

Nos. 07-60748, 07-60751, 07-60774

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN H. WHITFIELD, PAUL S. MINOR & WALTER W. TEEL,

Defendants-Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

CORRECTED BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The government agrees that oral argument may be helpful to the Court in addressing the issues presented by these appeals.

JURISDICTIONAL STATEMENT

These are appeals from final judgments of conviction and sentence. The district court (Henry T. Wingate, C.J.) had jurisdiction under 18 U.S.C. § 3231 and entered judgments against John H. Whitfield (D617), Paul S. Minor (D618), and Walter W. Teel (D616) on September 18, 2007.¹ Defendants timely filed notices of appeal. D613 (Whitfield on 9/17/07); D614 (Minor on 9/17/07); D622 (Teel on 9/27/07). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

1. Whether the honest services mail and wire fraud instructions correctly described the elements of bribery under Mississippi law.
2. Whether Minor has waived any claim that the jury should have been instructed that any campaign contributions he made must have been “in return for an

¹ “D” refers to the district court docket number. Record Excerpts are referenced by “RE” preceded by the defendant’s last name initial and followed by the Tab number, e.g., Tab 5 to Minor’s Record Excerpts is “MRE/5.” The government’s Excerpts of Record are cited as “GRE.” Documents in a defendant’s original record are cited by “R,” preceded by a defendant’s last name initial and followed by the relevant page number, e.g., p. 1254 of Minor’s original record is “MR1254.” The 2007 trial transcripts are referenced by “Tr.” and the page number, e.g., “Tr. 4663,” while the 2005 trial transcripts are referenced by “2005Tr.” All other transcripts are identified by the hearing date, “Tr.,” and page number and/or by a cite to the Second Supplemental Record on appeal, followed by the volume number, e.g., “2SR/108”. Exhibits are referenced by the district court exhibit number, e.g., G1(A)1.

explicit promise or undertaking by [Whitfield or Teel] to perform or not perform an official act,” United States v. McCormick, 500 U.S. 257, 273 (1991), and, if not, whether the district court plainly erred in failing to so instruct the jury.

3. Whether the jury instructions permitted Minor to be convicted for any crimes not charged in the Indictment.

4. Whether Counts 11-14 of the Indictment charged an offense under 18 U.S.C. § 666.

5. Whether the evidence was sufficient to demonstrate that Whitfield and Teel were agents of a subdivision of the Mississippi judicial branch receiving more than \$10,000 in federal funds during a one-year period.

6. Whether conviction under 18 U.S.C. § 666 requires proof that the defendant have actual control over the disposition of his agency’s federal funds.

7. Whether the district court abused its discretion in excluding evidence that Minor served on the Legal Services Corporation board with Whitfield when Minor was otherwise permitted to argue and prove that he had pre-existing relationships with both Whitfield and Teel.

8. Whether the district court abused its discretion in excluding evidence that Minor guaranteed a loan to a closely aligned law firm when Minor was otherwise permitted to argue and prove that he guaranteed loans to friends and colleagues.

9. Whether the district court abused its discretion in excluding expert testimony, including testimony that was not disclosed to the prosecution in a timely manner.

10. Whether the district court abused its discretion in excluding cumulative evidence that most contributions to judicial campaigns came from attorneys.

11. Whether the district court abused its discretion in excluding evidence that Minor brought other law suits in which he did not attempt to bribe Whitfield.

12. Whether the district court abused its discretion in excluding cumulative evidence of Minor's skills as a lawyer.

13. Whether the district court abused its discretion in excluding evidence of the billing records of a witness who was a private attorney.

14. Whether the record demonstrates that no defendant requested that an FBI interview memorandum be admitted for impeachment purposes.

15. Whether the district court abused its discretion in excluding double hearsay statements contained in a litigation report prepared by a witness who was a private attorney.

16. Whether the district court abused its discretion in admitting evidence that Whitfield lied about the Peoples Bank loans in his divorce proceeding.

17. Whether testimony from three government witnesses contained expert

opinions and, if it did, whether Whitfield was unfairly surprised by the admission of this testimony.

18. Whether the district court abused its discretion in admitting the government's summary charts.

19. Whether Whitfield properly preserved his Speedy Trial Act claim below and, if he did, whether the Speedy Trial Act was violated in this case.

20. Whether the charges against Teel and Whitfield were misjoined and, if not, whether the district court abused its discretion in denying Teel's severance motion.

21. Whether the record of the 2005 trial demonstrates that the district court's rulings at the 2007 trial were motivated by actual bias towards the defendants.

