-needed" basis and spanned the entire 24-year period that he served as Sheriff. During Sheriff McCabe's tenure the City utilized a competitive bidding process and issued public Requests for Proposals ("RFPs") for services needed at the jail. The RFP was developed by a team of subject matter experts in the Sheriff's Department, who worked in conjunction with a city contracting officer to develop a detailed proposal that would meet the daily needs of prisoners at the jail. Pet.App.A5. After interested vendors submitted proposals, the RFP team worked with city officials to rank the vendors and awarded the contract to the vendor deemed most qualified by the city. The contracts were typically for a two-year term with two or more annual extensions if the City was satisfied with the vendor's performance. JA679, JA730-31. ("JA" herein refers to the Joint Appendix filed by the parties in the court of appeals). Sheriff McCabe was never a member of any RFP committee or involved in the ranking of bids but he and the city attorney both signed the contracts and any contract extensions. As services were performed the vendors submitted invoices which were paid monthly by the city with checks through the U.S. mail.

The charges involved the vendor for food services, Appleton or "ABL", for 24 years and the vendor for medical services, Boyle, an executive with Correct Care Solutions or "CCS" for 12 years. The Indictment charged McCabe with accepting a stream of benefits in exchange for broad categories of official acts on an "as-needed basis," essentially a retainer-style agreement for official acts favorable to the vendors as they may be needed. Neither the conspiracy charges nor the substantive charges of honest services mail fraud or Hobbs Act extortion linked any campaign contribution or gift from the vendors to a specific or focused official act by Sheriff McCabe. Nor did any of the charges correlate any payment by the city to any campaign contribution or gift to McCabe. The money laundering charge involved a campaign contribution from Boyle to McCabe's mayoral race on the theory that the transaction involved the proceeds of honest services mail fraud. Pet.App.A12-13.

The gravamen of each count was bribery under Section 201, the allegation that McCabe engaged in a quid pro quo relationship involving his receipt of campaign contributions and gifts during his tenure as Sheriff in exchange for official acts on an "as-needed basis." In reliance on *McDonnell v. United States*, 579 U.S. 550 (2016), McCabe moved pretrial to dismiss the Indictment for failure to allege a quid pro quo agreement involving a specific official act and to strike all evidence involving campaign contributions pursuant to *McCormick v. United States*, 500 U.S. 257 (1991) because the Indictment did not allege an explicit quid pro quo. In a 42-page opinion, the district court denied all of McCabe's pretrial motions. Pet.App.A17.

During litigation, the parties agreed as they had in *McDonnell* that bribery as codified at 18 U.S.C. § 201(b) applied to the honest services mail fraud and Hobbs Act extortion charges in the Indictment. Pet.App.A17. Section 201(b) makes it a crime for a federal official to corruptly demand, seek, receive, or request, anything of value "in return for: (A) being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2)(A).

The Evidence at Trial

The broad scope of the charges allowed the government to introduce evidence at trial included acts and statements made by McCabe to any Sheriff's Department ("NSO") employee during his entire 24-year tenure as Sheriff. The evidence included his failure to properly disclose certain campaign contributions and gifts on campaign finance reports or statements of economic interests filed with the city.

When McCabe ran for office conditions at the jail were deplorable and consequently was under federal oversight. Improving conditions at the jail became McCabe's campaign platform. Sheriff McCabe set about cleaning up conditions and ensuring it was safe for both inmates and staff. After city officials condemned the jail kitchen Appleton came in on an emergency basis in 1994 and developed plans to renovate the kitchen and prepared food off-site until the renovations were complete. Appleton and McCabe worked closely together and described their early days like being in a "foxhole" together. JA2945. Appleton, pursuant to a grant of immunity, testified that he never intended to bribe McCabe, but believed there was a tacit understanding "you scratch my back, and I'll scratch yours." JA1649, JA1664,

JA1732. The Norfolk Sheriff's Office ("NSO") had both counsel and a director of finance. NSO's Director of Finance was confident throughout the long relationship with ABL that ABL was providing the jail with the lowest prices for food services of any large facility in the Commonwealth. JA2631. Throughout the years, Sheriff McCabe encouraged NSO personnel to keep ABL's prices low, at times granting ABL small increases on contract extensions tied to increases in the cost of living ("COLA"), but often refusing increases or granting smaller COLA increases than ABL requested. JA1715, JA2657.

Meanwhile Appleton and McCabe became close personal friends, McCabe and his wife were guests of the Appleton's during *mardi gras* and Mrs. McCabe and their son attended an Appleton family wedding. They attended sporting events and concerts together, even vacationed at the same time in the Bahamas with their wives. JA1658, JA1689, JA1724-26, JA2957-59. Typically, they split the expenses although under immunity, Appleton described paying for the pricier meals and described the catering for Sheriff McCabe's political functions as excessive. JA1602, JA1624, JA2958.

The Indictment listed five broad categories of possible official acts related to the food services contracts and nine broad categories of possible official acts, including writing letters of reference, for the medical services contract, but did not link any official act to any benefit or series of benefits received by Sheriff McCabe. JA47-51, Indictment. Nor was there any evidence at trial that correlated any official act with any particular benefit. The government's theory was that campaign

contributions and gifts over a 24-year served to retain Sheriff McCabe so that he would take official acts favorable to the vendors on an "as-needed basis" as the opportunities arose.

During Sheriff McCabe's first 10 years, co-defendant Boyle was an executive with two different companies that held the contracts for medical services at the jail. By 2004, Boyle had formed Correct Care Solutions and bid on the Norfolk RFP. After winning the contract, CCS hired an excellent Director of Nursing and NSO staff all agreed that the quality of medical care improved. JA2801-02. The NSO Finance Director was adamant that CCS never received special consideration and identified times that CCS sought a COLA increase on an extension of the original contract which was denied or decreased. JA2657, JA2638, JA2643, JA2657, JA2646-47, JA2662-64, JA2662. In 2009, when the city was having a tough budget, CCS was persuaded to extend the contract for one-year with no increase in price. JA2643-44. JA1423, JA2640-41.

During the long friendship between McCabe and Boyle, they golfed together, attended concerts, went gambling and attended sporting events. Boyle and CCS made regular contributions to McCabe's campaigns, attended campaign fundraisers and made donations for auctions at campaign fundraisers. Boyle also made campaign contributions to McCabe's unsuccessful bid for mayor. Although McCabe sought to call Boyle as a witness in his defense, the cases were severed and Boyle, who gave exculpatory information to federal prosecutors in a debriefing, was not legally available to McCabe. Pet.App.A26.

Jury Instructions

The district judge grouped the counts by the statutory offenses and instructed the jurors by first reading the charges in the indictment before reciting the statutes that provided the basis for each count. The court then provided relevant definitions of the legal terms. Consistent with pretrial litigation, the court instructed the jurors that honest services mail fraud and Hobbs Act extortion required a quid pro quo bribery agreement as that term is defined at 18 U.S.C. § 201(b). Pet.App.A17, note 9.

Pertinent to this petition, the district court provided the following specific instructions which were affirmed by the court of appeals as correct statements of the applicable law:

> **55, Bribery, Quid Pro Quo.**
>
> Where the thing or things of value solicited or received by a public official are the payment of campaign contributions, the government must further prove a meeting of the minds on the explicit quid pro quo. This means that the receipt of such contributions are taken under color of official right, if the payments are made in return for an explicit promise or understanding by the official to perform or not to perform an official act. While the quid pro quo must be explicit, it does not have to be express. Political contributions may be the subject of an illegal bribe even if the terms are not formalized in writing or spoken out loud. "Explicit" refers not to the form of the agreement between the payor and the payee but the degree to which the payor and payee were aware of its terms.
>
> **56**, **Bribery Need Not Be Express.**
>
> The public 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. Rather, the intent to exchange may be established by circumstantial evidence, based on the defendant's words, conduct, acts, and all the surrounding

circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

57, Bribery - Mixed Motive No Defense.

Also, because people rarely act for a single purpose, a public official need not have solicited or accepted the thing of value only in exchange for the performance of official action. If you find beyond a reasonable doubt that a public official solicited or received a thing of value at least in part in exchange for the performance of official action, then it makes no difference that the public official may also have had another lawful motive for soliciting or accepting the thing of value.

58, Bribery - Beneficial Act No Defense.

The government also need not prove that the thing of value caused the public official to change his position. In other words, it is not a defense to claim that a public official would have lawfully performed the official action in question anyway, regardless of the bribe. It is also not a defense that the official action was actually lawful, desirable, or even beneficial to the public. The offense of honest services fraud is not concerned with the wisdom or results of the public official's decisions or actions but, rather, with the manner in which the public official makes his or her decisions or takes his or her actions.

71, Knowledge that the Public Official Obtained a Thing of Value in Return for Official Action.

As was the case with bribery, the exchange or quid pro quo need not be stated in express terms, and the intent to exchange can be inferred from all the surrounding circumstances. Furthermore, as also is the case with bribery, a given thing of value need not be correlated with a specific official action, and a thing or things of value may be given with the intent to retain a public official's services on an as-needed basis, so that as opportunities arise the public official would take specific official action on the payor's behalf. As also was the case with bribery the government need not prove that the thing of value caused the defendant to change his position. If the defendant obtained a thing of value to which he was not entitled, knowing the thing of value was given and returned for official actions, it is not a defense that he would have lawfully performed the official action anyway, regardless of the thing of value.

Pet.App.A72-74 and A85-86. Based on these instructions, McCabe was convicted on all counts.

McCabe was sentenced to 12 years (144 months) imprisonment, followed by 3 years of supervised release. Pet.App.A3. McCabe timely appealed.

2. The Appeal

On appeal to the U.S. Court of Appeals for the Fourth Circuit in reliance on *McCormick v. United States*, 500 U.S. 257 (1991), *McDonnell v. United States*, 579 U.S. 550 (2016), and other relevant authority, Sheriff McCabe challenged the jury instructions defining bribery as violative of his constitutional rights. Pet.App.A23. In its 49-page published opinion the court of appeals recited only those facts and inferences favorable to the Government without regard for the evidence mounted by Sheriff McCabe and affirmed the instructions given as accurate statements of the applicable law. Pet.App.A4, A37-39, and A46-47.

The court of appeals defined the terms "expressed" and "explicit" as follows: "The term 'express' simply means reduced to words, either in writing or spoken aloud. The term 'explicit,' on the other hand, refers to something that is obvious and unambiguous." Pet.App.A40. Although neither explanation was given by the trial court, the court of appeals found the instructions properly distinguished the need for an explicit agreement when campaign contributions were the subject of the bribe holding:

> And even though Justice Stevens's dissent in *McCormick* articulated his concern that the Court's decision could be read to require an "express" agreement, the majority opinion requires only "an explicit promise or undertaking by the official." *See McCormick*, 500 U.S. at 273 (White, J.), 282 (Stevens, J., dissenting). Put succinctly, the *McCormick* decision requires – in a bribery involving campaign

> contributions – a quid pro quo that is "explicit" but not necessarily a quid pro quo that is stated in words.

Pet.App.A40.

In rejected McCabe's challenges under *McDonnell*, the court of appeals narrowed this Court's holding finding that "[t]he *McDonnell* decision simply clarified the term "official act" as used in § 201(a)(3), explaining that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'" Pet.App.A43. The court of appeals affirmed its prior holding in *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), that "the government need not show that the defendant intended for his payments to be tied to specific official acts (or omissions). … Rather it is sufficient to show that the payor intended for each payment to induce the official to adopt a specific course of action." *Jennings*, at 1014. Pet.App.A45. The court of appeals found that because *McDonnell* was silent on the "theory of bribery based on official acts retained on an as-needed basis" the instructions given were a correct statement of the applicable law. Pet.App.A43.

Shortly after the mandate was issued by the court of appeals, this Court decided *Snyder v. United States,* 144 S.Ct. 1947 (2024).

REASONS FOR GRANTING THIS PETITION

This case squarely presents the question of whether in the context of federal bribery law the statutory language in § 201(b) "in return for" requires any linkage or correlation between the benefits received and an official act to be performed. Alternately, whether honest services mail fraud and Hobbs Act extortion premised

on a corrupt agreement to accept campaign contributions "in return for" official acts prospectively on an "as-needed basis" is consistent with the statutory requirements of 18 U.S.C. § 201(b). Because federal prosecutors continue to aggressively prosecute state and local elected officials and their supporters under federal bribery statutes the question presented here arises frequently.

This Court has repeated narrowed the application of federal public corruption statutes when used to prosecute state and local public officials, holding that it is not the role of federal courts to set standards of good government for state and local officials. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020); *Percoco v. United States*, 598 U.S 319 (2023); and *Ciminelli v. United States*, 598 U.S. 306 (2023). The Court regularly cautions against "a sweeping expansion of federal criminal jurisdiction" into areas "traditionally regulated by state and local authorities," absent a clear statement by Congress. *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *McNally v. United States*, 483 U.S. 350, 360 (1987).

A. The Jury Instructions Endorsed by the Court of Appeals Fail to Apply This Court's Requirement that a Bribery Agreement Involving Campaign Contributions Must be Explicit.

Federal prosecutors continue to charge elected state and local officials with bribery based on the theory that a public official can be retained through a stream of benefits, including campaign contributions, in return for official acts as they may be needed prospectively without regard for the important constitutional protections attached to raising funds for political campaigns. It is well-established that contributing and spending money on political campaigns is political speech that

implicates the most fundamental First Amendment protections. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 196 (2014) (citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*per curiam*)). This Court recently observed "[t]o be sure "the 'line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights.' And in drawing that line, 'the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.'" *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1653 (2022) (quoting *Fed. Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007). In *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), Chief Justice Roberts characterized contributing to a political campaign as a form of political participation analogous to voting. *Id.*, at 1440-41. "There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: they can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign." *Id.*

These core democratic and First Amendment values lie at the heart of this Court's *McCormick* decision, which developed a heightened standard requiring that the corrupt agreement be explicit where campaign contributions were involved. *McCormick v. United States*, 500 U.S. 257, 272-73 (1991). In exempting political contributions from Hobbs Act extortion under color of official right, the Court held that the receipt of political contributions could be "vulnerable as having been taken under color of official right; but only if the payments are made in return for an

explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be *controlled* by the terms of the promise or undertaking." *Id.* (emphasis added). The rule in *McCormick* draws a clear line between a corrupt bargain and legitimate campaign fundraising to prevent prosecutors from chilling democratic participation and punishing conduct that is necessary and central to our system of elective government.

The court of appeals without regard for this Court's holding in *McCormick* specifically endorsed Instruction number 56 as a correct statement of the applicable law. Instruction Number 56 told jurors that:

> The public 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. Rather, the intent to exchange may be established by circumstantial evidence, based on the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

Pet.App.A39.

The application of McCormick's requirement for an explicit agreement in cases involving campaign contributions has been and without intervention by this Court will continue to be a point of controversy in the courts of appeal. *See, United States v. Siegelman*, 640 F.3d 1159, 1170 (11th Cir. 2011) (a campaign contribution becomes an illegal bribe "only if the payments are made in return for an explicit promise" to perform a specific official act); *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) ("proof of an express promise is necessary when the payments are

in the form of campaign contributions"); *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992) (requiring a clear and unambiguous agreement, with no uncertainty about the terms); *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001); and *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994).

The court of appeals in note 17 cites with approval the definition of "explicit" from the 1991 edition of *Black's Law Dictionary*, but this guidance was not included in the instructions given in Sheriff McCabe's trial. Pet.App.A39. Instead, the trial court instructed the jurors on multiple factors that which the trial court did not deem necessary for an explicit corrupt agreement. Rather than focusing on the essential elements of a corrupt agreement to accept campaign contributions in return for official acts, the court instructed jurors that lawful motive was not a defense telling jurors in Instruction No. 57 that:

> [B]ecause people rarely act for a single purpose, a public official need not have solicited or accepted the thing of value only in exchange for the performance of official action. If you find beyond a reasonable doubt that a public official solicited or received a thing of value at least in part in exchange for the performance of official action, then it makes no difference that the public official may also have had another lawful motive for soliciting or accepting the thing of value."

Pet.App.A73-74.

After being told that lawful motive was not a defense, jurors were twice instructed that the bribe did not have to cause the elected official to change his position and the fact that it was beneficial for the city was irrelevant. In Instruction Number 58 jurors were told:

> The government also need not prove that the thing of value caused the public official to change his position. In other words, it is not a defense

> to claim that a public official would have lawfully performed the official action in question anyway, regardless of the bribe. It is also not a defense that the official action was actually lawful, desirable, or even beneficial to the public.

Pet.App.A74, see also Pet.App.A86. Taken as a whole the court's instructions contradict this Court's requirement that a bribery agreement involving campaign contributions must be explicit. The instructions failed to fairly instruct the jurors as to the facts and circumstances that should be considered before finding a local elected official guilty of honest services fraud and Hobbs Act extortion. Because the court of appeals endorsed these specific instructions as correct statements of the applicable law, these instructions will continue to be employed by federal prosecutors against local elected officials until this Court intervenes.

B. A Retainer-Style Agreement for Official Acts Prospectively on an "As-Needed Basis" is Incompatible with This Court holding in *McDonnell*.

This Court has repeated narrowed the application of federal public corruption statutes when employed to convict state and local officials cautioning against a "sweeping expansion of federal criminal jurisdiction" into areas "traditionally regulated by state and local authorities," absent a clear statement by Congress. *Snyder v. United States*, 144 S. Ct. 1947, 1956-57 (2024); *Prococo v. United States,* 598 U.S. 319 (2023), *Ciminelli v. United States,* 598 U.S. 306 (2023); *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020); and *Cleveland v. United States*, 531 U.S. 12, 24 (2000). Recognizing that a State "defines itself as a sovereign through the structure of its government and the character of those who exercise government authority" and relying on principles of federalism this Court appropriately declines to set

standards of good government for state and local officials. *Snyder*, 144 S. Ct. at 1956 (citing *McDonnell*, 579 U.S. 550, 576 (2016)). Sheriff McCabe's conviction represents another effort by federal prosecutors to utilize federal public corruption statutes against state and local officials on lesser standards than required by Congress.

In *McDonnell v. United States*, 579 U.S. 550; 136 S. Ct. 2355 (2016) this Court narrowed prior understanding of what constitutes an official act under 18 U.S.C. § 201(a)(3) and clarified that an act is "official" only if it is a "decision or action" taken on a "specific and focused" matter that "involves a formal exercise of governmental power." *Id.*, 136 S. Ct. at 2372. This Court in *McDonnell* criticized the trial court's instructions on three specific points, including, failing to instruct the jurors that they must find that Governor McDonnell "made a decision or took an action – or agreed to do so – on the *identified* question, matter, cause, suit, proceeding or controversy." *Id.*, 136 S. Ct. at 2374 (emphasis added). The government's theory that a stream of benefits, including campaign contributions, in return for broad categories of official acts that occurred over the span of 24 years lacked the necessary specificity to constitute bribery under § 201(b) and deprived Sheriff McCabe of fair notice. On principles of fair notice this Court has often declined to construe a criminal statute on the assumption that the government will use it responsibly. *Snyder v. United States*, 144 S. Ct. 1947, 1958 (2024) (citing *McDonnell*, 579 U.S. 576, 136 S. Ct. 2355)); see also *United States v. Sun Diamond Growers of Cal*, 526 U.S. at 408 (1992). This is such a case.

The same statutes and broad charging language that were used to prosecute former Governor McDonnell were used to convict Sheriff McCabe. While the charges against Governor McDonnell did not involve campaign contributions, both cases were prosecuted in the Eastern District of Virginia and involved a broad list of possible benefits in exchange for broad categories of official acts that might be taken on an "as-needed basis" as the opportunities arose. *McDonnell v. United States*, 579 U.S. 550 (2016). The court of appeals is correct that:

> The *McDonnell* decision specifically clarified the term "official act," as used in 18 U.S.C. § 201(a)(3), explaining that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act."

Pet.App.A43, citing *McDonnell*, 579 U.S. at 567,. But the court of appeals incorrectly limits this Court's holding to those facts and ignores the requirement that the official act "must be more specific and focused than a broad policy objective." *Id.* at 578.

While the court of appeals in this case viewed no division within the courts of appeal, the courts of appeal are split on the question of whether the government's retainer-style quid pro quo agreement for official acts on an "as-needed basis" is cognizable post-*McDonnell*. Pet.App.A43. The Second, Sixth and Eleventh Circuits have recognized that *McDonnell's* narrowed requirement for a specific and focused official act is inconsistent with a retainer-style stream of benefits theory of bribery. The Second Circuit observed that "*McDonnell* re-emphasizes that the relevant point in time in a quid pro quo bribery scheme is the moment at which the public official accepts the payment." *United States v. Silver*, 948 F.3d 538 (2d Cir. 2020) *cert.*

denied 141 S. Ct. 656 (2021). While the Second Circuit did not invalidate all "stream of benefits" cases in light of *McDonnell,* they invalidated retainer style agreements for official acts on an "as needed" basis. *Id.,* at 568 (reversing because "the jury should have been instructed that, to convict on honest services fraud, the Government must prove that, at the time the bribe was accepted, Silver promised to take official action on a specific and focused question or matter as the opportunities to take such action arose.") See also, *United States v. v. Skelos,* 988 F.3d 645 (2d Cir. 2021) (jury required to find a specific understanding of the pending question or matter at the time of payment); *United States v. Hills*, 27 F.4th 1155, 1179 (6th Cir. 2022) (finding *McDonnell* did not invalidate all "as the opportunities arise" bribery – only schemes akin to a retainer for services to be determined); *United States v. Roberson*, 998 F.3d 1237, 1251 (11th Cir. 2021) (distinguishing bribery under § 666 from § 201 and finding post-*McDonnell* a retainer theory of liability remained viable only where campaign donations were not alleged).

In *McDonnell* this Court narrowed the conduct which qualified as an official act and made clear that the government must prove that a defendant explicitly agreed to undertake "specific official acts" that were "specific and focused at the time of the alleged quid pro quo." *McDonnell*, 136 S. Ct. at 2371-72 (citations omitted). "Section 201 prohibits quid pro quo corruption – the exchange of a thing of value for an "official act." *McDonnell* narrows prior understanding and holds that the "official act" must be "specific and focused" and must be identified at the time of the corrupt agreement. *Id*. An agreement generally to provide a stream of benefits

to retain a public official for official acts as they may be needed in the future is not an agreement to perform, or not perform, specific and focused official acts. This Court should grant this Petition and reverse Sheriff McCabe's conviction because the jury instructions misstated the law on this essential element.

This Court's decision in *McDonnell* flowed in part from concerns about federalism, declining to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the federal government in setting standards" of "good government" for local and state officials." *Id.*, 136 S. Ct. at 2373 (citing *McNally v. United States*, 483 U.S. 350 (1987)), see also *United States v. Abdelaziz*, 68 F.4th 1, 33-39 (1st Cir. 2023) (reversing honest services fraud conviction as invalid under *Skilling*). Although not good government, favoritism or cronyism is not bribery. With respect to the payor's intent, it is not enough for a payor to have an expectation that the public official will reward him for contributing. Similarly, politicians are free to deliberately benefit someone who once did a favor for them and while it may be objectionable to prosecutors and jurors, it is not federal bribery. For bribery the elected official must agree to take a specific and focused official act in exchange for the bribe, he must agree that his official acts will be controlled by the bribe.

C. Congress by using the term "In Return For" under 18 U.S.C. § 201(b) Intended to Require a Link Between the Benefit Accepted and a Specific Official Act.

The federal public corruption statutes are transactional in nature. The statute requires a corrupt intent to accept a benefit in return for a specific official

act. It is this willingness to exchange an official act in return for the benefit that makes the benefit illegal. This Court limited the scope of Hobbs Act extortion to schemes involving bribery and kickbacks in *Evans v. United States*, 504 U.S. 255, 268 (1992), and in *Skilling v. United States*, 561 U.S. 358, 409 (2010), similarly narrowed the scope of honest services fraud to bribery and kickback schemes. The lower courts, as they did here, often use the term "quid pro quo" to describe bribery allegations in public corruption cases. But the courts are using a wide range of definitions and jury instructions intended to capture the nature of the necessary corrupt agreement to exchange an illegal benefit in return for a specific official act which lies at the heart of a corrupt bribery agreement.

In Sheriff McCabe's trial there was no instruction on corrupt intent, but instead a litany of instructions on "quid pro quo" which consisted primarily of limiting instructions telling the jurors that even though campaign contributions were the benefits Sheriff McCabe accepted the quid pro quo did not need to be expressed. Jurors were told instead to consider the "surrounding circumstances" and "rational or logical inferences that may be drawn from them." Pet.App.A73. They were told that innocent motive was not a defense; "it makes no difference that the public official may also have had another lawful motive for soliciting or accepting the thing of value." Pet.App.A74. Additionally, they were instructed that the government need not prove that any benefit caused Sheriff McCabe "to change his position" and that it was not a defense that he "would have lawfully performed the official action in question anyway, regardless of the bribe." Pet.App.A74. They

were further instructed that it was "not a defense that the official action was actually lawful, desirable, or even beneficial to the public." Pet.App.A74. The cumulative effect of these instructions weakened the necessary corrupt intent and deprived Sheriff McCabe of a fair trial.

The statutory text of 18 U.S.C. § 201(b) requires a "corrupt" agreement to accept something of value "in return for: being influenced in the performance of any official act." Some correlation or linkage between the benefits receive and the official act to be influenced is required under the statutory language. Congress intentionally used the term "in return for" when drafting the statute.

In *McDonnell*, consistent with prior holdings, this Court reinforces the essential element that the bribe be paid or accepted "in exchange for" a specific and focused official act. *McDonnell*, 136 S. Ct. at 2365 (citing *Evans v. United States*, 504 U.S. 255, 258 (1992) (when a public official demands a bribe "in exchange for a specific requested exercise of his official power" the Hobbs Act is violated)). Despite Congress's stated intent, the court of appeals endorsed Instruction Number 71:

> As was the case with bribery, the exchange or quid pro quo need not be stated in express terms, and the intent to exchange can be inferred from all the surrounding circumstances. Furthermore, as also is the case with bribery, a given thing of value need not be correlated with a specific official action, and a thing or things of value may be given with the intent to retain a public official's services on an as-needed basis, so that as opportunities arise the public official would take specific official action on the payor's behalf. As also was the case with bribery, the government need not prove that the thing of value caused the defendant to change his position.

Pet.App.A43.

This Court revisited the 18 U.S.C. § 201 this summer in *Snyder v. United States*, 144 S.Ct. 1947 (2024) and observed again that the dividing feature between federal bribery and federal gratuities is the requirement under § 201(b) for a corrupt intent:

> [T]he dividing line between § 201(b)'s bribery provision and § 201(c)'s gratuities provision is that bribery requires that the official have a corrupt state of mind and accept (or agree to accept) the payment intending to be influenced in the official act.

Id., at 1955 (citing, *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–405 (1999)). In both *Snyder* and *Sun-Diamond* this Court pointed to "corrupt intent" as the "distinguishing feature" under 18 U.S.C. § 201. *Snyder*, at 1954-55. While bribery under § 201(b) requires the benefit be accepted by a public official "in return for" "being influenced" in the performance of an official act, gratuities under § 201(c) requires the benefit be given and accepted "for or because of any official act." Both statutes require linkage or correlation between the item of value and a specific official act.

In *Sun Diamond*, this Court specifically rejected the government's "stream of benefits" theory under 18 U.S.C. §201(c) and held that "the Government must prove a *link* between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398 (1999) (emphasis added). This Court rejected the government's position that the beneficial "official act" could be some favorable act at an unspecified future time and instead found that the statutory "insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *Id.*, at 405.

Bribery under Section 201(b) requires identification of the specific official act at the time of the exchange. The offense is committed when there is a corrupt agreement to exchange an unlawful benefit for the specific promise to perform an official act. The danger in the "retainer-style" theory is that the jury is not required to identify any benefit the public official accepted in exchange for a specific official act which is the subject of the corrupt agreement. Rather the government's theory that a stream of benefits can serve as a retainer allows a defendant to be convicted based on conduct the jury may perceive broadly as favoritism for a donor. The instructions here invited jurors to convict Sheriff McCabe on the inference that there must have been some unspoken agreement to reciprocate in an unspecified way for the benefits given. Nor did the instructions provide any of the heightened protections that this Court requires when campaign contributions are the benefits accepted. When campaign contributions are the subject of the bribe under § 201(b) the public official must explicitly agree, in exchange for a bribe, he will perform or not perform a specific official act. That a specific official act will be controlled by the bribe. The government's theory of official acts to be taken prospectively on an "as-needed basis" does not comply with the plain language of the statute.

The court of appeals viewed this Court's decision in *McDonnell* as completely irrelevant to the issue of whether there must be some correlation between the benefits received and some prospective official action to be taken on an "as-needed" basis. The court of appeals found that "the *McDonnell* decision did not mention the stream-of-benefits theory of bribery, nor did it refer to a theory of bribery based on official acts retained on an as-needed basis." Pet.App.A43. This Court in *McDonnell*

limited the Government's broad interpretation of "official act" and held that the jury must decide "whether a public official agreed to perform an 'official act' at the time of the alleged quid pro quo." *McDonnell*, 136 S. Ct. at 2371 (2016). *McDonnell* makes clear that the government must prove that a public official must agree to undertake "specific and focused official acts" to constitute a corrupt agreement.

The definition of "official act" under Section 201(a)(3) applies to both federal bribery and illegal gratuities. In the context of illegal gratuities, this Court has rejected the "stream of benefits" theory and held that "to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398 (1999). In *Sun Diamond*, this Court rejected the Government's position that the beneficial "official act" could be some favorable act at an unspecified future time instead finding that the statutory "insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *Sun Diamond*, at 405. It is nonsensical to think that some correlation or linkage is required for the less serious crime of illegal gratuities but is not required for bribery. The court of appeals erred by limiting this Court's holding in *McDonnell*. Bribery as defined by 18 U.S.C. § 201(b) requires linkage between the benefit given or accepted "in return for" the specific official act which the parties agree will be influenced.

Bribery under § 201(b) requires that a public official corruptly demand, seek, receive, or request, anything of value "*in return for*: (A) being influenced in the

performance of any official act." 18 U.S.C. § 201(b)(2)(A)(emphasis added). It is the corrupt agreement to obtain an item of value in exchange for a specific and focused official act which is the essence of the bribery agreement that underlies both the honest services fraud statute and Hobbs Act extortion. The court of appeals decision cannot be squared with this Court's decisions in *Snyder v. United States,* 144 S. Ct. 1947 (2024); *McDonnell v. United States*, 579 U. S. 550 (2016); and *United States v. Sun Diamond Growers of Cal.,* 526 U. S. 398 (1999) all of which clarify that Section 201(b) requires some correlation between the benefits given "in return for" a specific official act.

CONCLUSION

To be guilty of honest services mail fraud or Hobbs Act extortion the parties must have a specific corrupt intent to exchange a benefit "in return for" a specific official act. It is this corrupt intent to engage in an exchange of official acts for benefits that distinguishes bribery from illegal gratuities and innocent transactions. The plain reading of the statute requires some linkage or correlation between the benefit and the official act.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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NO._____

In The
Supreme Court of the United States

ROBERT JAMES MCCABE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4309

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ROBERT JAMES MCCABE,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:19-cr-00171-AWA-DEM-1)

Argued: October 25, 2023 Decided: June 3, 2024
Amended: August 14, 2024

Before KING and GREGORY, Circuit Judges, and Joseph R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Gregory and Judge Goodwin joined.

ARGUED: Laura Pellatiro Tayman, LAURA P. TAYMAN, PLLC, Newport News, Virginia, for Appellant. Richard Daniel Cooke, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. **ON BRIEF:** Jessica D. Aber, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia;

Jacqueline R. Bechara, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Anthony Mozzi, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Norfolk, Virginia, for Appellee.

KING, Circuit Judge:

Former Sheriff Robert James McCabe of the City of Norfolk, Virginia, appeals from his convictions and related sentences for carrying out wide-ranging fraud and bribery schemes with contractors concerning medical and food services for prisoners in the Norfolk Jail. For more than 20 years, McCabe assisted favored contractors by providing them with inside information about competing bids for the Jail's contracts, as well as unilaterally altering and extending contracts for the benefit of those contractors. In exchange, McCabe received various things of substantial value, including campaign contributions, sums of cash, and a stream of so-called "gifts." Indicted in 2019 in the Eastern District of Virginia with the CEO of a jail contractor — that is, Gerard Francis Boyle — McCabe was tried alone by a jury in Norfolk in 2021. McCabe was convicted of 11 federal offenses, including charges of conspiracy, honest services mail fraud, Hobbs Act extortion, and money laundering. In May 2022, McCabe was sentenced to 144 months in prison, plus supervised release.

On appeal, Sheriff McCabe pursues four contentions of error arising from his convictions and sentences. First, he presents a trial sequence issue, maintaining that his trial was erroneously unfair because it was conducted before a trial of codefendant Boyle. Second, McCabe contends that the trial court fatally erred by admitting hearsay statements made by a so-called "Undersheriff." Third, McCabe contests jury instructions of the trial court. That is, relying primarily on the Supreme Court's decisions in *McCormick v. United States*, 500 U.S. 257 (1991), and in *McDonnell v. United States*, 579 U.S. 550 (2016), McCabe disputes certain of the court's instructions pertaining to bribery which, according

to McCabe, fatally undermine each of his convictions. Finally, McCabe challenges the court's application of an 18-level sentencing enhancement.

As explained herein, we are satisfied that each of Sheriff McCabe's appellate contentions lacks merit, and we affirm his convictions and sentences.

I.

Before reviewing and assessing the legal issues presented, we will summarize the pertinent facts underlying those issues. The pertinent facts and reasonable inferences drawn therefrom are recited in the light most favorable to the Government, as the prevailing party at trial. *See United States v. Burgos*, 94 F.3d 849, 854 (4th Cir. 1996).

A.