22. Whether this Court should reverse the defendants' convictions based on the district court's decision to exclude a potential juror who stated that her belief that she should not sit in judgment of others would affect her ability to deliberate.

23. Whether Whitfield's motion to dismiss the Indictment on the ground that the government allegedly presented perjured testimony to the grand jury was untimely, and, if not, whether this motion was properly denied.

24. Whether the evidence was sufficient to show that it was reasonably foreseeable to Whitfield that the mails would be used in connection with his scheme

to defraud the state of Mississippi of his honest services.

25. Whether this Court should consider unsubstantiated claims of government misconduct that are untied to any claim for reversal on appeal.

26. Whether the Sixth Amendment limited the district court at sentencing to factual findings made by the jury.

27. Whether the district court clearly erred in applying the bribery guideline at sentencing.

28. Whether the district court's net benefit calculations under Sentencing Guidelines § 2C1.1(b)(2)(A) were clearly erroneous.

29. Whether the district court committed a "procedural error" in applying an obstruction of justice enhancement to the base offense levels of Minor and Whitfield.

30. Whether the district court clearly erred in declining to reduce Whitfield's Sentencing Guidelines offense level based on his alleged acceptance of responsibility.

31. Whether the district court abused its discretion in declining to vary from the Sentencing Guidelines in sentencing Whitfield.

32. Whether the district court erred in awarding restitution based upon the losses Minor's conduct caused to USF&G.

33. Whether the district court's decision to impose a fine on Minor above the level recommended by the Sentencing Guidelines was a departure or a variance.

34. Whether, assuming arguendo that any sentencing error occurred, this Court should decline to remand for resentencing because the district court used the 2001 version of the Sentencing Guidelines in the mistaken belief that the ex post facto Clause required it to do so.

35. Whether, assuming arguendo that any remand is required, this Court should exercise its “rarely invoked” power of reassignment.

STATEMENT OF THE CASE

On July 25, 2003, a federal grand jury sitting in the Southern District of Mississippi returned a 16 count indictment against defendants Minor, Whitfield and Teel, and two other people, Mississippi Supreme Court Justice Oliver E. Diaz and his former wife, Jennifer Diaz. D1. Superceding indictments were returned on February 20, 2004, and October 19, 2004, and Jennifer Diaz was dismissed from the case. D154, D297. Following a jury trial in the summer of 2005, Justice Diaz was acquitted on all counts, Minor was acquitted on six counts and Whitfield was acquitted on one count. MRE/6. A mistrial was declared on all other counts. Id.

On December 6, 2005, a 14 count Third Superceding Indictment (“Indictment”) was returned against the defendants. Count One charged Whitfield and Minor with conspiracy to commit various offenses against the United States, including mail fraud, wire fraud and offering and accepting bribes concerning

programs receiving federal funds. Count Two charged Teel and Minor with conspiring to commit the same offenses against the United States. Count Three charged Minor with conducting and participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity. Counts Four through Seven charged Minor and Whitfield with devising a scheme to defraud the state of Mississippi of its intangible right to Whitfield's honest services. Count Eight charged Minor with devising a scheme to defraud the state of Mississippi of its intangible right to Whitfield's honest services. Counts Nine and Ten charged Minor and Teel with devising a scheme to defraud the state of Mississippi of its intangible right to Whitfield's honest services. Count Eleven charged Whitfield with accepting bribes while acting as an agent of a state agency receiving federal funds. Count Twelve charged Minor with offering bribes to Whitfield while Whitfield was acting as the agent of a state agency receiving federal funds. Count Thirteen charged Teel with accepting bribes while acting as an agent of a state agency receiving federal funds. Finally, Count Fourteen charged Minor with offering bribes to Teel while Teel was acting as an agent of a state agency receiving federal funds. MRE/1 (D454).

Jury selection commenced on February 7, 2007, and on March 30, 2007, the jury returned a verdict of guilty on all counts. MRE/4. Defendants filed post-trial motions for judgments of acquittal and/or new trial. D573, D574, D575, D576; see

also D590 (gov. response) but failed to obtain relief.

On September 7, 2007, the district court sentenced Whitfield to 110 months of imprisonment, to be followed by three years of supervised release, WRE/4 (D617); Minor to 132 months of imprisonment, to be followed by three years of supervised release, MRE/5 (D618); and Teel to 70 months of imprisonment, to be followed by two years of supervised release. TRE/5 (D616). These appeals followed.