In 1993, defendant McCabe was elected Sheriff of the City of Norfolk. He served in that capacity from 1994 through 2017. Under Virginia law, a Sheriff is "charged with the custody, feeding and care of all prisoners confined in the county or city jail." *See* Va. Code Ann. § 15.2-1609. As the Sheriff of Norfolk, McCabe exercised broad discretion over the Jail's contracts providing, among other things, medical care and food services for prisoners. More specifically, McCabe was involved with and responsible for, inter alia, contract negotiations, renewals, and extensions. The primary constraint on Sheriff

McCabe's discretion over Jail contracts was a competitive bidding process, which involved the City of Norfolk's issuance of "Requests for Proposals," also known as "RFPs."[1]

During his extended tenure as Sheriff of Norfolk, McCabe maintained and carried out corrupt relationships with at least two major jail contractors. One of them, ABL Management, Inc. ("ABL"), was the City's primary provider of food services for Jail prisoners from 1994 until 2017.[2] John Appleton was ABL's CEO, and Appleton became a cooperating unindicted coconspirator and witness for the prosecution. The second major contractor — named Correct Care Solutions, LLC ("CCS") — provided medical services for Jail prisoners, and it was operated by coconspirator and codefendant Boyle, its founder and CEO.[3]

Relevant here, Sheriff McCabe assisted ABL and CCS in three corrupt ways: (1) he ensured that ABL and CCS could obtain lucrative Jail services contracts — paid for by the City — by providing Appleton and Boyle with important inside information that

[1] During the relevant period, ethics rules were in place with respect to the RFP process of the City of Norfolk, in order to ensure a level playing field between entities seeking and bidding for the Jail's medical and food business. The RFP process prohibited communications about the contract proposals between the bidders and City employees who were not members of a committee designated to receive and evaluate bid proposals. Sheriff McCabe was never a member of the City's bid evaluation committee.

[2] Although ABL was the primary provider of food services for the Jail during nearly all of Sheriff McCabe's tenure as the Sheriff of Norfolk, ABL lost the bid in 1999, and thus did not provide food services for that one year.

[3] Our references to Appleton and Boyle refer equally to ABL and CCS, respectively. That is, references herein to Appleton mean ABL, and vice versa. And references to Boyle mean CCS, and vice versa.

enabled them to undercut other bidders in the City's competitive bidding processes; (2) McCabe exercised his authority to modify terms of the Jail's medical and food services contracts to financially benefit ABL and CCS — and thus also benefit Appleton and Boyle — without corresponding benefits for the City; and (3) McCabe unilaterally extended Jail contracts and thereby allowed ABL and CCS to avoid the competitive bidding process. In exchange for the foregoing, McCabe routinely expected and received substantial benefits from ABL and CCS, including, inter alia, campaign contributions, free catering of McCabe's personal events, fully-expensed travel, entertainment expenses, cash payments, gift cards, and other valuable benefits.

1.

a.

The various benefits provided to Sheriff McCabe by Appleton and ABL began in about 1994, when ABL received a one-year emergency services contract to provide food for the Norfolk Jail. Shortly before the emergency contract was to expire in 1995, the City issued an RFP for bids from potential food service vendors. Seeking to continue its business of providing food services for the Jail, ABL submitted a bid proposal in 1995 to the City and its evaluation committee.

After ABL's 1995 food services proposal was submitted, Sheriff McCabe met with Appleton in McCabe's office. During their meeting, McCabe advised Appleton that something of "interest" had been left for Appleton on McCabe's desk. *See* J.A. 1560.[4]

[4] Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this appeal.

McCabe then left his office, and Appleton looked on the desk. Appleton found that the something of "interest" placed there for him by McCabe was a major competitor's bid sheet. Appleton then used the competitor's bid sheet to modify ABL's bid proposal, undercutting the competition and ensuring that ABL would obtain the Jail's 1995 food services contract. That contract — worth approximately 1.3 million dollars — was only for a single year, but it gave McCabe the right to renew for two additional years.

b.

Sheriff McCabe and Appleton continued their illicit relationship through at least 2016, that is, for a period of more than 20 years. Even though there were other bidders for the Jail's food services contract during that period, McCabe consistently favored Appleton and ensured that ABL would continue as the food contractor for the Norfolk Jail. In return, Appleton provided McCabe with numerous benefits of substantial value. For example, following the Jail's emergency food contract being awarded to ABL in 1994, and the City's subsequent award to ABL of the renewable 1995 contract, Appleton did the following, inter alia, for McCabe:

- Routinely provided free continental breakfasts and lunches for McCabe and his employees;
- Provided and paid for catering of a Christmas party at McCabe's home, with about 100 attendees, in December 1998;
- Paid for and escorted McCabe to a "Black Tie" party in New Orleans during Mardi Gras;
- Paid McCabe's travel expenses for a trip to San Francisco, including a tour of Alcatraz Island and a flight in a glass-bottom helicopter; and

- Provided complimentary catering of food and drinks for annual golf tournaments — from 2000 to 2016 — hosted by McCabe.

In 2003, when Sheriff McCabe could no longer unilaterally extend the Jail's food contract with ABL, the City issued a new RFP for the Jail's food services. Unsurprisingly, Sheriff McCabe caused the 2003 contract to be awarded to ABL. And in 2004, McCabe exercised his discretionary authority to renew ABL's Jail contract. Thereafter, McCabe assisted ABL in other ways by making the Jail's food contract more profitable. For example, when McCabe extended the Jail's food contract in June 2005, it was revised to include a 3.1% increase in the price per meal. Between 2006 and 2008, Sheriff McCabe re-awarded and extended ABL's food contract, and he also increased the price per meal two more times.

During the period when ABL was receiving those lucrative contract terms from Sheriff McCabe, Appleton provided McCabe with tickets to the 2004 college football National Championship game in New Orleans. Appleton also paid for McCabe's associated travel expenses to the big football game. At no cost to McCabe, Appleton catered about $1500 worth of food for a Sheriff's Association function in 2006, and ABL provided food worth at least $600 for a 2006 Christmas party at McCabe's home.

From 2009 to 2016, Sheriff McCabe unilaterally renewed the Jail's food contract with ABL at least five times. McCabe also continued to make the Jail's food contracts more lucrative for ABL, increasing the price per meal on at least three more occasions. McCabe supported ABL's expenses by having his office budget reimburse the salary of an ABL employee, who had been hired to assist in preparation of the Jail's food. *See* J.A.

1830. During that same period, McCabe received around $5000 of campaign donations through Appleton, plus an additional $3500 worth of food and related catering services for multiple events hosted by McCabe.

2.

Turning next to the Jail's medical services contracts with CCS, the trial evidence proved an extensive and continuing corrupt relationship between Sheriff McCabe and codefendant Boyle. That relationship began in 2004 and was even more egregious than McCabe's relationship with Appleton and ABL concerning the Jail's food services.

a.

In pursuit of a contract for the Jail's medical services, Boyle showered Sheriff McCabe with various things of substantial value. In January 2004, for example, McCabe and Boyle attended a conference together in New Orleans. During their trip, Boyle gave McCabe — who had lost a lot of money gambling — a "fistful" of gambling chips for his use at Harrah's Casino. The next morning, McCabe cashed in about $10,000 worth of gambling chips. Boyle also treated McCabe and other employees of the Sheriff to dinner at an expensive New Orleans steakhouse, where they discussed the upcoming RFP for the Jail's medical services contract.

On March 16, 2004, the City of Norfolk issued its RFP for the Jail's medical services contract. Two weeks later, Sheriff McCabe hosted a public meeting with interested bidders, which Boyle attended. Immediately prior to the public meeting, however, McCabe met privately with Boyle. McCabe and Boyle concealed their private meeting from the

other bidders and walked into the public bidders meeting separately. They then pretended they were not even acquainted.

Throughout the next couple of months, Sheriff McCabe and Boyle continued to meet and discuss the 2004 RFP and the Jail's medical services contract. At various points, McCabe directed certain of his employees, including a former Undersheriff named Koceja, to provide Boyle with inside information regarding competitors' bids for the contract. Equipped with confidential inside information, Boyle then met with McCabe for closed-door negotiations, culminating in a "deal" with Boyle on the Jail's medical services contract. The following day, Boyle and CCS sent a letter to McCabe, revising CCS's bid proposal in a manner consistent with their secret backchannel "deal."

When the RFP process concluded in June 2004, Sheriff McCabe secured a multi-year contract with CCS — on behalf of the City of Norfolk — for the Jail's medical services. Pursuant thereto, the City agreed to pay 3.11 million dollars to CCS for 2004, plus 3.24 million dollars to CCS for 2005. The 2004 contract with CCS gave McCabe the sole discretion to extend it for a third year. And McCabe did so, resulting in an additional 3.37 million dollar payment to CCS in 2006.

b.

After Sheriff McCabe and Boyle began their corrupt relationship in about 2004, it continued through 2016. During that period, McCabe solicited and received multiple valuable benefits from Boyle, including a stream of cash payments, campaign donations, clothing, travel expenses, and tickets to multiple concerts and sporting events.

Significant inculpatory evidence was presented by the prosecutors concerning the City's 2009 RFP for the Jail's medical services contract. In October 2008, Boyle wrote to a man named Jim Sohr, a CCS investor, explaining that Sheriff McCabe had advised Boyle that "it would be cool" if Boyle could secure political donations to support McCabe's re-election campaign for Sheriff. *See* J.A. 8596. Boyle explained that he was writing at McCabe's request, emphasizing to Sohr that CCS's "contract [for the Jail's medical services in 2009] is out to bid in January for a July renewal." *Id.* When McCabe received a $3000 donation from Sohr in 2009, McCabe had the City's 2009 medical services RFP postponed for a year, that is, until 2010, effectively awarding CCS an extra year as the Jail's medical services provider.

When the City issued its RFP for the Jail's medical services contract in 2010, Sheriff McCabe alerted Boyle by private email that a new competitor, named "Prime Care," would likely be the low bidder on the 2010 contract. In response to that inside information, CCS lowered its bid by about $200,000, narrowly making CCS the successful low bidder. At trial, a CCS employee confirmed that CCS's reduced bid was due solely to McCabe having provided inside information to CCS about Prime Care and other bidders. As a result, CCS was awarded the 2010 Jail medical services contract. Shortly thereafter, in 2011, Boyle and CCS gave McCabe approximately $37,000, plus another $7500 campaign donation.

And CCS also paid McCabe's expenses for a 2011 golf trip to Palm Springs, California, as well as a trip in November of that year to a casino in Arizona.[5]

c.

In 2016, Sheriff McCabe was a candidate for Mayor of Norfolk. In support of that effort, Boyle presented McCabe a personal $12,500 check, dated April 25, 2016. The "memo" line on the check falsely specified that it was for "Consulting." *See* J.A. 10761. The inculpatory $12,500 personal check was signed by Boyle, with the "Pay to" line left blank. When introduced into evidence, however, Boyle's $12,500 check was payable to a man named "James E. Baylor." Baylor is "Conspirator #2" in the Indictment, and he was a friend of Sheriff McCabe. Baylor's identity as a coconspirator and as the source of the "Baylor Money" was confirmed at trial, when Baylor testified for the prosecution. The Baylor Money escapade was introduced by the prosecution as further support for the corrupt intentions of McCabe and his coconspirators in a mail fraud conspiracy and a money laundering conspiracy.

The reason for the blank "Pay to" line, as Baylor confirmed at trial, was that Boyle did not want to publicly reveal his large contribution to Sheriff McCabe's 2016 campaign for Mayor of Norfolk. At McCabe's direction, Baylor wrote his own name on the "Pay to" line of the $12,500 check and deposited it into Baylor's own personal bank account. Baylor

[5] Of the $37,000 that Boyle and CCS gave McCabe, Boyle first handed McCabe $6000 in cash in Philadelphia in October 2011. The other $31,000 was later given to McCabe by Boyle on their 2011 trip to Arizona. This larger payment was proved by one of the Sheriff's employees, who confirmed that after McCabe returned from the Arizona trip, the employee saw McCabe in his home with stacks of cash, which McCabe acknowledged being $31,000.

then used the Baylor Money as follows: Baylor had three of his business associates send "straw donor" checks — one for $3000 and two for $1500 each — to McCabe's campaign for Mayor. Using $6000 of the Baylor Money, Baylor reimbursed each of those three straw donors for their phony campaign donations to McCabe. After one of Baylor's own business entities wrote another $1500 straw donor check to McCabe's campaign, Baylor also reimbursed that $1500 payment from the Baylor Money. As a result, at least $7500 of the Baylor Money was used to fund fraudulent campaign contributions to McCabe's campaign for Mayor. The apparent remaining sum of $5000 of the Baylor Money is not accounted for in the trial record.[6]

3.

The prosecution's evidence also proved that Sheriff McCabe failed to publicly disclose any of the payments and benefits he had received from Appleton and Boyle, as

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[6] In Baylor's trial testimony, his handling of the Baylor Money and the missing $5000 were sought to be explained as follows:

> Defense counsel: Okay, so let's talk about this $12,500 check.
>
> Baylor: Okay. . . .
>
> Defense counsel: So you then took the check, and you described exactly what you did with it. The way I counted it up — and correct me if I'm wrong — there were four separate checks that were then written out, which you reimbursed; a $3,000 check and three $1,500 checks. So my math would be that's $7,500. Do you know what happened to the other 5,000 [dollars]?
>
> Baylor: There were other checks I gave the government for reconciliation.

See J.A. 2455.

required by the law of Virginia. *See* Va. Code Ann. § 2.2-3116. The law required the Sheriff to file an annual disclosure statement, detailing his personal economic interests. Each disclosure statement, called a Statement of Economic Interests ("SOEI"), was required by the Commonwealth to identify annually, inter alia, gifts and entertainment valued in excess of $50 and given to Virginia officials. Although McCabe filed his SOEI disclosure each year, he failed to disclose any of the payments and benefits he received from Appleton and Boyle, or from ABL and CCS. Those payments and benefits were thus concealed from the public.

As a candidate for Sheriff and Mayor, McCabe was also required under Virginia law to file financial disclosure reports identifying campaign contributions and expenditures. *See* Va. Code Ann. § 24.2-947.4. McCabe filed those disclosure reports from 2010 through 2016, but his reports failed to identify any campaign contributions made by Appleton and Boyle — or their businesses — for McCabe's re-election campaign, or for his campaign for Mayor of Norfolk.

* * *

The prosecution established beyond a reasonable doubt that Appleton and Boyle — along with ABL and CCS — supported Sheriff McCabe with an extensive stream of valuable benefits over a period of more than 20 years, totalling at least $261,000, in various forms. Those benefits included multiple cash payments, campaign donations, event tickets, expenses for food, trips, and golf tournaments, plus catering costs for parties and events hosted by McCabe. And McCabe failed to disclose those and other valuable and illegal benefits, in violation of Virginia law. In exchange for the benefits received, McCabe, as

explained above, consistently awarded ABL and CCS the contracts with the Jail, extended the contracts when he had the discretion to do so, and modified the terms of the contracts for the benefit of ABL and CCS.

B.

1.

On October 24, 2019, the federal grand jury in Norfolk indicted Sheriff McCabe and coconspirator Boyle. The Indictment alleged, inter alia, that from 1994 to 2016 McCabe and Boyle, as codefendants and coconspirators, plus Conspirators #1 and #2 and other unnamed coconspirators, engaged in multiple fraud and bribery schemes. In carrying out those schemes, McCabe was alleged to have

> used his official position . . . to enrich himself by soliciting things of value including, but not limited to, gifts, food, cash, travel, entertainment, campaign contributions, in-kind political donations and other things of value.

See J.A. 32. The Indictment detailed McCabe's relationships with Appleton and Boyle and their respective business entities. McCabe was indicted for the following 11 offenses:

- Two counts of conspiracy to commit honest services mail fraud (Counts One and Two), in violation of 18 U.S.C. §§ 1341, 1346, and 1349;
- Five counts of honest services mail fraud (Counts Three through Seven), in violation of 18 U.S.C. §§ 1341, 1346, and 2;
- Two counts of conspiracy to commit Hobbs Act extortion (Counts Eight and Nine), in violation of 18 U.S.C. § 1951;
- One count of Hobbs Act extortion (Count Ten), in violation of 18 U.S.C. § 1951; and
- One count of conspiracy to commit money laundering (Count Eleven), in violation of 18 U.S.C. § 1956(h).

For his part, Boyle was indicted as a codefendant with McCabe in six counts of the Indictment, that is, Counts Two, Five through Seven, Nine, and Eleven.

2.

Following the return of the Indictment in 2019, Sheriff McCabe and Boyle filed a series of pretrial motions. In particular, McCabe requested the district court to dismiss the Indictment against him for failure to allege a quid pro quo, and he separately moved for dismissal of the money laundering offense in Count Eleven. Boyle filed, inter alia, a motion to sever his trial from that of Sheriff McCabe. On March 19, 2020, the district court entered a comprehensive Order (the "Pretrial Opinion") addressing several of the pretrial motions. The Pretrial Opinion denied McCabe's motion to dismiss the Indictment for failure to allege a quid pro quo. In so ruling, the court thoroughly reviewed and assessed the elements of "honest services mail fraud," under § 1341 of Title 18,[7] and "extortion" under the Hobbs Act, that is, § 1951 of Title 18.[8]

[7] The mail fraud statute, codified in 18 U.S.C. § 1341, criminalizes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses" using the Postal Service or any "authorized depository" for mail matter. Section 1341 cross-references 18 U.S.C. § 1346, which further defines the term "scheme or artifice to defraud" to "include[] a scheme or artifice to deprive another of the intangible right of honest services."

[8] Section 1951 of Title 18, commonly known as the "Hobbs Act," prohibits extortion offenses that affect interstate or foreign commerce, as well as attempts or conspiracies to do so. Extortion, as used in the Hobbs Act, includes the offense of bribery. *See Evans v. United States*, 504 U.S. 225, 260 (1992) (recognizing that Hobbs Act extortion by a public official is the "rough equivalent" of "taking a bribe").

Specific to McCabe's and Boyle's prosecutions, an element of each of those offenses is a bribery scheme, which requires proof of a "quid pro quo." In discussing the quid pro quo requirement of a bribery scheme that does not involve a campaign contribution, the Pretrial Opinion carefully assessed the Supreme Court's 2016 decision in *McDonnell v. United States*, 579 U.S. 550 (2016). Applying *McDonnell*, the district court recognized that, to prove the quid pro quo of bribery, "the Government must prove that Defendant McCabe committed (or agreed to commit) an 'official act' in exchange for the loans and gifts." *See* Pretrial Opinion 12.[9] Pursuant thereto, the court ruled that the Indictment sufficiently alleged quid pro quo corruption between Sheriff McCabe and his coconspirators — including Appleton and Boyle.

By its Pretrial Opinion, the district court also denied Sheriff McCabe's motion to dismiss the money laundering charge in Count Eleven for failure to allege an explicit quid pro quo with respect to the campaign contributions tied to the Baylor Money.[10] The court ruled that Count Eleven sufficiently alleged an "explicit" quid pro quo as to McCabe, relying on the Supreme Court's 1991 decision in *McCormick v. United States*, 500 U.S. 257 (1991). The *McCormick* Court established that the proper analysis of a quid pro quo

[9] The Pretrial Opinion recited that, in evaluating the Hobbs Act allegations of the Indictment, the "parties appear to agree that bribery should be defined as it was defined in *McDonnell v. United States*." *See* Pretrial Opinion 12. In *McDonnell*, the Supreme Court relied on the federal bribery statute, codified at 18 U.S.C. § 201, for its definition of bribery. *See* 579 U.S. at 562.

[10] Defendant Boyle also moved to dismiss Count Eleven, asserting that it failed to sufficiently allege a money laundering conspiracy against him. The district court agreed, and dismissed Count Eleven as to Boyle only.

issue when campaign contributions are involved is distinct from that of a typical bribery scheme. As the Court explained, the receipt of political contributions can establish bribery only when the Government proves an "explicit" quid pro quo — that is, a quid pro quo where "the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." *See McCormick*, 500 U.S. at 273. Applying *McCormick*, the Pretrial Opinion ruled that Count Eleven sufficiently alleged an "explicit" quid pro quo in charging McCabe with money laundering.

The Pretrial Opinion then addressed Boyle's severance motion, ruling that Sheriff McCabe and Boyle were improperly joined in the Indictment, due to the five charges lodged solely against McCabe. The court, however, deferred ruling on how its severance decision would impact the trials of McCabe and Boyle. The court thus requested further briefing on how the trials should be conducted — that is, whether McCabe and Boyle should be tried jointly on the common charges, or whether they should be tried separately.

About a month later, in April 2020, the district court entered a follow-up Order and granted a severance of trials to Sheriff McCabe and codefendant Boyle (the "Trial Sequence Order"). The court also ruled therein that McCabe's trial would be conducted first, and that Boyle would be tried thereafter. The court's trial sequence ruling — i.e., that McCabe would be tried first — was mainly due to McCabe being the primary defendant in the Indictment. The Trial Sequence Order also discussed our decision in *United States v. Parodi,* 703 F.2d 768 (4th Cir. 1983), where Judge Russell identified four factors that a trial court should consider in resolving a severance issue. To the extent *Parodi* applied, the trial court concluded that it weighed in favor of McCabe being tried first. The court

also emphasized that considerations of efficiency and the "ends of justice" supported McCabe being tried first, before a trial of Boyle. *See* Trial Sequence Order 4; *see also* J.A. 313, 322, 330, 338 (explaining several subsequent trial continuances, the court relied on its Trial Sequence Order and its finding that the "ends of justice" were best served by McCabe being tried first).

C.

Sheriff McCabe's jury trial began in Norfolk on August 3, 2021, and the trial proceedings lasted about three weeks. The prosecution presented extensive testimonial and documentary evidence in its case-in-chief, including nearly 30 witnesses, plus more than 650 exhibits. The Government's evidence detailed the fraud and bribery schemes conceived and carried out by McCabe, Appleton, Boyle, and their businesses, establishing McCabe's intimate role in the corrupt activities surrounding the City's awards of contracts for food and medical services at the Norfolk Jail. For his part, McCabe presented what can be fairly characterized as a robust defense — calling several witnesses and testifying at length on his own behalf.

1.

In the prosecution's case-in-chief, two of the witnesses were Virginia Rader and Paul Ballance, who had been employees of Sheriff McCabe during his tenure in office. Rader and Ballance were called to testify about out-of-court statements made to them by one of McCabe's so-called Undersheriffs, a man named Norman Hughey. Hughey had died before McCabe's trial began. According to Rader and Ballance, Hughey had revealed to each of them, when they worked together for the Sheriff, that he (Hughey) was instructed

by McCabe to provide Boyle with confidential inside information about the bidding competitors' various bids for the Jail's medical services contracts (the "Hughey Statements").

Rader began working for Sheriff McCabe as a classification officer in February 1999, and she was still employed by the City when she testified. When the prosecutors indicated at trial that Rader would be testifying about the Hughey Statements, the defense objected on multiple grounds, including hearsay. More specifically, McCabe challenged the admission of the Hughey Statements under Rule 801(d)(2)(D) of the Federal Rules of Evidence. Although McCabe's hearsay objection to the Hughey Statements was initially sustained by the trial court, the prosecutors requested the court to reconsider its ruling.

In support of its reconsideration request, the prosecution presented further details of interviews with Hughey, Rader, and Ballance. The district court then secured additional briefing on the admissibility question. In his supplemental brief on the issue, Sheriff McCabe presented — in addition to Rule 801(d)(2)(D) — challenges predicated on Rule 403 of the Federal Rules of Evidence and the Sixth Amendment's Confrontation Clause. The court then considered and rejected all three of those challenges in a mid-trial Order (the "Evidence Ruling"). The testimony of Rader and Ballance regarding the Hughey Statements was thus admitted into evidence.

In Rader's testimony, she confirmed that the Hughey Statements had been made. Rader said that Hughey was a member of the City's evaluation committee in 2010 for the RFP involving medical services for prisoners at the Norfolk Jail. In that regard, Sheriff McCabe had instructed Hughey to call Boyle and inform him about confidential competing

bids on the 2010 RFP. Hughey, however, told Rader that he had refused to pass that confidential bidding information along to CCS.

Ballance's testimony about the Hughey Statements was consistent with and corroborated Rader's testimony. Ballance worked for the City from 2003 to 2018 and was a fire safety coordinator. Ballance confirmed that, in 2010, Hughey was a member of the City's evaluation committee for the Jail's medical services contract. Hughey had expressed concerns to Ballance regarding the 2010 bid process. According to Ballance, Sheriff McCabe told Hughey to call Boyle and advise him of details of the confidential competing bids so that CCS could reduce its bid and win the Jail's medical services contract. Hughey did not carry out McCabe's request.

2.

On August 23, 2021 — the fourteenth day of trial — the district court finalized its jury instructions in a charge conference that the court conducted with defense counsel and the prosecutors. During that conference, the court reviewed its intended instructions, providing each party an opportunity to object to and seek to alter or strike any of the proposed instructions. Of importance, defense counsel failed to make any objections to the instructions that Sheriff McCabe now contests on appeal. Consistent with the results of the charge conference, the court presented its instructions to the jury. The trial concluded on August 24, 2021, and the jury verdict found McCabe guilty on all 11 counts.

3.

On May 20, 2022, the district court conducted its sentencing hearing with respect to Sheriff McCabe. During the sentencing proceedings, McCabe objected to an 18-level

sentencing enhancement recommended by the Presentence Report (the "PSR"), which was predicated on the amount of loss attributed to his criminal conduct. More specifically, McCabe argued that the determination of the amount of loss should have been limited to the value of the benefits that flowed to him personally ($261,000), as opposed to the net profits that ABL and CCS made in performing their respective Jail contracts for the City ($5.2 million).

The district court overruled Sheriff McCabe's objection to the 18-level enhancement, ruling that a sentencing court is entitled to calculate the amount of loss by ascertaining "the value of anything obtained or to be obtained by a public official or others acting with a public official." *See* USSG § 2C1.1(b)(2). Relying on our precedent that has sustained upward adjustments based on the value of the profits received by the payor in exchange for a bribe — rather than upon the value of the bribe itself — the sentencing court applied the 18-level enhancement recommended by the PSR to McCabe's base offense level of 14. The resulting 18-level enhancement, along with other enhancements, resulted in McCabe's total offense level of 43. Based on the applicable Guidelines, an offense level of 43 warrants a sentence of up to life in prison. *Id.* § 5A. Consistent with the statutory maximum penalty of 20 years on each of his 11 charges, the PSR recommended that McCabe be sentenced to 240 months on each conviction.

The district court accorded Sheriff McCabe a substantial downward departure from the PSR recommendation and sentenced him to 144 months in prison on each conviction,

plus three years of supervised release, to run concurrently. McCabe has timely appealed his convictions and sentences, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.[11]

II.

Sheriff McCabe presents four contentions of error on appeal. First, he presents his trial sequence issue, maintaining that his trial was erroneously unfair because it was conducted before a trial of codefendant Boyle. Second, McCabe contends that the trial court fatally erred by admitting the Hughey Statements into evidence. Third, McCabe contests several jury instructions of the trial court. That is, relying primarily on the Supreme Court's decisions in *McCormick v. United States*, 500 U.S. 257 (1991), and in *McDonnell v. United States*, 579 U.S. 550 (2016), McCabe disputes certain of the court's instructions pertaining to bribery which, according to McCabe, fatally undermine each of his convictions. Finally, McCabe challenges the court's application of an 18-level sentencing enhancement. We will address and resolve each of Sheriff McCabe's appellate claims.

[11] Sheriff McCabe was the only defendant named in the Indictment who was tried and convicted. Codefendant Boyle was not tried, but entered into a plea agreement with the United States Attorney. Boyle later pleaded guilty to a one-count Information, charging a violation of 18 U.S.C. § 371, that is, conspiracy to commit an offense against the United States. Boyle did not testify in Sheriff McCabe's trial and was ultimately sentenced to 36 months in prison, plus three years of supervised release. Coconspirator Appleton, referred to in the Indictment as "Conspirator #1," testified against Sheriff McCabe and was not charged. Similarly, coconspirator Baylor, referred to in the Indictment as "Conspirator #2," also testified against McCabe and was not charged.

A.

We first address Sheriff McCabe's contention of error concerning the district court's trial sequence ruling. In that regard, it is settled that we review a trial court's decisions on scheduling for abuse of discretion. *See Morris v. Slappy*, 461 U.S. 1, 11 (1983) ("Trial judges necessarily require a great deal of latitude in scheduling trials.").

1.

Sheriff McCabe maintains that the district court abused its discretion by scheduling his trial to be conducted before the trial of codefendant Boyle. Although McCabe acknowledges that a trial court's decision to "sever a case and [its] corresponding decisions about the order of severed cases" are generally reviewed for abuse of discretion, he contends that, in his situation, defendant Boyle should have been — as a matter of law — tried first. *See* Br. of Appellant 85. And McCabe emphasizes that a court "abuses its discretion when it makes an error of law." *Id.* (quoting *United States v. Ebersole*, 411 F.3d 517, 526 (4th Cir. 2005)).

In support, Sheriff McCabe contends that he was prejudiced because the trial sequence established by the district court "required [McCabe] to proceed to trial first [and denied] him access to essential exculpatory evidence." *See* Br. of Appellant 85. More specifically, McCabe argues that coconspirator and codefendant Boyle would have testified favorably to McCabe if a joint trial had been conducted.

2.

Although our Court has not directly resolved an appellate challenge to a trial sequence issue such as that presented here, several of our sister circuits have done so. And

each of them has applied a deferential standard of review to such rulings, that is, an abuse of discretion review. *See, e.g.*, *Taylor v. Singletary*, 122 F.3d 1390, 1392 (11th Cir. 1997) ("It is well-settled that it is within the trial judge's sound discretion to set the order in which codefendants will be tried."); *United States v. Poston*, 902 F.2d 90, 97 (D.C. Cir. 1990); *Byrd v. Wainwright*, 428 F.2d 1017, 1022 (5th Cir. 1970). Additionally, several of the courts of appeals have ruled that a severed codefendant has no right to be tried in a particular order or sequence. *See United States v. DiBernardo*, 880 F.2d 1216, 1229 (11th Cir. 1989) ("[A]mong severed co-defendants, there is no absolute right to be tried in a certain order; each case must be evaluated on its own facts."); *see also Poston*, 902 F.2d at 98 (same); *Mack v. Peters*, 80 F.3d 230, 235 (7th Cir. 1996) ("[D]efendants have no inherent right to be tried in a certain order.").

We have established a framework for evaluating a severance request that is predicated on an effort to secure a codefendant's testimony. *See United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983). And that framework is helpful in assessing a challenge to a trial sequence ruling.[12] Judge Russell's *Parodi* decision explains that a trial court should assess whether the movant has established the following:

> (1) a bona fide need for the testimony of his co-defendant, (2) the likelihood that the co-defendant would testify at a second trial and waive his Fifth Amendment privilege, (3) the substance of his co-defendant's testimony, and (4) the exculpatory nature and effect of such testimony.

See Parodi, 703 F.2d at 779.

[12] At least three of our sister circuits have found that the standards for reviewing severance motions are useful guidance in reviewing a challenge to a trial sequence ruling. *See, e.g.*, *Singletary*, 122 F.3d at 1393; *Mack*, 80 F.3d at 235; and *Byrd*, 428 F.2d at 1022.

Although Sheriff McCabe contends on appeal that he was prejudiced by the district court's trial sequence ruling — asserting that he was denied access to the exculpatory evidence of Boyle's prospective testimony — there was no showing that Boyle, if he had been tried first, would have waived his Fifth Amendment privilege and testified in favor of McCabe. Indeed, Boyle's lawyer confirmed to the trial court that Boyle would neither waive his Fifth Amendment privilege nor testify, stating that:

> [E]ven if [Boyle] were to be tried before Mr. McCabe, he will not provide testimony in a later trial of Mr. McCabe because . . . he would be entitled to assert his Fifth Amendment privilege against self-incrimination.

See J.A. 284; *see also United States v. Oloyede*, 933 F.3d 302, 312 (4th Cir. 2019) (concluding that appellants failed to satisfy *Parodi* framework because they had "no evidence" that their codefendant would waive his Fifth Amendment privilege); *United States v. Medford*, 661 F.3d 746, 754 (4th Cir. 2011) (ruling that there was no abuse of discretion where codefendant's "representation was, at best, equivocal regarding his willingness to waive his Fifth Amendment rights if the trials were severed").

Put simply, the district court exercised its broad discretion and scheduled Sheriff McCabe's trial to be conducted first. The court carefully justified that decision by explaining, inter alia, that the "interests of efficiency favor trying Mr. McCabe first on all charges." *See* Trial Sequence Order 4. And it recognized and emphasized that McCabe was the "primary defendant." *Id.* In the Trial Sequence Order, the court also explained that Sheriff McCabe was

> charged with offenses related to two bribery schemes. These schemes overlapped in time and [McCabe's] involvement in each scheme was similar:

> he is alleged to have solicited and accepted bribes from a contractor providing services to the Norfolk City Jail.

Id. In these circumstances, we cannot say that the trial court acted arbitrarily or legally erred in any respect. And the court did not abuse its discretion in ruling that McCabe would be tried first.

B.

Sheriff McCabe also challenges the district court's admission of alleged hearsay statements made by Undersheriff Hughey — that is, the "Hughey Statements" — arguing that the court's Evidence Ruling contravened Rules 801(d)(2)(D) and 403 of the Federal Rules of Evidence, as well as McCabe's confrontation rights under the Sixth Amendment. To reiterate, Hughey had separately advised Rader and Ballance, who were employees of Sheriff McCabe, that McCabe had directed Hughey to provide confidential inside information about competing bids to Boyle and CCS during the 2010 medical services RFP process. Hughey also advised both Rader and Ballance that he had declined to do so. And we review a trial court's ruling on the admission of evidence for abuse of discretion. *See Macsherry v. Sparrows Point, LLC*, 973 F.3d 212, 221 (4th Cir. 2020).

1.

Pursuing this evidence admission issue, Sheriff McCabe primarily argues that the district court erred in admitting the Hughey Statements under Rule 801(d)(2)(D). That is, McCabe asserts that those Statements were inadmissible hearsay, because they were made outside the scope of Hughey's employment.