STATEMENT OF FACTS

Biloxi, Mississippi lawyer Paul Minor became wealthy and powerful, primarily by representing plaintiffs for a contingency fee.² Minor operated his own law firm, known as Minor and Associates, and received all the profits this firm generated. Tr. 3560-62; G146. In the fall of 1998, Minor decided to enrich himself (and his clients) by bribing John Whitfield, a sitting Circuit Court judge, and Wes Teel, who became a Chancery Court judge on January 1, 1999. G23.

Both Whitfield and Teel needed money, a situation Minor exploited by arranging for his own bank to provide them with substantial loan proceeds. Tr. 2159, 2218-19. Although nominally loans to the judges, Minor guaranteed these transactions and made most (Whitfield) or all (Teel) of the required payments of

² This Statement of Facts summarizes the evidence at trial, viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 (1942), and with all reasonable inferences and credibility choices resolved in support of the jury verdicts. United States v. Zweig, 562 F.2d 962, 963 (5th Cir. 1977).

principal and interest. See infra at 10-16, 23-25. In addition, when Teel became the subject of an unrelated state corruption probe, Minor helped to orchestrate and finance Teel's defense. See infra at 25-26.

While Minor & Associates litigated potentially lucrative cases before them, Whitfield and Teel concealed these transactions, failing to disclose them on campaign finance forms or economic interest statements. See infra at 16, 26. Minor likewise employed various ruses, including cash payments, fraudulent documents and strawman payoffs to keep his payments hidden. See infra at 12-16, 19-23, 24-25. In the end, Minor repaid all the bank loans through intermediaries, spending at least \$171,226 in connection with two loans to Whitfield, and \$26,985 in connection with a loan to Teel. GRE/4. In addition, Minor spent over \$10,000 on Teel's criminal defense. See infra at 25-26.

Whitfield and Teel understood that Minor's largess would have to be repaid, and both men came through. Whitfield awarded a Minor & Associates client over \$3.6 million in tort damages, an amount the Mississippi Supreme Court later deemed "so high as to be unreasonable at first blush." MRE/12 at 16; see infra at 17-19. As for Teel, he forced through a \$1.5 million settlement to a Minor & Associates plaintiff by refusing to stay a civil case (even though the dispositive issue was pending before the Mississippi Supreme Court), and then making clear his intent to award punitive

damages. See infra at 30-33. Because the judicial defendants' concealed their relationships with Minor, none of the attorneys opposing him in these cases knew of his payoffs to the presiding judges. Tr. 2782-83, 3036, 3404-06.

A. The Whitfield Bribery Scheme.

1. Minor Arranges for Whitfield to Receive \$140,000 from Peoples Bank.

In 1994, John H. Whitfield was elected a judge of the Mississippi Circuit Court. G21. By October 1998, Whitfield was in a personal and financial jam, as he was divorcing his wife (with whom he had three children) and facing a re-election battle. Tr. 2063, 3861; GX 28.

Conveniently, Minor stepped forward to assist on both fronts. Tr. 2159-76, 3859-61. First, Minor offered to secure \$40,000 to finance Whitfield's re-election campaign. Tr. 2159-60; G1(A)2. Second, Minor offered to provide Whitfield \$100,000 to purchase a new home with his girlfriend, Rhonda Hawthorne. Tr. 2159-60; G1(A)16. Whitfield accepted Minor's offers even though he had no means of repaying these sums in the foreseeable future. Tr. 2233.

Minor's payments to Whitfield were structured as loans through Peoples Bank, where Minor had over \$12,000,000 in deposits. Tr. 2158-2176, 2363. The bank loaned Whitfield \$140,000 only because Minor guaranteed the loans. As one bank official explained, Minor was "the money" behind the loans, Tr. 2209, which were

made “simply on the strength of [his] financial ability.” Tr. 2210, 2355.

The \$40,000 loan issued on October 12, 1998. Tr. 2373-74; G1(A)2. Whitfield placed the proceeds in his campaign account and was subsequently re-elected. Tr. 2188, 4006. The \$100,000 loan did not issue until November 19, 1998 -- after Whitfield had been re-elected -- because Minor informed the bank that Whitfield “didn’t need” the money until this time. Tr. 2160, 2188, 2185-88, 2374; G1(A)16, G1(A)17. The loan documents described the purpose of this loan as “down payment on home.” Tr. 2186-87, 3978; G1(A)16. Whitfield placed the proceeds in Hawthorne’s account. Tr. 2192, 4006; G1(A)18. On December 31, 1998, Hawthorne used \$61,744 of these funds to make a down payment on a house in Gulfport, Mississippi which she then shared with Whitfield. Tr. 4008; G3(A)6, G3(A)8, G3(A)9. Whitfield and Hawthorne spent the remainder on personal expenses, including credit card payments and \$7,364 worth of furniture and blinds. Tr. 4007; GRE/4 at 5 (chart tracing proceeds of \$100,000 loan); G3(A)5.