Rule 801(d)(2) identifies specific categories of out-of-court statements that are not hearsay.[13] Most relevant here is subsection (D) thereof, which provides that a statement offered against an opposing party, and which was "made by the party's agent or employee on a matter within the scope of that relationship and while it existed" is not hearsay. *See* Fed. R. Evid. 801(d)(2)(D). In its Evidence Ruling, the district court determined that the Hughey Statements are not hearsay under Rule 801(d)(2)(D). Although Sheriff McCabe argued strenuously that the Hughey Statements were not made within the scope of Hughey's employment relationship with McCabe, the court rejected that proposition.

On appeal, Sheriff McCabe contends that the Evidence Ruling was erroneous. As background for our analysis of that contention, our Court has explained, in an unpublished setting, that

> [t]he concern of Rule 801(d)(2)(D) is not whether the employee was carrying out the employer's wishes or whether the employee's statement was authorized. Rather, the court must determine whether the subject matter and circumstances of the out-of-court statement demonstrate that it was about a matter within the scope of the employment.

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[13] The evidence rule that the parties dispute is Rule 801(d)(2)(D), which spells out the applicable exclusion from hearsay. In relevant part, it provides:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
> . . .
> **(2) An Opposing Party's Statement.** The statement is offered against an opposing party and:
> . . .
> **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.

See Fed. R. Evid. 801(d)(2)(D).

See United States v. Poulin, 461 F. App'x 272, 282 (4th Cir. 2012).

In Sheriff McCabe's trial, the prosecution proved that Hughey was an employee of Sheriff McCabe, and that the Hughey Statements were "about a matter within the scope of [Hughey's] employment." *See Poulin*, 461 F. App'x at 282. And McCabe himself acknowledged in his trial testimony that Hughey "ran the day-to-day operations in [McCabe's] absence." *See* J.A. 3039. As the Evidence Ruling related, Hughey reported directly to Sheriff McCabe, and "[o]ne of [Hughey's] job responsibilities was to assist in the selection of food and medical services providers for the Norfolk City Jail." *See* Evidence Ruling 4. The Evidence Ruling explained that Hughey "was also one of three individuals responsible for evaluating the bids that were submitted in response to the 2010 RFP from medical services providers." *Id.* In the context of these factual determinations, the trial court did not err in ruling that the Hughey Statements were "clearly related to Mr. Hughey's area of authority and were made during his time working for" McCabe. *Id.* (citing *Yohay v. City of Alexandria Emps. Credit Union, Inc.*, 827 F.2d 967, 969 (4th Cir. 1987)).

The Evidence Ruling also properly rejected Sheriff McCabe's assertion that the Hughey Statements were inadmissible because they were "office gossip," and that Hughey was simply "blowing off steam" when he spoke to Rader and Ballance. In so ruling, the trial court emphasized that "the statement of an agent regarding a matter within the scope of the agency relationship [does not] become gossip merely because it is uttered at a restaurant over lunch rather than within the four walls of an office." *See* Evidence Ruling 5.

Put simply, Hughey had extensive direct involvement in the 2010 RFP process as an employee of the Sheriff, and the challenged out-of-court statements, i.e., the Hughey Statements, specifically related to the 2010 RFP process. We therefore reject McCabe's contention that the district court abused its discretion in ruling that the Hughey Statements were excluded from hearsay.

2.

Sheriff McCabe also maintains, however, that although the Hughey Statements were "relevant evidence," the trial court's admissibility ruling was fatally erroneous because it contravened Rule 403 of the Federal Rules of Evidence. Rule 403 authorizes a trial court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of," as relevant here, "unfair prejudice." *See* Fed. R. Evid. 403. At its core, Rule 403 favors the inclusion and admission of evidence, and a trial court possesses broad discretion about whether a specific piece of evidence should be excluded due to Rule 403 concerns. *See United States v. Miller*, 61 F.4th 426, 429 (4th Cir. 2023) ("Rule [403] is a rule of inclusion, generally favoring admissibility.").

The bar for exclusion of relevant evidence under Rule 403 is quite high. *See Miller*, 61 F.4th at 429. Sheriff McCabe argues, however, that the Hughey Statements — even as "relevant evidence" — were "unfairly prejudicial," and that the prejudice of their admission against him outweighed their probative value. The crux of McCabe's unfair prejudice contention consists of unsubstantiated assertions that Hughey, Rader, and Ballance were biased against McCabe, and that the Hughey Statements were inconsistent and unreliable.

Although bias and unreliability are valid bases for impeachment of a witness, *see, e.g.*, Fed. R. Evid. 608 (witness character for truthfulness or untruthfulness), they do not typically rise to the level of "unfair prejudice" under Rule 403. *See Old Chief v. United States*, 519 U.S. 172, 180 (1997) (explaining that unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged"). Nor is the risk of unfair prejudice "disproportionate to the probative value of" the Hughey Statements. *See United States v. Lentz*, 524 F.3d 501, 525 (4th Cir. 2008). In this situation, we are evaluating a trial court's admission of "relevant evidence" under the deferential standard of abuse of discretion. And Sheriff McCabe's assertions of witness bias and credibility do not rise to "Rule 403's high bar." *See Miller*, 61 F.4th at 429.

In any event, Sheriff McCabe's contentions of bias and unreliability were, as the trial court explained in its Evidence Ruling, "more appropriately addressed through cross examination [of Rader and Ballance] or closing argument, not the exclusion of probative evidence." *See* Evidence Ruling 8. Counsel for McCabe were thereafter accorded a full opportunity to cross examine the witnesses and they did so thoroughly. In these circumstances, there was no abuse of discretion, and we are constrained to reject McCabe's position on Rule 403 as well.

3.

Finally, Sheriff McCabe argues that the district court's admission of the Hughey Statements contravened his Sixth Amendment rights under the Confrontation Clause. Specifically, McCabe maintains that the court erred in ruling that the Hughey Statements

were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). The Supreme Court's *Crawford* decision stands for the proposition that testimonial out-of-court witness statements are barred from admission under the Confrontation Clause, unless a witness is unavailable and the defendants had a prior opportunity to cross-examine him. *Id.* at 58.

In *Crawford*, the Supreme Court distinguished between testimonial and non-testimonial statements, recognizing that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *See* 541 U.S. at 51. The Hughey Statements fall within the latter type — they were not elicited from Rader and Ballance in the testimonial context, but rather made by him to coworkers in informal settings, including during a luncheon with Rader in a Mexican restaurant, and in Ballance's office. Moreover, the Hughey Statements were made in 2010, several years before Sheriff McCabe was indicted. *See United States v. Jordan*, 509 F.3d 191, 201 (4th Cir. 2007) ("The critical *Crawford* issue here is whether [the declarant], at the time she made her statements . . . believed these statements would be later used at trial."). Because the Hughey Statements were not testimonial, the Confrontation Clause is not implicated.

In sum, we reject Sheriff McCabe's contentions that the district court abused its discretion in admitting the Hughey Statements.

C.

We now turn to Sheriff McCabe's contentions of error about the jury instructions. In a direct appeal, "[w]e review a district court's decision to give a particular jury instruction for abuse of discretion, and review whether a jury instruction incorrectly stated

the law de novo." *See United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018). Jury instructions are suitable when, "construed as a whole, and in light of the whole record, [the instructions] adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *Id.*

1.

As a threshold matter, the parties disagree on an important point: whether Sheriff McCabe's appellate contentions concerning the jury instructions were properly preserved in the trial court. Pursuant to Rule 30(d) of the Federal Rules of Criminal Procedure:

> A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate.

See Fed. R. Crim. P. 30(d). A failure to object to an instruction in a manner consistent with Rule 30(d) precludes appellate review, unless the court of appeals can identify "[a] plain error that affects substantial rights." *See* Fed. R. Crim. P. 52(b). Notably, McCabe's counsel had ample opportunities to object to the proposed instructions. And they failed to object to any of the instructions that McCabe now contests on appeal.

Sheriff McCabe now maintains that, even though his lawyers did not make any specific objections to the jury instructions, as required by Rule 30(d), he nonetheless preserved his appellate contentions on the instructions by way of pretrial motions and in related proceedings. For support, McCabe relies primarily on our 2005 decision in *United States v. Ebersole*, 411 F.3d 517 (4th Cir. 2005). He characterizes *Ebersole* as supporting his contention that a pretrial motion seeking dismissal of an indictment will preserve legal

assertions concerning the jury instructions. The *Ebersole* opinion, however, does not support that proposition.

In *Ebersole*, we ruled — consistent with Rule 30(d) — that a defendant's "failure to specifically object to [a jury] instruction during the trial would constrain us to review its substance for plain error only." *See Ebersole*, 411 F.3d at 526. In the context of a preservation issue like that contested here, however, *Ebersole* identified a single exception to a defendant's failure to comply with Rule 30(d). As explained therein, an instructional contention can be preserved by a pretrial challenge if it was thereafter renewed "in a directed verdict motion made pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, before the jury retires." *Id.* (internal citations omitted).

The Rule 29 exception identified in *Ebersole* is not applicable here. Although McCabe presented a Rule 29 motion to the district court, his motion had nothing to do with the *McCormick*- and *McDonnell*-based contentions raised in his pretrial motion to dismiss the Indictment. *Ebersole*, on the other hand, concerned a rejected pretrial venue contention which the defendant renewed in his Rule 29 motion. Our *Ebersole* decision is therefore readily distinguishable.[14] For these reasons, McCabe's *McCormick*- and *McDonnell*-based

[14] In addition to our *Ebersole* decision, Sheriff McCabe relies on two of our other decisions, *United States v. Williams*, 81 F.3d 1321 (4th Cir. 1996), and *United States v. Wilson*, 118 F.3d 228 (4th Cir. 1997), to support his claim that his objections to the now-contested instructions were properly preserved. *Williams* and *Wilson*, however, apply exclusively to evidentiary challenges. Neither decision bears on the preservation of a jury instruction challenge.

contentions were not preserved in a manner consistent with the requirements of Rule 30(d).[15]

Because McCabe failed to properly preserve his jury instruction contentions, we review them for plain error only. Applying plain-error review, McCabe "must show (1) that the court erred, (2) that the error is clear and obvious, and (3) that the error affected his substantial rights, meaning that it affected the outcome of the district court proceedings." *See United States v. Catone*, 769 F.3d 866, 871 (4th Cir. 2014) (internal quotation marks omitted). And even when those plain error requirements have been satisfied, we will not correct the error unless it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *See United States v. Olano*, 507 U.S. 725, 732 (1993) (cleaned up).

2.

Having identified the applicable standard of review, we turn to Sheriff McCabe's various contentions concerning the jury instructions. Each of McCabe's 11 convictions implicated either the offense of honest services mail fraud or that of Hobbs Act extortion. In turn, each of those offenses required proof of an underlying act of bribery. *See, e.g.*, *McDonnell v. United States*, 579 U.S. 550, 562 (2016) ("The theory underlying both the honest services fraud and Hobbs Act extortion charges was that Governor McDonnell had

[15] The Rule 30(d) requirements are not unduly harsh. An error that is sought to be presented on appeal simply has to be properly preserved in the trial court. We are a court of review, and not of first view. *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. 2020). A lawyer is not allowed to sit on his hands, fail to present his legal contentions to the trial court, and thereby mousetrap the judge. It is therefore critical for lawyers to comply with Rule 30(d).

accepted bribes from Williams."). In defining bribery, the district court recited that the parties appeared to agree on the applicability of § 201 of Title 18.[16]

McCabe maintains on appeal that the district court erred with respect to six bribery-related instructions — that is, Instructions 55, 56, 57, 58, 60, and 71. Five of the challenged instructions implicate legal principles established in the *McCormick* decision. Those instructions — which we call the "*McCormick*-based Instructions" — are:

- Instruction 55, entitled "Quid Pro Quo";
- Instruction 56, entitled "Bribery Need Not Be Express";
- Instruction 57, entitled "Bribery — Mixed Motive No Defense";
- Instruction 58, entitled "Bribery — Beneficial Act No Defense"; and
- Instruction 71, entitled "Third Element — Knowledge That the Public Official Obtained a Thing of Value in Return For Official Action."

In relying on *McCormick*, McCabe contends that the trial court failed to properly instruct the jury on what constitutes an "explicit" quid pro quo — an essential element of proving bribery involving campaign contributions. That is, McCabe asserts that the court

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[16] Section 201 of Title 18, entitled "Bribery of public officials and witnesses," provides, in relevant part, as follows:

> Whoever . . . being a public official[,] . . . directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally . . . in return for . . . being influenced in the performance of any official act . . . shall be fined . . . or imprisoned for not more than fifteen years.

See 18 U.S.C. § 201(b).

erred in instructing the jury that an "explicit" quid pro quo does not have to be an "express" quid pro quo.

McCabe also challenges two of the trial court's instructions on the bases of principles enunciated in *McDonnell v. United States*. Those instructions — which we call the "*McDonnell*-based Instructions" — are:

- Instruction 60, entitled "Official Act"; and
- Instruction 71, entitled "Third Element — Knowledge That the Public Official Obtained a Thing of Value in Return For Official Action."

In contesting the *McDonnell*-based Instructions, McCabe argues that they were erroneous because they advised the jury that a "thing of value" did not have to be correlated to a specific official action, and that the thing of value could be given to a public official to secure his services on an "as-needed" basis. Otherwise stated, in challenging the *McDonnell*-based Instructions, McCabe argues that the prosecution's reliance on the so-called "stream of benefits" theory of bribery was fatally erroneous.

As explained herein, however, the district court did not err in utilizing either the *McCormick*-based Instructions or the *McDonnell*-based Instructions.

a.

Turning first to Sheriff McCabe's challenges to the *McCormick*-based Instructions, he primarily contends that the district court failed to properly instruct the jury on the prosecution's burden to prove an "explicit" quid pro quo. Put simply, McCabe is incorrect in that regard. Instructions 55 and 56 properly defined the term "quid pro quo," as it

pertains to the bribery theory of honest services mail fraud. In Instruction 55, for example, the court explained that

> [b]ribery involves the exchange of a thing or things of value for official action by a public official. In other words, bribery involves a quid pro quo, a Latin phrase meaning "this for that" or "these for those." Bribery also includes offers and solicitations of things of value in exchange for official action; that is, for the public official, bribery includes the public official's solicitation or agreement to accept the thing of value in exchange for official action whether or not the payor actually provides the thing of value and whether or not the public official ultimately performs the requested official action or intends to do so.

See J.A. 3489. Continuing with Instruction 55, the court instructed the jury that an "explicit" quid pro quo is required when payments are made to a public official in the context of campaign contributions. That is, the court therein explained that

> [w]here the thing or things of value solicited or received by a public official are the payment of campaign contributions, the government must further prove a meeting of the minds on the *explicit* quid pro quo. This means the receipt of such contributions are taken under color of official right, if the payments are made in return for an *explicit* promise or understanding by the official to perform or not to perform an official act. *While the quid pro quo must be explicit, it does not have to be express.* Political contributions may be the subject of an illegal bribe even if the terms are not formalized in writing or spoken out loud. *"Explicit" refers not to the form of the agreement between the payor and payee but the degree to which the payor and payee were aware of its terms*.

Id. at 3489-90 (emphases added).

Although the "explicit" quid pro quo requirement can be satisfied by proof of an "express" quid pro quo, the trial court, in Instruction 56, emphasized that an "explicit" quid pro quo does not need to be stated in "express" terms. More specifically, the jury was advised that

> [t]he public 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. Rather, the intent to exchange may be established by circumstantial evidence, based on the defendant's words, conduct, acts, and all surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

See J.A. 3490. By way of Instructions 55 and 56, the court carefully instructed and emphasized to the jury that a quid pro quo in a bribery situation implicating campaign contributions must be "explicit," but does not need to be "express."

In Instruction 71, the court further emphasized that the explicit quid pro quo requirement, as explained in Instructions 55 and 56 in the context of honest services mail fraud offenses, applies also to the Hobbs Act extortion offenses. As pertinent here, the court instructed the jury that

> [a]s was the case with bribery [in the context of honest services mail fraud], the exchange or quid pro quo need not be stated in express terms, and the intent to exchange can be inferred from all the surrounding circumstances.

See J.A. 3502. McCabe maintains on appeal that the *McCormick*-based Instructions contravened the *McCormick* principles. He argues that those Instructions erred in explaining to the jury that, although a quid pro quo must be "explicit," it need not be "express."

Sheriff McCabe's contention in this regard relies on a misreading of the terms "explicit" and "express." Those terms have distinct meanings.[17] Although the difference

[17] When the Supreme Court decided *McCormick* in 1991, *Black's Law Dictionary* had defined the term "explicit" as: "Not obscure or ambiguous, having no disguised meaning or reservation. Clear in understanding." *See United States v. Blanford*, 33 F.3d 685, 696 n.13 (6th Cir. 1994) (quoting *Explicit*, BLACK'S LAW DICTIONARY (6th ed. (Continued)

between "explicit" and "express" may be subtle, it is important. The term "express" simply means reduced to words, either in writing or spoken aloud. The term "explicit," on the other hand, refers to something that is obvious and unambiguous. And even though Justice Stevens's dissent in *McCormick* articulated his concern that the Court's decision could be read to require an "express" agreement, the majority opinion requires only "an explicit promise or undertaking by the official." *See McCormick*, 500 U.S. at 273 (White, J.), 282 (Stevens, J., dissenting). Put succinctly, the *McCormick* decision requires — in a bribery involving campaign contributions — a quid pro quo that is "explicit," but not necessarily a quid pro quo that is stated in words.

In various post-*McCormick* decisions, our sister circuits have consistently concluded that the "explicit" quid pro quo required in a Hobbs Act extortion prosecution involving campaign contributions does not need to be "express." For example, the Ninth Circuit rejected the notion that the "explicitness requirement" of *McCormick* can be satisfied only if "an official has specifically stated that he will exchange official action for a contribution." *See United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992).[18] And the Eleventh Circuit ruled that there is no requirement that a Hobbs Act extortion quid pro

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1990)). The term "express," on the other hand, was then defined as: "Declared in terms; set forth in words. Directly and distinctly stated. . . . Manifested by direct and appropriate language." *Id.* (quoting *Express*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

[18] For his part, Sheriff McCabe relies primarily on a Second Circuit decision for his appellate contention that an express promise is required for a quid pro quo bribery agreement. *See United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007). The *Ganim* case did not involve campaign contributions, and the distinction between an "explicit" and an "express" quid pro quo was not germane.

quo involving political contributions must be stated in "actual conversations by defendants" or "memorialized in writing." *See United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) ("Explicit . . . does not mean express."). Similarly, the Sixth Circuit concluded that *McCormick*'s quid pro quo mandate for political contributions is satisfied by simply "knowing the payment was made in return for official acts" — explaining that no "formalized and thoroughly articulated contractual arrangement" is needed. *See Blanford*, 33 F.3d at 696.

Indeed, if the "explicit" quid pro quo mandate meant that an "express" quid pro quo is essential, corrupt public officials could, as Justice Kennedy emphasized, escape Hobbs Act liability by "knowing winks and nods." *See Evans v. United States*, 504 U.S. 225, 274 (1992) (Kennedy, J., concurring). And, as the Seventh Circuit astutely put it, "[f]ew politicians say, on or off the record, 'I will exchange official act X for payment Y.'" *See United States v. Blagojevich*, 794 F.3d 729, 738 (7th Cir. 2015).

At bottom, Instructions 55, 56, and 71 of the *McCormick*-based Instructions were correct statements of the applicable law.[19] That is, they fairly explained, in the context of campaign contributions, that which is required for proving bribery. Consistent with the foregoing, we are satisfied that Sheriff McCabe's appellate contentions concerning the

[19] Two additional *McCormick*-based Instructions, that is, Instructions 57 and 58, are also being contested by Sheriff McCabe. He argues that those two Instructions "compounded" the trial court's *McCormick*-based errors, and thus "further prejudiced" him. *See* Br. of Appellant 41. Because the trial court did not err in Instructions 55, 56, and 71, however, there was no error that could be "compounded" by Instructions 57 and 58. Those challenges are therefore also rejected.

McCormick-based Instructions fail on the first prong of plain error review. Put simply, the trial court did not err or abuse its discretion in that regard.

b.

Sheriff McCabe next contends that the Supreme Court's 2016 *McDonnell* decision forecloses any prosecutions against him for Hobbs Act extortion, honest services mail fraud, or money laundering, that are predicated on bribery schemes where a "stream of benefits" has been exchanged for official acts on an "as-needed basis." As explained earlier, each of those offenses requires proof of a bribe. *See McDonnell*, 579 U.S. at 562. In pursuing that contention, McCabe maintains that the *McDonnell* decision overruled our precedent in *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998). As explained herein, however, we are satisfied that the district court did not err in its formulation of the *McDonnell*-based Instructions.

In its Instruction 60, the trial court instructed the jury on the meaning of the term "official act," defining an official act as

> any decision or action on any question or matter, which at any time be pending, or which may by law be brought before any public official, in such public official's official capacity, or in such official's place of trust or profit.

See J.A. 3492. The trial court therein carefully explained that an "official act" would also include a public official "exerting pressure on another official to perform an official act or providing advice." *Id.* at 3492. On the other hand, the court specified that "[s]etting up a meeting, hosting an event, or talking to another official, without more," would not qualify as an "official act." *Id.* at 3493.

Thereafter, in Instruction 71, the trial court instructed the jury that "a given thing of value need not be correlated with a specific official action." *See* J.A. 3502. Rather, the thing of value "may be given with the intent to retain a public official's services on an as-needed basis, so that as opportunities arise the public official would take specific official action on the payor's behalf." *Id.* at 3502-03.[20]

As with his contentions against the *McCormick*-based Instructions, Sheriff McCabe overreads the *McDonnell* decision in his arguments against the *McDonnell*-based Instructions. He simply pursues an interpretation of *McDonnell* that is at odds therewith. The *McDonnell* decision specifically clarified the term "official act," as used in 18 U.S.C. § 201(a)(3), explaining that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'" *See McDonnell*, 579 U.S. at 567. The prosecution must prove that the public official "agreed to perform an 'official act' at the time of the alleged quid pro quo." *Id.* at 572-73. And the official act "must be more specific and focused than a broad policy objective." *Id.* at 578. Notably, the *McDonnell* decision did not mention the stream-of-benefits theory of bribery, nor did it refer to a theory of bribery based on official acts retained on an as-needed basis.

Importantly, McCabe has presented no authority that the stream-of-benefits theory of bribery is no longer valid. In fact, after the *McDonnell* decision, several of the courts of appeals have sustained the stream-of-benefits theory. The First Circuit, for example,

[20] Neither of the *McDonnell*-based Instructions refer to the term "stream of benefits." Nevertheless, the lawyers in these proceedings have used that term liberally in their various appellate submissions.

explained that bribery, in the context of honest services mail and wire fraud, does not require proof of "a tight nexus between any particular gratuity and a specific official act." *See Woodward v. United States*, 905 F.3d 40, 46 (1st Cir. 2018). Rather, the underlying acts of bribery can be established "through an ongoing course of conduct, so long as the evidence shows that the favors and gifts flowing to a public official are in exchange for a pattern of official actions favorable to the donor." *Id.* (cleaned up). The Second Circuit also ruled that the stream-of-benefits theory of bribery — in the context of honest services mail and wire fraud, Hobbs Act extortion, and money laundering — has survived post-*McDonnell*. The requirement is that the "particular question or matter" concerning the official act has been "identified at the time the official makes a promise or accepts a payment." *See United States v. Silver*, 948 F.3d 538, 558 (2d Cir. 2020).

And our colleagues on the Third Circuit have similarly ruled that bribery in the context of Hobbs Act extortion can be proved by evidence 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." *See United States v. Repak*, 852 F.3d 230, 251 (3d Cir. 2017). Significantly, the Eighth Circuit carefully explained that a bribe underlying the offense of honest services wire fraud "may be paid with the intent to influence a general course of conduct," and that the prosecution is not required "to link any particular payment to any particular action." *See United States v. Suhl*, 885 F.3d 1106, 1115 (8th Cir. 2018).

Against that backdrop of compelling authorities, Sheriff McCabe nevertheless argues that Judge Michael's *Jennings* decision was overruled by *McDonnell*. In evaluating

that contention, "[w]e do not lightly presume that the law of the circuit has been overturned, especially, where, as here, the Supreme Court opinion and our precedent can be read harmoniously." *See Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019) (internal quotation marks and citation omitted). In *Jennings*, Judge Michael acknowledged the legal validity of the stream-of-benefits theory of bribery. He succinctly explained that, in such a case, "the evidence shows a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor." *See* 160 F.3d at 1014. His *Jennings* opinion aptly concluded that

> the government need not show that the defendant intended for his payments to be tied to specific official acts (or omissions). . . . Rather, it is sufficient to show that the payor intended for each payment to induce the official to adopt a specific course of action.

Id. Because *Jennings* and *McDonnell* can be applied harmoniously, *Jennings* has not been overturned.

The ruling that Sheriff McCabe seeks today — that the stream-of-benefits theory of bribery cannot be legally pursued post-*McDonnell* — would simply reward corrupt bribery schemes that involve multiple exchanges over a period of time, as opposed to the so-called "one-and-done handshake deal." Sheriff McCabe seems to even suggest that his involvement in bribery schemes spanning more than 20 years should mitigate in his favor. *See* Br. of Appellant 57 (arguing that *McDonnell* forecloses prosecution's "attenuated theory of liability" where stream of benefits and official acts are exchanged for more than two decades). As explained in *Jennings*, however, "the intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that.'" *See* 160 F.3d at 1014. As

such, "all that must be shown is that payments were made with the intent of securing a specific *type* of official action or favor in return." *Id.* (emphasis in original).

Thus, we are satisfied that the trial court did not abuse its discretion or err in any of its *McDonnell*-based Instructions.[21] Because Sheriff McCabe cannot show that the court erred, his challenges to those Instructions fail at the first prong of the plain error test as well.[22]

In sum, the *McCormick*-based Instructions and the *McDonnell*-based Instructions, "construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles" in all relevant respects. *See Miltier*, 882 F.3d at 89. In

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[21] We are obliged to observe that Sheriff McCabe's arguments about the jury instructions are substantially undermined by Instruction 59 — the "Goodwill" Instruction, which was given at McCabe's request. It advised the jury that:

> Individuals may lawfully give a gratuity or gift to a public official to foster goodwill. To prove that a gift is a bribe, rather than a lawful act of goodwill, the government must demonstrate that the gift is coupled with a particular criminal intent or quid pro quo. You may refer to the instructions laying out the elements of bribery to make this determination.
>
> A gift to an official to foster a favorable business climate does not constitute a bribe. It is not enough for the government to prove that the gift was given with the generalized hope or expectation of ultimate benefit on the part of the gift giver. Vague expectations of some future benefit are not sufficient to make a gift of goodwill a bribe.

See J.A. 3491-92. By the Goodwill Instruction, the trial court reduced the risk that the jury would equate "favoritism or cronyism" with bribery. *See* Br. of Appellant 51.

[22] Because Sheriff McCabe's contentions on the challenged Instructions fail at the first prong of the plain error analysis, our disposition of those contentions would be the same under the less stringent standard of harmless error review.

these circumstances, we are satisfied that the trial court did not either mislead or confuse the jury.

D.

Sheriff McCabe's final contention on appeal is that the district court erred in calculating the amount of loss in connection with his sentencing. We review a district court's sentencing decisions "under a deferential abuse-of-discretion standard." *See United States v. Dennings*, 922 F.3d 232, 235 (4th Cir. 2019). And "[i]n assessing whether a sentencing court properly applied the [Sentencing] Guidelines, we review the court's factual findings for clear error and its legal conclusions de novo." *Id.* (internal quotation marks omitted).

Sheriff McCabe contends that the value of the benefits he unlawfully received, rather than the profits made by ABL and CCS on the Jail contracts, should have been used to determine the amount of loss. In other words, he argues that the $261,000 in benefits he personally received, rather than the estimated $5.2 million in profits he secured for ABL and CCS, should be the relevant amount of loss in calculating any sentencing enhancement.[23] That proposition, however, is mistaken.

The Guidelines provide, inter alia, that a sentencing enhancement applies to honest services mail fraud and Hobbs Act extortion convictions in situations where

[23] The profits of ABL and CCS are the net profits of those businesses from the various Jail contracts, not the total payments they received on the contracts. Because the net profits of ABL and CCS were over $3.5 million but below $9.5 million, the PSR recommended an 18-level enhancement to McCabe's base offense level, which was 14. *See* J.A. 11520, 11523.

> the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $6,500.

See USSG § 2C1.1(b)(2). The number of enhancement levels to be applied depends on the corresponding amount of loss. A loss valued between $6,500 and $15,000, for example, corresponds with a two-level enhancement to the base offense level. *Id.* § 2B1.1. At the highest range, for loss valued at more than $550 million, the Guidelines recommend a 30-level enhancement. *Id.*

The relevant Guidelines commentary also explains that "the value of . . . the benefit received" can include the profits made on a contract that was awarded in return for a bribe. *See* USSG § 2C1.1 cmt. n.3 (explaining value of "the benefit received or to be received" to include the net value of such benefit, e.g., "[a] $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000"). Because the Guidelines specify the use of "whichever is greatest," it was appropriate for the sentencing court to use the $5.2 million in estimated net profits of ABL and CCS as the relevant amount of loss, rather than the $261,000 that Sheriff McCabe received as bribes.

In further support of his sentencing contention, Sheriff McCabe argues that "there was no financial loss to the city" due to his fraud and bribery schemes and that the sentencing court erred in using "projected profits for years when no records existed to support the profit calculations." *See* Br. of Appellant 94. He further maintains that there was "no evidence that [he] ever disregarded the recommendation of the RFP committee or

exerted any influence with respect to the award or extension of these contracts." *Id.* at 95. In our view, those contentions are attempts to relitigate facts relied on by the court. And McCabe makes no claim that the court abused its discretion at sentencing by relying on a clearly erroneous finding of fact.

At bottom, in applying the 18-level sentencing enhancement, the district court relied on the Guidelines as well as our precedent, which has upheld upward adjustments to the base offense level for conspiracy to bribe a public official, based upon the value of the benefits received, rather than the value of the bribe, where the benefits from the bribe were greater. *See, e.g.*, *United States v. Kant*, 946 F.2d 267, 269 (4th Cir. 1991). Because the sentencing court's application of the sentencing enhancement was grounded in the Guidelines and our precedent, the court did not abuse its discretion, and Sheriff McCabe's sentencing contentions must be rejected.

III.

Pursuant to the foregoing, we reject Sheriff McCabe's various contentions of error and affirm his convictions and sentences.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT JAMES MCCABE, Defendant.	CRIMINAL CASE NO. 2:19cr00171

TRANSCRIPT OF PROCEEDINGS
(JURY TRIAL, DAY FOURTEEN)

Norfolk, Virginia

August 20, 2021

BEFORE: THE HONORABLE ARENDA L. WRIGHT ALLEN,
United States District Judge, and a jury

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE
By: Melissa E. O'Boyle
Randy Stoker
Anthony Mozzi
Assistant United States Attorneys
Counsel for the United States

ZOBY, BROCCOLETTI & NORMILE, P.C.
By: James O. Broccoletti
Counsel for the Defendant

The defendant, however, must have willfully caused the other person to take the action which, if the defendant had done it himself or herself, would have made the defendant guilty.

This means that the defendant must have done an act either with knowledge that the other person's act would follow in the ordinary course of business, or where the other person's act could reasonably have been foreseen.

38, The Nature of the Offense Charged: Conspiracy to Commit Honest Services Mail Fraud - Counts One and Two.

Count One. Count One of the indictment charges that in or about 1994 through in or about 2016, in the Eastern District of Virginia and elsewhere, defendant Robert James McCabe and Coconspirator No. 1 knowingly and intentionally conspired with each other and with other persons known and unknown to commit the following offense: Mail fraud; that is, having devised a scheme and artifice to defraud the citizens of the City of Norfolk through bribery, did knowingly place and caused to be placed in any post office and authorized depository for mail, any matter and thing whatever to be sent and delivered by the Postal Service; did deposit and caused to be deposited any matter and thing whatever to be sent and delivered by any private and commercial interstate carrier; and caused to be delivered by mail and such carrier any manner and thing whatever according

to the direction thereon, in violation of Title 18, United States Code, Section 1341.

Purpose. The purpose of the conspiracy was for the defendant Robert James McCabe to secretly use his official position as the Sheriff of the City of Norfolk to enrich himself by soliciting and/or accepting payments, gifts, and other things of value from Conspirator No. 1 in exchange for Robert James McCabe performing official actions, including certain specific official actions and other official actions on an as-needed basis to benefit Conspirator No. 1 and Company A.

Manner and means. The manner and means by which the conspirators would and did carry out the conspiracy included but were not limited to the following:

1. The citizens of Norfolk repeatedly elected Robert James McCabe to serve as the Sheriff of Norfolk.

2. Robert James McCabe solicited and/or accepted things of value, including, but not limited to, free catering, travel, campaign contributions, entertainment, gift cards, and personal gifts from Conspirator No. 1 and others.

3. Conspirator No. 1, and others at his direction, gave numerous things of value to Robert James McCabe in exchange for favorable treatment related to Company A's food services contract for the Norfolk City Jail.

4. In return, Robert James McCabe violated RFP

regulations and disclosed information to Conspirator No. 1 related to confidential bid proposals.

5. Robert James McCabe engaged in official acts related to the food services contract on behalf of Conspirator No. 1 on an as-needed basis and in specific official acts, including, but not limited to, those set forth below:

a. Robert James McCabe, in his capacity as Sheriff, ensured that Company A was selected to serve as the food services vendor for the Norfolk City Jail.

b. Robert James McCabe, in his capacity as Sheriff, executed contracts on behalf of the Norfolk Sheriff's Office conferring financial benefits on Company A.

c. Robert James McCabe, in his capacity as Sheriff, repeatedly exercised the options left to his discretion to extend Company A's contract beyond its original term to prevent Company A from having to participate in a new RFP.

d. Robert James McCabe, in his capacity as Sheriff, granted Company A COLA increases and other terms that financially benefitted Company A.

e. Robert James McCabe, in his capacity as Sheriff, advocated for and exercised waivers and other contract provisions containing favorable terms for Company A.