2. Whitfield Lies under Oath to Conceal the Loan Transactions.

On January 28, 1999, less than four months after he received the \$140,000, Whitfield testified under oath in his divorce proceeding. Tr. 3864. Whitfield acknowledged taking out a \$40,000 loan to finance his political campaign, but denied that any other party signed the guarantee, thereby concealing Minor’s role. Tr. 3867-

68; G107a at 13-14. Whitfield also concealed the \$100,000 loan entirely, claiming that he did not contribute any funds towards the acquisition of his home with Hawthorne. Tr. 3872; G107a at 21, 41-42.

3. Minor Assumes Responsibility for the Loans to Whitfield, Using Cash Payments to Conceal his Role.

Both men understood that Minor -- not Whitfield -- was primarily responsible for repaying these loans. Indeed, as time went on -- and Minor and Whitfield identified an opportunity for Whitfield to “repay” Minor through his judicial office, see infra at 17-19 -- Minor assumed complete responsibility for them.³

The loans were structured -- at Minor’s request -- as renewable balloon loans, with accumulated interest and principal due every six months. Tr. 2166, 2374-75. As a result, Whitfield was periodically reminded of the substantial debt he had incurred -- and of Minor’s on-going role in keeping it at bay.

Although the \$40,000 loan became due on April 10, 1999, and the \$100,000 loan became due on May 18, 1999, Whitfield made no effort to repay (or extend)

³ Whitfield made a few payments towards the \$40,000 loan. On April 6, 1999, Whitfield repaid \$5,000 of this loan using funds withdrawn from his campaign account. Tr. 2379, 3986-87; G2(A)2, G2(A)3. Whitfield also made a \$1,000 payment by money order on this loan on August 2, 1999, Tr. 3990; G2(A)9, G2(A)10; and a \$1,050 payment through a savings account withdrawal on December 14, 1999. Tr. 3990; G2(A)11, G2(A)12. Finally, on August 3, 2000, Whitfield applied a \$500 check from a donor to the \$40,000 loan. Tr. 3991; G2(A)20, G2(A)21. Minor supplied the funds for all other payments on the two loans (including the final pay-offs). See generally GRE/4 at 2 (summary chart of loan payments).

either loan. Instead, when Peoples Bank repeatedly attempted to contact him, he simply ignored it, Tr. 2375-76, 2395, 2452, forcing the bank to contact Minor instead. Tr. 2375-76, 3343-45. Dale Dorcik Thibodeaux, a secretary at Peoples Bank, testified that the loans to Whitfield and Teel were the only times she ever had to contact a guarantor to obtain payment. Tr. 2370, 2410.

Minor arranged to renew the loans on June 16, 1999.⁴ Tr. 2176, 2190-91, 2387-88, 2393-4; G1(A)10, G1(A)11, G1(A)19, G1(A)20, G1(A)21. Renewal required a \$530 payment towards the \$40,000 loan and a \$4,500 payment towards the \$100,000 loan. Tr. 2392; G2(A)5, G2(A)6. To obtain the necessary funds, Minor instructed his office manager, Janet Miller, to cash a \$6,500 check on June 25, 1999. Tr. 2392, 3352-53, 3369; G2(A)4. When Minor made the renewal payments the next business day, he used cash to disguise that he was their source.⁵ Tr. 2377-88, 2390-92, 3988; G2(A)5, G2(A)6, G2(A)7, G2(A)8.

Thereafter, the Whitfield loans fell into a predictable pattern, with Whitfield avoiding responsibility, and Minor ensuring that the loans remained in good standing. See, e.g., Tr. 2269-70, 2176-77, 2179-80, 2198, 2394-95. Minor continued to conceal

⁴ Minor's office manager obtained the necessary loan documents from Peoples Bank and notarized them, falsely asserting (at Minor's request) that Whitfield had personally appeared before her. Tr. 3349-50, 3555-56; G1(A)21.