6. In furtherance of this scheme, Conspirator No. 1 and Robert James McCabe used the mails and/or private and

commercial interstate carriers to facilitate payments to Company A.

7. Robert James McCabe took steps to conceal from the citizens of Norfolk the things of value received from Conspirator No. 1 and others including, but not limited to, omitting things of value given to McCabe from his statement of economic interests and omitting in-kind political donations from his campaign finance reports, in violation of Title 18, United States Code, Sections 1349, 1341, and 1346.

Count Two. Count Two of the indictment charges that from in or about January, 2004, through in or about December, 2016, in the Eastern District of Virginia and elsewhere, defendants James McCabe and Gerard Francis Boyle knowingly and intentionally conspired with each other and with other persons, known and unknown, to commit the following offense: Mail fraud; that is, having devised a scheme and artifice to defraud the citizens of the City of Norfolk through bribery, did knowingly place and cause to be placed in any post office and authorized depository for mail any matter or thing whatever to be sent and delivered by the Postal Service; did deposit and caused to be deposited any matter and thing whatever to be sent and delivered by any private and commercial interstate carrier; and caused to be delivered by mail and such carrier any matter and thing whatever according to the direction thereon, in violation of Title 18, United

States Code, Section 1341.

Purpose. The purpose of the conspiracy was for defendant Robert James McCabe to secretly use his official position as the Sheriff of the City of Norfolk to enrich himself by soliciting and/or accepting payments, gifts, and other things of value from Gerard Francis Boyle and others known and unknown to the Grand Jury, in exchange for Robert James McCabe performing official actions, including certain specific actions and other official actions on an as-needed basis to benefit Gerard Francis Boyle and CCS.

Manner and means. The manner and means by which the conspirators would and did carry out the conspiracy included, but were not limited to, the following:

1. The citizens of Norfolk repeatedly elected Robert James McCabe to serve as the Sheriff of Norfolk.

2. Robert James McCabe solicited and/or accepted things of value including, but not limited to, gifts, cash, a loan, entertainment, sporting events, travel-related expenses, campaign contributions, undisclosed in-kind political donations, "McCabe for Mayor" cigars, autographed guitars, a TAG Heuer watch, and gift cards.

3. Robert James McCabe used certain campaign contributions obtained through the bribery scheme for purely personal purposes and falsified his campaign filings to conceal the scheme.

4. Gerard Francis Boyle, and others at his direction, gave numerous things of value to Robert James McCabe in exchange for specific requested exercise of McCabe's official authority as it related to CCS's medical services contract with the Norfolk City Jail.

5. Robert James McCabe violated RFP regulations and disclosed confidential information to Gerard Francis Boyle, and others, related to the bidding process.

6. Robert James McCabe engaged in official acts on behalf of Gerard Francis Boyle on an as-needed basis and in specific official acts, including, but not limited to, those set forth below.

a. Robert James McCabe, in his capacity as Sheriff, disclosed and directed others to disclose confidential bidding information to Boyle and other CCS employees.

b. Robert James McCabe, in his capacity as Sheriff, ensured that CCS was selected to serve as the medical services company for the Norfolk Jail.

c. Robert James McCabe, in his capacity as Sheriff, executed contracts on behalf of the Norfolk Sheriff's Office conferring substantial financial benefits on CCS.

d. Robert James McCabe, in his capacity as Sheriff, repeatedly exercised options left to his discretion to extend CCS's contract beyond its original term and to prevent CCS from having to participate in a new RFP.

e. Robert James McCabe, in his capacity as Sheriff, awarded staffing cost adjustments to CCS that increased the value of its contract.

f. Robert James McCabe, in his capacity as Sheriff, granted CPI, also called COLA, increases and other terms that financially benefitted the CCS.

g. Robert James McCabe, in his capacity as Sheriff, exercised waivers and other contract provisions containing favorable terms for CCS.

h. Robert James McCabe, in his capacity as Sheriff, agreed to alter the terms of the contract to decrease CCS's obligation to provide prescription drugs to certain inmates upon their release from the Norfolk City Jail.

i. Robert James McCabe, in his capacity as Sheriff, wrote numerous letters of reference in support of the CCS.

7. In furtherance of the scheme, Robert James McCabe and Gerard Francis Boyle used the mails and/or private and commercial interstate carriers to facilitate payments to CCS.

8. Robert James McCabe took steps to conceal his bribery relationship with Gerard Francis Boyle from the citizens of Norfolk and others. Such steps included, but were not limited to, excluding in-kind political donations from his campaign finance reports, falsifying expenditures in his campaign finance reports, and excluding a cash loan,

gifts, and other things of value from his statement of economic interests.

9. Gerard Francis Boyle took steps to conceal his bribery relationship from the citizens of Norfolk and other local sheriffs. Such steps included, but were not limited to, preparing a $12,500 check payable to no one and giving the check to McCabe, in violation of Title 18, United States Code, Sections 1349, 1341, and 1346.

39, The Statute Defining the Offense Charged: Conspiracy to Commit Honest Services Mail Fraud - Counts One and Two.

Title 18, United States Code, Chapter 63, Section 1349 provides, in pertinent part:

"Any person who conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the conspiracy."

In turn, Title 18, United States Code, Chapter 63, Section 1341 provides, in pertinent part:

"Whoever having devised or intending to devise any scheme or artifice to defraud, places in any Post Office or authorized depository for mail, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom or knowingly causes to be delivered by the mail according to the direction thereon..." shall be guilty

of an offense against the United States.

In turn, Title 18, United States Code, Chapter 63, Section 1346 provides, in pertinent part:

"For purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

40, The Essential Elements of the Offense Charged: Conspiracy to Commit Honest Services Mail Fraud - Counts One and Two.

To prove a conspiracy, as charged in Counts One and Two, the government must prove three essential elements beyond a reasonable doubt:

First, that the conspiracy, agreement, or understanding to commit honest services mail fraud, as charged in the indictment, was formed, reached, or entered into by two or more persons.

Second, that at sometime during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement.

And, third, that with knowledge of the purpose of the conspiracy, agreement, or understanding, the defendant then deliberately joined the conspiracy, agreement, or understanding.

41, Conspiracy - Existence of an Agreement (Counts One and Two, Also Applicable to Counts Eight, Nine and

Eleven).

A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.

A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

The government must prove that the defendant and at least one other person knowingly and deliberately arrived at an agreement or understanding that they, and perhaps others, would violate some law by means of some common plan or course of action, as alleged in Counts One and Two of the indictment. It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy.

To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding. To prove that a conspiracy existed, moreover, the government is not required to show that all of the people named in the indictment as members of the conspiracy were, in fact, parties to the agreement or that

all of the members of the alleged conspiracy were named or charged or that all of the people whom the evidence shows were actually members of the conspiracy agreed to all of the means or methods set out in the indictment.

Unless the government proves beyond a reasonable doubt that a conspiracy, as just explained, actually existed, then you must acquit the defendant of the conspiracy charge contained in Counts One, Two, Eight, Nine, and Eleven of the indictment.

42, conspiracy - Membership in an Agreement (Counts One and Two, Also Applicable to Counts Eight, Nine and Eleven).

Before the jury may find that the defendant or any other person became a member of the conspiracy charged in Counts One and Two, Eight, Nine, and Eleven of the indictment, the evidence in the case must show beyond a reasonable doubt that the defendant knew the purpose or goal of the agreement or understanding and deliberately entered into the agreement intending in some way to accomplish the goal or purpose by this common plan or joint action. If the evidence establishes beyond a reasonable doubt that the defendant knowingly and deliberately entered into an agreement to commit the offense as alleged in Counts One, Two, Eight, Nine, and Eleven of the indictment, the fact that the defendant did not join the agreement at its beginning or

did not know all the details of the agreement or did not participate in each act of the agreement or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding membership in the conspiracy.

Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct, does not, of itself, make someone a member of a conspiracy or a conspirator.

43, Conspiracy - Acts and Declarations of Coconspirators (Counts One and Two, Also Applicable to Counts Eight, Nine, and Eleven).

Evidence has been received in this case that certain persons who are alleged in Counts One, Two, Eight, Nine, and Eleven of the indictment to be a coconspirator of the defendant and unnamed coconspirators have done or said things during the existence or life of the alleged conspiracy in order to further advance its goals.

Such acts and statements of these coconspirators and other individuals may be considered by you in determining whether or not the government has proven Counts One and Two, Eight, Nine, and Eleven of the indictment against the defendant Robert James McCabe.

Since these acts may have been performed and these statements may have been made outside the presence of defendant Robert James McCabe and even said or done without the defendant's knowledge, these acts or statements should be examined with particular care by you before considering them against the defendant who did not do the particular act or make the particular statements.

Acts done or statements said by an alleged coconspirator before a defendant joined a conspiracy may also be considered by you in determining whether the government has sustained its burden of proof in Counts One and Two, Eight, Nine, and Eleven of the indictment. Acts done or statements made before an alleged conspiracy ended, however, may only be considered by you regarding the person who performed that act or made that statement.

44, Circumstantial Evidence - Conspiracy (Counts One and Two, Also Applicable to Counts Eight, Nine and Eleven).

The informal agreement present in conspiracy cases must frequently be proved entirely by circumstantial evidence. The absence of direct proof of an agreement generally results from the secretiveness and complexity of modern-day conspiracies.

45, Conspirator's Liability (Counts One and Two, Also Applicable to Counts Eight, Nine, and Eleven).

A conspirator is responsible for acts committed by

other conspirators if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of or as a foreseeable consequence of the conspiracy.

Therefore, if you have first found a defendant a member of a conspiracy charged in Counts One and Two, Eight, Nine, and Eleven, and if you find beyond a reasonable doubt that during the time the defendant was a member of that conspiracy, other coconspirators committed acts in the indictment in furtherance of or as a foreseeable consequence of that conspiracy, then you may find the defendant responsible for those acts, even though the defendant may not have participated in any of the acts.

46, Relationship Between Substantive Offense and Conspiracy to Commit Offense.

Under the law, participating in a conspiracy to commit a crime is an entirely separate and distinct charge from the actual violation of the substantive charge which may be the object of the conspiracy. Therefore, all of the underlying elements of the substantive participation in an act affecting mail fraud need not be met in order for you to find that there was a conspiracy to commit that offense. All that you must find is that there was an agreement to commit that offense and that a defendant voluntarily joined the conspiracy.

I will instruct you on the elements of honest services mail fraud shortly. You should consider these elements in determining whether the defendant knowingly and intentionally conspired to participate in honest services mail fraud. As I have explained to you before, however, the government need not prove each of these underlying elements to prove that a defendant conspired to participate in honest services mail fraud.

47, Success of Conspiracy Immaterial (Counts One and Two, Also Applicable to Counts Eight, Nine and Eleven).

The government is not required to prove that the parties to or members of the alleged agreement or conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.

48, Unanimity - Explained.

Counts One, Two, Eight, Nine, and Eleven of the indictment charge the defendant with violation of federal rule concerning conspiracy. The indictment alleges a number of separate means or methods by which the defendants are accused of violating the law.

The government is not required to prove all of the means or methods alleged in Counts One, Two, Eight, Nine, and Eleven of the indictment. Each juror must agree with each of the other jurors, however, that the same means or methods alleged in Counts One, Two, Eight, Nine, and Eleven of the

indictment was, in fact, engaged in or employed by the defendant in committing the crime charged in Counts One and Two, Eight, Nine, and Eleven of the indictment. The jury need not unanimously agree on each means or method but in order to convict must unanimously agree upon at least one such means or method, that is one engaged in by the defendant.

Unless the government has proven the same means or methods to each of you beyond a reasonable doubt, you must acquit the defendant of the crimes charged in Counts One, Two, Eight, Nine, and Eleven of the indictment.

49, The Nature of the Offense Charged: Honest Services Mail Fraud - Counts Three through Seven.

Counts Three and Four. Counts Three and Four of the indictment charge that from in or about 1994 through in or about December 2016, within the Eastern District of Virginia and elsewhere, defendant Robert James McCabe, Coconspirator No. 1, and other persons known and unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud the citizens of Norfolk of their rights to the honest services of the Norfolk Sheriff through bribery.

On or about the dates listed below, for the purposes of executing the aforesaid scheme and artifice, Robert James McCabe, Coconspirator No. 1, and other persons, known and unknown to the grand jury, having devised a scheme and

artifice to citizens of the City of Norfolk through bribery, did knowingly place and caused to be placed in any Post Office and authorized depository for mail, any matter and thing whatever to be sent and delivered by the Postal Service; did deposit and caused to be deposited any matter and thing whatever to be sent and delivered by any private and commercial interstate carrier; and caused to be delivered by mail and such carrier any matter and thing whatever according to the direction thereon, each mailing being a separate count of this indictment as indicated.

Defendant McCabe; Count Three; date, March 18, 2016; mailing, City of Norfolk check to Company A for approximately $18,290.28.

McCabe; Count Four; date, April 6, 2016; mailing, City of Norfolk check to Company A for approximately $18,317.

All in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Counts Five, Six, and Seven. Counts Five, Six, and Seven of the indictment charge that from in or about 2004 through in or about December 2016, within the Eastern District of Virginia and elsewhere, defendants Robert James McCabe, Gerard Francis Boyle, and other persons known and unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud the citizens of the City of Norfolk their right to the honest services of the Norfolk

Sheriff through bribery.

On or about the dates listed below, for purposes of executing the aforesaid scheme and artifice, Robert James McCabe, Gerard Francis Boyle, and other persons known and unknown to the Grand Jury, having devised a scheme and artifice to defraud the citizens of the City of Norfolk through bribery, did knowingly place and caused to be placed in any Post Office and authorized depository for mail, any matter or thing whatever to be sent and delivered by the Postal Service; did deposit and caused to be deposited any matter and thing whatever to be sent and delivered by any private and commercial interstate carrier; and caused to be delivered by mail and such carrier any matter and thing whatever according to the direction thereon, each mailing being a separate count of this indictment as indicated:

Defendant McCabe; Count Five; date, December 23, 2015; mailing, City of Norfolk check to CCS for approximately $321,754.

McCabe; Count Seven; date, April 20, 2016; mailing, City of Norfolk check to CCS for approximately $321,754.50.

All in violation of Title 18, United States Code, Sections 1341, 1346, and 2.

50, The Statute Defining Offense Charged: Honest Services Mail Fraud - Counts Three through Seven.

Title 18, United States Code, Chapter 63, Section

1341 provides, in pertinent part:

"Whoever, having devised or intended to devise any scheme or artifice to defraud, places in any Post Office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, or knowingly causes to be delivered by mail according to the direction thereon, shall be guilty of an offense against the United States."

In turn, Title 18, United States Code, Chapter 63, Section 1346, provides, in pertinent part:

"For purpose of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible rights of honest services."

51, The Essential Elements of the Offense Charged: Honest Services Mail Fraud - Counts Three through Seven.

To prove honest services mail fraud as charged in Counts Three through Seven, the government must prove four essential elements beyond a reasonable doubt:

First, the defendant knowingly devised or participated in a scheme to defraud the public of its right to the honest services of a public official through bribery, as charged in Counts Three through Seven.

Second, the scheme or artifice to defraud involved a material misrepresentation, false statement, false pretense, or concealment of material fact.

Third, the defendant did so knowingly and with an intent to defraud.

And, fourth, in advancing or furthering or carrying out the scheme to defraud, the defendant used the mails or an interstate carrier or caused the mails or interstate carrier to be used.

52, Scheme Or Artifice to Defraud.

The first element of honest services mail fraud is that the defendant knowingly devised or participated in a scheme or artifice to defraud the public of its right to a public official's honest services through bribery. A scheme is any plan or course of action formed with the intent to accomplish such purpose. Thus, the government must prove beyond a reasonable doubt that the defendant devised or participated in a plan or course of action involving bribes given or offered to a public official or solicited or accepted by a public official.

It is not necessary to find the defendant was actually successful in defrauding anyone, nor is it necessary to find that anyone was actually deprived of the right to a public official's honest services through bribery. An unsuccessful scheme or plan is as illegal as a scheme or plan that is ultimately successful.

53, A Public Official's Fiduciary Duty to the Public.

Public officials, such as sheriffs, owe a fiduciary duty to the public. To owe a fiduciary duty to the public means that the official has a duty of honesty and loyalty to act in the public's interest, not for that official's own enrichment. When a public official devises or participates in a bribery scheme, that official violates the public's right to that public official's honest services. This is because although the public official is outwardly purporting to be exercising independent judgment in passing on official matters, in fact, the official has received things of value in exchange for taking his official actions. The public is defrauded because the public is not receiving what it expects and is entitled to, namely, the public official's honest services.

54, Bribery.

Bribery involves the exchange of a thing or things of value for official action by a public official, in other words, a *quid pro quo*, a Latin phrase meaning "this for that" or "these for those." Bribery also includes a public official's solicitation or agreement to accept a thing of value in exchange for official action, whether or not the payor actually provides the thing of value, and whether or not the public official ultimately performs the requested official action or intends to do so. Thus, it is not necessary that the scheme actually succeeded or that any

official action was actually taken by the public official in the course of the scheme. What the government must prove is that the defendant you are considering knowingly devised or participated in a scheme or artifice to defraud the public and the government of their right to a public official's honest services through bribery.