⁵ As noted infra at 24, Minor also made a cash payment on Teel's loan within a couple of minutes of the payments on Whitfield's loans.

his role by paying the bank with cash -- sometimes funneled through Whitfield. Thus, in connection with the second loan renewal, Whitfield wrote a check for \$5,644.66 on January 27, 2000, to cover the necessary costs, even though his bank balance was only \$471.93. Tr. 3990-91; G2(A)13, G2(A)14, G2(A)15, G2(A)16. After the check bounced, \$5,800 in cash appeared in Whitfield's account on February 4, 2000, which Whitfield then used to pay the bank. See Tr. 2179-83, 3990-91; G1(A)13, G2(A)14, G2(A)15, G2(A)16, G1(A)22, G1(A)23.

The next loan renewal, which took place in September 2000, required payments totaling \$6,900. Again, Minor cashed a \$7,000 check on September 8, 2000, to obtain the necessary funds. Tr. 3370, 3991; G2(A)22. Miller noted the transaction's purpose on the check stub: "loan interest JW."⁶ G2(A)23. The loan payments were made in cash on September 11, 2000, the next business day. Tr. 3991-92; see Tr. 2196-98; G1(A)24, G1(A)25, G1(A)26, G2(A)25, G2(A)26, G2(A)27, G2(A)28.

At the end of 2000, Whitfield left the bench and, with Minor's help, obtained a position in private practice. Tr. 4142-46, 4150-52; G22. Although Whitfield's

⁶ At trial, Miller (who was still employed by Minor) claimed that she had simply "assumed" that the check was intended to pay back Whitfield's loan. Tr. 3372. In the jury's presence, she apologized to Minor and Whitfield, ostensibly for making this assumption. Tr. 3382-83. Of course, the jury was entitled to conclude that she was really apologizing for noting the check's actual purpose in Minor's books.

financial situation presumably improved, Tr. 4878, the Peoples Bank loans remained Minor's problem alone. Only the means by which Minor funneled money to Whitfield changed.

Rather than giving Whitfield large quantities of cash, Minor now sent him checks with cover letters documenting a false purpose. Thus, when the loans were consolidated and then renewed a fourth time on May 4, 2001, Whitfield made total payments by check of \$15,000. Tr. 2200 (loans consolidated), 3992; G1(A)27. But the money came from Minor, who sent Whitfield \$15,000, purportedly as an "advance" on an unresolved lawsuit involving Whitfield's mother. Tr. 3384, 3992; G2(A)29; see also Tr. 2000-01, 2415; G1(A)27, G1(A)28. Whitfield deposited this check in his personal account and then wrote a \$15,000 check to Peoples Bank the next day. Tr. 3993-94; G2(A)29, G2(A)30, G2(A)31.

Minor employed a similar ruse for the fifth renewal in December 2001, paying Whitfield \$10,000 on December 5, 2001, for a "position paper" that Whitfield never wrote. Tr. 3385-3387; G13, G2(A)35. Once again, Whitfield deposited Minor's check in his own account and then wrote a personal check for \$10,000 to Peoples Bank in payment on the consolidated loan. See Tr. 2203, 3995; G2(A)36, G2(a)37, G1(A)29, G1(A)(30).

Apparently tired of inventing ruses for his loan payments, Minor reverted to the tried-and-true cash payment method for the final loan renewal, which closed on June 6, 2002. Tr. 3388. This time, Minor obtained \$13,000 in cash by cashing a \$5,000 check and a \$4,5000 check on June 3, 2002, and a \$3,500 check on June 6, 2002. Tr. 3389-90, 3996; G(2)A39. The consolidated loans were then renewed by virtue of a \$9,500 cash payment and a separate \$500 cash payment made on June 6, 2002. See Tr. 2205, 3996; G1(A)31, G1(A)32, G2(A)41, G2(A)42, G2(A)43.

4. Whitfield Files False Financial and Campaign Disclosure Forms.

Mississippi ethics laws required elected officials (including judges) to file an annual statement of economic interest. Tr. 2477. Although the form did not require bona fide loans to be disclosed, Tr. 2523, 2521-24, it did require disclosure of private sources of income over \$2,500, including cash and loan forgiveness. Tr. 2483-2488, 2554-56, 2557. Because Whitfield did not intend to repay the \$140,000 he received from Peoples Bank, he was required to disclose this windfall, but did not. Id.; G24. Nor did he disclose (as either income or loan forgiveness) the large quantities of cash that Minor provided to pay the principal and interest on these loans. Tr. 2557-58; G24. Whitfield's campaign disclosure forms likewise did not identify the funds he received from Minor. Tr. 2519-20; G28.

5. Minor and Whitfield Arrange for Payback by a \$3.64 Million Award in Marks v. Diamond Offshore.

Meanwhile, shortly after Whitfield received the \$140,000, the two men arranged to have Whitfield repay Minor by rendering a favorable decision in Marks v. Diamond Offshore. Archie Marks, a roustabout on an off-shore oil rig, sustained a back injury while carrying buckets of water. Tr. 3026. Marks then retained Minor & Associates and sued his employer, Diamond Offshore, under the Jones Act. Although the Jones Act provided for jury trials, Minor & Associates made an unusual request for a bench trial and arranged for Whitfield to hear the case. Tr. 3047, 3060-61.

Circuit Court procedures specified that cases were to be randomly assigned after the answers were filed. Tr. 3054, 4519-20. Before that time, litigants could present motions to any sitting judge. In the Marks case, Minor & Associates filed an ex parte “Motion to Set Expedited Hearing and Case Scheduling Order” with Whitfield on February 10, 1999, 12 days before Diamond Offshore received a summons. Tr. 3053-58; GRE/5. This motion asked the court to set a hearing date in order to establish an expedited schedule and trial date. GRE/5 at 2. The same day, Whitfield signed a “Fiat” granting this motion and setting a hearing on plaintiff’s motion for May 3, 1999. Tr. 2054; WRE/7. Because Circuit Court judges did not schedule trial dates for other judges, the signing of this “Fiat” effectively assigned the

Marks case to Whitfield. Tr. 3136-37, 3244-48, 4545.

Richard Salloum, Diamond Offshore's counsel, sought to determine how the case could have been assigned to Whitfield before his client had even been served. Tr. 3056-58. The Court Administrator's answer (which was inadmissible hearsay at trial), Tr. 3038, 3109, failed to satisfy him that the case had been randomly assigned. Tr. 3057. Accordingly, Salloum began investigating the relationship between Minor and Whitfield, Tr. 3058-59, 3063, and, as part of this inquiry, requested Whitfield's campaign finance disclosure forms. Id. at 3059. As noted above, these reports did not disclose the \$40,000 loan Minor orchestrated for Whitfield at Peoples Bank. Tr. 3068-69; see supra at 16. Salloum's other inquiries likewise failed to uncover the additional \$100,000 loan. Tr. 3070, 3304-06.

In early February 2000, while the Marks case was pending before Whitfield, Minor ensured that Peoples Bank renewed Whitfield's loans (which were then due in full), providing Whitfield with \$5800 in cash. See supra at 14. The Marks case was tried without a jury on June 20-22, 2000, about one month before the third renewal date. G1(A)22. Whitfield found for Marks and entered judgment for \$3.75 million, plus interest and costs. Tr. 3072-73; G84. After post-trial motions, Whitfield reduced the verdict to \$3.64 million, but otherwise denied relief. Tr. 3075-87; G82, G84b, PM-105a. Whitfield entered his final decision on October 3, 2000, just three

weeks after Minor had (unbeknownst to defense counsel) once again provided \$6,900 in cash to renew Whitfield's loans. Tr. 3085; G82, G2(A)22, G2(A)23, G2(A)26, G2(A)27. Had Salloum known about Minor's financial relationship with Whitfield, he would have asked Whitfield to recuse himself. Tr. 3086.

Diamond Offshore appealed to the Mississippi Supreme Court. Tr. 3087. Applying a deferential standard of review, the court affirmed Whitfield's liability ruling. MRE/12 at 11. But the court overturned his damages award, finding that "\$3 million in compensatory damages, above and beyond purely economic damages, is so high as to be unreasonable at first blush." Id. at 16. The court reduced the award by \$2 million to "bring[] it within the range of what we consider acceptable for [Marks'] pain and suffering and loss of enjoyment of life." Id. at 17.⁷

6. The Whitfield Bribery Scheme Unravels, and Minor and Whitfield Attempt a Coverup.

The Whitfield bribery scheme unraveled in July 2002 when bank examiners uncovered and criticized the consolidated loan. Tr. 2206-07. Peoples Bank accordingly asked Minor to get the loan paid off. Tr. 2208-09, 2359. Minor agreed, stating that he had a friend in New Orleans who would pay it off. Id.

⁷ The Marks case was then stayed in the Supreme Court, pending resolution of the criminal proceedings against Minor and Whitfield. Tr. 3088-89.

Minor had already attempted to get Richard Scruggs, another prominent Mississippi plaintiff's lawyer, to act as his strawman on a payoff.⁸ Minor and Scruggs were good friends, and Scruggs had agreed to act as the intermediary in paying off Minor's hidden loan to Teel. See infra at 24-25. Sometime in 2000, Minor also asked Scruggs to substitute for him as the guarantor on Whitfield's loan. Tr. 3763, 3764-65. Even though Scruggs understood that Minor would repay him, Tr. 3816-17, 3824-25, and considered Minor "one of my most trusted friends," Tr. 3776, he refused to help with the Whitfield loan, forcing Minor to locate another intermediary who could disguise his role. Tr. 3761-65.