55, Bribery, *Quid Pro Quo*.

Bribery involves the exchange of a thing or things of value for official action by a public official. In other words, bribery involves a *quid pro quo*, a Latin phrase meaning "this for that" or "these for those." Bribery also includes offers and solicitations of things of value in exchange for official action; that is, for the public official, bribery includes the public official's solicitation or agreement to accept the thing of value in exchange for official action whether or not the payor actually provides the thing of value and whether or not the public official ultimately performs the requested official action or intends to do so.

Where the thing or things of value solicited or received by a public official are something other than a campaign contribution, the government must prove a *quid pro quo*, or solicitation of or agreement to engage in a *quid pro quo* as described above.

Where the thing or things of value solicited or

received by a public official are the payment of campaign contributions, the government must further prove a meeting of the minds on the explicit *quid pro quo*. This means the receipt of such contributions are taken under color of official right, if the payments are made in return for an explicit promise or understanding by the official to perform or not to perform an official act. While the *quid pro quo* must be explicit, it does not have to be express. Political contributions may be the subject of an illegal bribe even if the terms are not formalized in writing or spoken out loud. "Explicit" refers not to the form of the agreement between the payor and the payee but the degree to which the payor and payee were aware of its terms.

56, Bribery Need Not Be Express.

The public 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.

Rather, the intent to exchange may be established by circumstantial evidence, based on the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

57, Bribery - Mixed Motive No Defense.

Also, because people rarely act for a single purpose, a public official need not have solicited or

accepted the thing of value only in exchange for the performance of official action. If you find beyond a reasonable doubt that a public official solicited or received a thing of value at least in part in exchange for the performance of official action, then it makes no difference that the public official may also have had another lawful motive for soliciting or accepting the thing of value.

58, Bribery - Beneficial Act No Defense.

The government also need not prove that the thing of value caused the public official to change his position. In other words, it is not a defense to claim that a public official would have lawfully performed the official action in question anyway, regardless of the bribe. It is also not a defense that the official action was actually lawful, desirable, or even beneficial to the public. The offense of honest services fraud is not concerned with the wisdom or results of the public official's decisions or actions but, rather, with the manner in which the public official makes his or her decisions or takes his or her actions.

59, Goodwill.

Individuals may lawfully give a gratuity or gift to a public official to foster goodwill. To prove that a gift is a bribe, rather than a lawful act of goodwill, the government must demonstrate that the gift is coupled with a particular criminal intent or *quid pro quo*. You may refer to

the instructions laying out the elements of bribery to make this determination.

A gift to an official to foster a favorable business climate does not constitute a bribe. It is not enough for the government to prove that the gift was given with the generalized hope or expectation of ultimate benefit on the part of the gift giver. Vague expectations of some future benefit are not sufficient to make a gift of goodwill a bribe.

60, Official Act.

The term "official act" means any decision or action on any question or matter, which at any time be pending, or which may by law be brought before any public official, in such public official's official capacity, or in such official's place of trust or profit. This has two parts to it.

First, the question or matter must be specific and focused and involve a formal exercise of governmental power.

Second, the public official must make or agree to make a decision or take or agree to take an action on that question or matter. A decision or action on a qualifying step for a question or matter would qualify as an official act. An official act also includes a public official exerting pressure on another official to perform an official act or providing advice to another official knowing or

intending that such advice will form the basis of an official act by another official.

Setting up a meeting, hosting an event, or talking to another official, without more, does not qualify as a decision or action on a question or matter. Simply expressing support at a meeting, event, or call, or sending a subordinate to such a meeting, event or call similarly does not qualify as a decision or action on a question or matter, as long as the official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an official act. You may, however, consider evidence that a public official set up a meeting, hosted an event, talked to another official, expressed support, or sent a subordinate as evidence of an agreement to take an official act. You may consider all the evidence in the case, including the nature of the transaction, in determining whether the conduct involved an official act.

61, Intent to Defraud.

The second element of honest services mail fraud as charged in Counts Three, Four, Five, Six, and Seven is that the defendant devised or participated in a scheme knowingly and with the specific intent to defraud.

"Intent to defraud" means to act knowingly and with a specific intent to deceive for the purpose of depriving the

public and the government of their right to a public official's honest services. For example, the deceit may consist of the concealment of the things of value that the public official has solicited or received, or the public official's implicit false pretense to his government employer that the public official has not accepted things of value in return for official action.

62, "Materiality" - Defined.

A statement, representation, promise, pretense, or concealment of a fact is material if it has a natural tendency to influence or is capable of influencing a decision or action.

To be material it is not necessary that the statement, representation, promise, pretense, or concealed fact actually influence or deceive.

As used in these instructions, a statement, representation, promise, pretence, or concealed fact is material if it has a natural tendency to influence or is capable of influencing the decision of the public or entity to which it is addressed. The government can prove materiality in either of two ways.

First, a statement, representation, promise, pretense, or concealed fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his or her choice of an action in

the transaction in question.

Second, a statement, representation, promise, pretense, or concealed fact could be material, even though only an unreasonable person would rely on it, if the person who made the statement knew or had reason to know his or her victim was likely to rely on it.

In determining materiality, you should consider that naivety, carelessness, negligence, or stupidity of a victim does not excuse criminal conduct, if any, on the part of the defendant.

63, Use of the Mails Or Interstate Carrier - Defined.

The use of the United States mails or an interstate carrier is an essential element of the offense of mail fraud, as charged in Counts Three, Four, Five, Six, and Seven of the indictment.

The government is not required to prove the defendant actually mailed anything or that the defendant even intended that the mails would be used to further or to advance or to carry out the scheme or plan to defraud.

The government must prove beyond a reasonable doubt, however, that the mails or an interstate carrier were, in fact, used in some manner to further, or advance, or carry out the scheme to defraud. The government must also prove that the use of the mails or the interstate carrier would

follow in the ordinary course of business or events or that the use of the mails or the interstate carrier by someone was reasonably foreseeable.

It is not necessary for the government to prove that the item itself mailed was false or fraudulent or contained any false or fraudulent statement, representation, or promise or contained any request for money or thing of value.

The government must prove beyond a reasonable doubt, however, that the use of the mails or the use of the interstate carrier furthered, or advanced, or carried out in some way the scheme or plan to defraud.

64, The Nature of the Offense Charged: Conspiracy to Obtain Property Under Color of Official Right - Counts Eight and Nine.

Count Eight. Count Eight of the indictment charges that from in or about 1994 through in or about December 2016, in the Eastern District of Virginia and elsewhere, defendant Robert James McCabe and Conspirator No. 1 did knowingly and intentionally conspire together and with other persons known and unknown to the Grand jury to cause each other and others to obstruct, delay, and affect in any way and degree commerce, and the movement of articles and commodities in commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, to obtain property not due Robert James McCabe or his office and to

which Robert James McCabe was not entitled from Conspirator No. 1 and others, with their consent, under color of official right, in violation of Title 18, United States Code, Section 1951.

Count Nine. Count Nine of the indictment charges that from in or about 2004 through in or about December 2016, in the Eastern District of Virginia and elsewhere, the defendant Robert James McCabe and Gerard Francis Boyle did knowingly and intentionally conspire together and with other persons, known and unknown to the Grand Jury, to cause each other and others to obstruct, delay, and affect in any way and degree commerce, and the movement of articles and commodities in commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, to obtain property not due Robert James McCabe or his office and to which Robert James McCabe was not entitled, from Gerard Francis Boyle and others, with their consent, under color of official right, in violation of Title 18, United States Code, Section 1951.

65, The Statute Defining the Offense Charged: Conspiracy to Obtain Property Under Color of Official Right - Counts Eight and Nine.

Title 18, United States Code, Section 1951(a) provides, in pertinent part that:

"Whoever conspires to in any way or degree obstruct,

delay, or affect commerce or the movement of any article or commodity in commerce by extortion is guilty of an offense against the United States."

In turn, Title 18, United States Code, Section 1951(b)(2) provides, in pertinent part:

"The term 'extortion' means the obtaining of property from another, with his consent, under color of official right."

In addition, Title 18, United States Code, Section 1951(b)(3) provides, in pertinent part:

"The term 'commerce' means all commerce between any point in any state, territory, possession, or the District of Columbia and any point outside thereof; all commerce between points within the same state through any place outside such state; and all other commerce over which the United States has jurisdiction."

66, The Essential Elements of the Offense Charged: Conspiracy to Obtain Property Under Color of Official Right - Counts Eight and Nine.

To prove a conspiracy as charged in Counts Eight and Nine, the government must prove the same three essential elements beyond a reasonable doubt that they had to prove for Count One:

First, that the conspiracy, agreement, or understanding to obtain property under color of official

right, as charged in the indictment, was formed, reached, or entered into by two or more persons;

Second, that at some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement;

And, third, that with knowledge of the purpose of the conspiracy, agreement, or understanding, the defendant then deliberately joined the conspiracy, agreement, or understanding.

The other conspiracy instructions given earlier with respect to Counts One and Two apply equally to Counts Eight and Nine.

67, The Nature of the Offense Charged: Obtaining Property Under Color of Official Right - Count Ten.

Count Ten of the indictment charges that from in or about January 1994 through in or about December 2016, in the Eastern District of Virginia and elsewhere, defendant Robert James McCabe did knowingly and intentionally obstruct, delay, and affect in any way and degree commerce, and the movement of articles and commodities in commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, Robert James McCabe obtained things of value not due Robert James McCabe for his office and to which Robert James McCabe was not entitled, from numerous individuals, with their consent, under color of official

right, in violation of Title 18, United States Code, Section 1951.

68, The Statute Defining the Offense Charged: Obtaining Property Under Color of Official Right - Count Ten.

Title 18, United States Code, Section 1951(a) provides, in pertinent part:

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by extortion or attempts so to do is guilty of an offense against the United States."

In turn, Title 18, United States Code, Section 1951(b)(2) provides, in pertinent part:

"The term 'extortion' means the obtaining of property from another, with his consent, under color of official right."

In addition, Title 18, United States Code, Section 1951(b)(3) provides, in pertinent part:

"The term 'commerce' means all commerce between any point in any state, territory, possession, or the District of Columbia and any point outside thereof; all commerce between points within the same state through any place outside such state; and all other commerce over which the United States has jurisdiction."

69, The Essential Elements of the Offense Charged: Obtaining Property Under Color of Official Right - Count Ten.

To prove the crime of obtaining property under color of official right against the defendant as charged in Count Ten, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was a public official;

Second, the defendant obtained a thing of value not due him or his office;

Third, the defendant did so knowing that the thing of value was given in return for official action;

And, fourth, that in so acting, the defendant did or attempted in any way or degree to delay, obstruct, or affect interstate commerce, or an item moving in interstate commerce.

70, Second Element - Property Not Due Office.

The second element, that the defendant obtained a thing of value not due him or his office, means that the defendant obtained a thing of value that was not legitimately owed to the office that the defendant represented. The defendant does not have to prove -- excuse me.

The government does not have to prove that the thing of value given was of personal benefit to the defendant, nor does the government have to prove that the thing of value was given to the defendant directly. If the defendant knows that the thing of value was given in return for the defendant's official actions, it does not matter that they were given to

a third party.

The government does have to prove beyond a reasonable doubt that the thing of value obtained was not due or owing the office which the defendant represented.

71, Third Element - Knowledge That the Public Official Obtained a Thing of Value in Return For Official Action.

To satisfy the third element, the government must prove beyond a reasonable doubt that the defendant obtained a thing of value to which he was not entitled, knowing that the thing of value was given in return for official action. The defendant need not have affirmatively induced the provision of the thing of value by his actions, but he must have known that the thing of value was given in exchange for official action. You do not have to determine whether the defendant could or did actually perform the official action in return for which the thing of value was given, or whether he actually had a duty to do so.

As was the case with bribery, the exchange or *quid pro quo* need not be stated in express terms, and the intent to exchange can be inferred from all the surrounding circumstances. Furthermore, as also is the case with bribery, a given thing of value need not be correlated with a specific official action, and a thing or things of value may be given with the intent to retain a public official's

services on an as-needed basis, so that as opportunities arise the public official would take specific official action on the payor's behalf. As also was the case with bribery, the government need not prove that the thing of value caused the defendant to change his position. If the defendant obtained a thing of value to which he was not entitled, knowing the thing of value was given and returned for official actions, it is not a defense that he would have lawfully performed the official action anyway, regardless of the thing of value. Finally, the instructions I gave with the definition of "official action" for purposes of the honest services mail fraud charges apply equally to the definition of "official action" for purposes of Count Ten.

72, Interstate Commerce - Defined.

To find the interstate commerce element satisfied, it is not necessary to find that a defendant actually intended to obstruct, delay, or affect commerce. Rather, the government need only prove that the defendant you are considering deliberately performed or attempted to perform an act, the ordinary and natural consequences of which would be obstruct, delay, or affect commerce. The effect on interstate commerce need only be slight, and it need not be adverse. Proof that the extortion under color of official right would have affected interstate commerce, even if minimally and even if positively, is sufficient.

73, The Nature of the Offense Charged: Conspiracy to Commit Money Laundering - Count Eleven.

Count Eleven of the indictment charges that from in or about April 2015 through in or about December 2016, in the Eastern District of Virginia and elsewhere, defendant Robert James McCabe, Gerard Francis Boyle, and Conspirator No. 2, together and with others known and unknown, knowingly and intentionally combined, conspired, confederated, and agreed to commit the following offense against the United States: to wit, laundering of monetary instruments; that is, to knowingly conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, which transactions involved the proceeds of specified unlawful activity; that is, honest services mail fraud, knowing that the transactions were designed, in whole or in part, to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, and that while conducting and attempting to conduct such financial transactions knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).

In addition, the ways, manner, and means by which McCabe, Boyle, Conspirator No. 2, and others sought to accomplish this conspiracy include, but were not limited to,

the following:

1. On or about April 15, 2016, Boyle concealed the nature of the transaction by writing Check No. 1280 for $12,500 ("the check"), leaving the "Pay to the Order of" line blank and writing "Consulting" in the memo line before giving the check to McCabe.

2. That same day, McCabe concealed the nature, control, and ownership of the funds by giving the check to Conspirator No. 2, instructing Conspirator No. 2 to write his name in the "Pay to the Order" line and deposit the funds into Conspirator No. 2's checking account.

3. After Conspirator No. 2 received the check, Conspirator No. 2 approached three friends and asked them to make donations to the "McCabe for Mayor" campaign and promised to reimburse them for their donation. In total, the three friends donated $6,000 to the "McCabe for Mayor" campaign.

4. After receiving Boyle's check, Conspirator No. 2 made two campaign contributions to the "McCabe for Mayor" campaign, one for $1,500 and another for $2,500, through two of Conspirator No. 2's companies.

5. On or about April 25, 2016, Conspirator No. 2 concealed the nature, control, and ownership of the funds by depositing the check into Conspirator No. 2's personal checking account at Heritage Bank.

6. Conspirator No. 2 reimbursed all three friends for their "McCabe for Mayor" contributions.

7. Conspirator No. 2 then reimbursed one of the Conspirator No. 2's companies for its $1,500 campaign contribution.

And, 8, McCabe, Boyle, and Conspirator No. 2 transferred the funds through the various financial accounts to conceal their bribery relationship and Boyle's and Conspirator No. 2's contribution to McCabe, in violation of Title 18, United States Code, Section 1956(h).

74, The Statute Defining the Offense Charged: Conspiracy to Commit Money Laundering - Count Eleven.

Title 18, United States Code, Section 1956(h) states, in pertinent part:

"Any person who conspires to commit concealment money laundering shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy..." shall be guilty of an offense against the United States.

In turn, Title 18, United States Code, Section 1956(a)(1)(B)(i) provides, in pertinent part:

"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 financial transaction which in fact involves the proceeds of

specified unlawful activity knowing that the transaction is designed, in whole or in part, to conceal or disguise the nature, the location, the source, the ownership, or control of the proceeds of the specified unlawful activity..." shall be guilty of an offense against the United States.

75, The Essential Elements of the Offense Charged: Conspiracy to Commit Money Laundering - Count Eleven.

Title 18, United States Code, Section 1956(h) makes it a crime for anyone to conspire to commit concealment money laundering.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First, the defendant and at least one other person made an agreement to commit the crime of concealment money laundering;

Second, the defendant knew the unlawful purpose of the agreement;

And, third, the defendant joined in the agreement willfully; that is, with the intent to further the unlawful purpose.

One may become a member of the conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme

and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him of conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove an overt act in furtherance of the conspiracy.

76, The Essential Elements of Concealment Money Laundering.

The three essential elements of concealment money laundering are:

First, the defendant conducted or attempted to conduct the financial transaction involving property constituting the proceeds of specified and unlawful activity;

Second, the defendant knew the property involved in the financial transaction was the proceeds of some form of unlawful activity;

And, third, the defendant knew the transaction was designed, in whole or in part, either to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity or to avoid a transaction reporting requirement under state or federal law.

77, Use of Electronic Technology to Conduct Research On or Communicate About a Case is Prohibited.

During your deliberations, you must not communicate