Minor turned to the "friend in New Orleans," a law school acquaintance named Leonard Radlauer. Radlauer had recently started running into Minor at Martin's Wine Cellar in New Orleans, and the two men had discussed Whitfield, a mutual acquaintance. Tr. 3574-76, 3578, 3626. Minor asked Radlauer to do a favor for him and Whitfield. He said he had co-signed a loan and owed some money with Whitfield, and he asked Radlauer to pay off the loan for him "because he [Minor] wanted to keep it out of the newspapers" that he was repaying a judge's loan. Tr. 3585; see Tr. 3629. When Radlauer asked Minor whether he was "doing anything funny," Minor assured Radlauer that he was not. Id. Radlauer thought the request

⁸ Scruggs has recently entered a plea to a federal charge of bribing a judge in an unrelated matter and has been sentenced to five years' imprisonment.

“unusual,” but ultimately agreed to help. Id. at 3586, 3630.

Minor arranged the details of the payoff with Radlauer’s secretary. Id. at 3586-87. On August 27, 2002, Minor wired \$125,000 from a non-Peoples Bank account into Radlauer’s trust account, and Radlauer’s secretary wired \$118,652.42 to Peoples Bank to pay off Whitfield’s consolidated loan. Tr. 2208-14, 2360, 3390-92, 3589-94, 3997-99; G2(A)44, G2(A)45, G2(A)46, G2(A)49, G17, G18, G19. Minor had told Radlauer that he should keep the difference (i.e., more than \$6,000) even though Radlauer insisted that he did not need to be paid. Tr. 3594-95.⁹

To Radlauer’s surprise, the transaction was not complete. While out of the office one Friday more than three weeks later, Radlauer learned from his secretary that he had received a package from Whitfield. Tr. 3595. The next day, before he had examined the package, Radlauer ran into Minor at Martin’s Wine Cellar. Id. at 3575, 3596. Minor, who appeared to be “very nervous” and even “panic stricken,” made a bee line for Radlauer. Id. at 3597. He informed Radlauer that the FBI might want to talk to him and stated that “John [i.e., Whitfield] would pay [Radlauer] back.” Radlauer pointed out that he had not spent any of his own money, but Minor continued to insist that Whitfield would pay him back. At this point, Radlauer asked if Minor was asking him to lie to the FBI. Minor denied it, but then continued to

⁹ All of the transactions involving Whitfield’s two loans are summarized on G1(A)1, G2(A)1 and G3(A)1. See GRE/4.

propose that Radlauer claim that he had actually paid off the loan and that Whitfield was going to pay him back. Id. at 3598. The conversation ended when Radlauer told Minor that he would “take care of it his own way” and left. Tr. 3598-99.

On Monday, Radlauer opened the package from Whitfield. Tr. 3600-06. Inside was a “completely false” promissory note executed by Whitfield in the amount of \$117,013.21, and backdated to August 26, 2002, the day before the loan payoff. Tr. 3603; G17. Also included was an undated, handwritten note from Whitfield, claiming that he was “in the process” of arranging to take care of the matter and would “repay the entire amount, plus interest.” G18. Unbeknownst to Radlauer, Minor had instructed his office manager to draft this promissory note, calling her at home on Sunday, September 8, 2002, and having her leave it in his mailbox at home. Tr. 3394-99; G14.

Radlauer “went through the roof,” realizing now that Minor had not orchestrated the money transfer merely “to keep it out of the newspapers.” Tr. 3605. Because the promissory note had been “predated * * * to a time when there was no such note” and evidenced a non-existent agreement between Whitfield and himself, Radlauer determined that “all in all, it was a pretty shady thing.” Id. Indeed, Radlauer now concluded that, in insisting that Whitfield would “pay him back,” Minor had been offering him \$120,000 to lie to the FBI. Tr. 3642-49. Radlauer sent

the promissory note back to Whitfield, along with a letter indicating that he was “not going to participate in any endeavors that are not completely above board” and requesting that Whitfield and Minor “leave [him] out of any activities such as these.” Tr. 3606-09; G19. Neither man responded. Id. at 3610.¹⁰

B. The Teel Bribery Scheme.

1. Minor Secures \$25,000 to Finance Teel’s Campaign.

In 1998, Walter W. (“Wes”) Teel, a Gulf Coast divorce attorney, decided to run for Mississippi Chancery Court. Tr. 2133. Chancery Court is an equity court that handles matters such as domestic relations, youth court, property disputes and the review of agency decisions. Id. at 2651, 2559. By October 1998, Teel was facing a runoff election and needed more campaign funds. Id. at 2133-34. Minor -- who had referred divorce work to Teel in the past -- stepped into the breach. As he had done with Whitfield, Minor offered to guarantee a Peoples Bank loan to Teel for \$25,000. Tr. 2218-20. Teel accepted, and the loan closed on November 12, 1998. Tr. 2218-19, 3999-4000; G(1)B2, G(1)B3, G(1)B4. The loan would not have been approved without Minor’s guarantee. Tr. 2356. Teel withdrew all but \$500 of the \$25,000 line of credit, placing this money in his election fund. Tr. 2220-23, 4005, 4050; G(1)B5,

¹⁰ A few weeks later, after he had been contacted by the FBI, Radlauer returned to Minor the money left over from the loan repayment, indicating that he had changed his mind about donating it to charity. Tr. 3624-25; G20.

G(1)B6, G(1)B7, G(1)B8; see GRE/4 at 3 (summarizing loan history). Teel won and was sworn in as a Chancellor on January 1, 1999. G23.

2. Minor Renews the Loan, Paying Principal and Interest with Cash.

Like the Whitfield loans, the loan to Teel was structured (at Minor's request) as a balloon payment that came due every six months. Tr. 2223. And, like Whitfield, Teel treated repayment as Minor's obligation. When the original loan expired on May 11, 1999, Tr. 2416, Teel made no effort to repay either principal or interest and failed to return phone calls from the bank. Tr. 2269, 2446, 3398-40. Minor then arranged to have the loan renewed. Minor made the required payment of \$1200 on June 28, 1999, after cashing a check for \$3,000 on June 25, 1999. Tr. 2224-25, 2416, 3400-05, 4001; G1(B)9, G1(B)10, G1(B)11, G2(B)2, G2(B)3, G2(B)4; see GRE/4 at 4 (summarizing repayment history). Minor disguised his role by making this loan payment in cash. G2(B)3. The payment was made at a Biloxi branch of Peoples Bank, two minutes before a \$4,500 cash payment on Whitfield's \$100,000 loan, and four minutes before a \$530 cash payment on Whitfield's \$40,000 loan. Tr. 2419-22, 3538-39, 3988-90, 4001-02; G2(B)4, G2(A)5, G2(A)7.

3. Minor Repays the Teel Loan, Using Richard Scruggs as a Strawman.

In February of 2000, when the loan was due again, Minor paid it off in full, using Scruggs as his strawman. Tr. 3747-3762, 3776. Minor promised Scruggs that

if Scruggs loaned Teel \$27,500, Scruggs would be reimbursed. Id. at 3750-52. After securing a 30-day promissory note from Teel, id. at 3752-54; G2(B)6, Scruggs sent Teel \$27,500 on February 23, 2000, which Teel used to pay off the loan. Tr. 2227, 3753-60, 4002-03; G2(B)7, G2(B)8, G2(B)9. Minor then reimbursed Scruggs by check on March 9, 2000. Tr. 3409-11, 4003-05, 3759-61; G2(B)10, G2(B)11, G2(B)12. Thereafter, Teel never contacted Scruggs about the promissory note or made any effort to repay him. Id. at 3762.

4. Minor Provides Teel with Financial Assistance in Connection with a Criminal Proceeding and Investigation.

By October 2001, Teel was under investigation for obtaining reimbursement for office supplies from the Mississippi Administrative Office of the Courts and then keeping the money instead of paying vendors. Tr. 2688, 2744-46. At the same time, two other Chancellors in the same district, Chief Judge J.N. Randall and Judge Tom Teel (Wes Teel's brother), were also under investigation for filing false travel vouchers. Minor provided valuable assistance to all three men. Tr. 2689-93, 2738-41, 3415-16. In particular, Minor met with the judges several times and paid a public relations specialist to advise them. Tr. 2690-91, 3416-23; G97, G98, G99, G100, G101. He also flew the judges to Jackson, Mississippi on his private plane and had a waiting limo take them to a meeting with the Mississippi Attorney General, which Minor personally arranged. Tr. 2691-92, 2740; G16, G139h.

The other two judges ultimately resigned from the bench in exchange for the State's agreement not to prosecute. Tr. 2694-97. But Teel went to trial on state criminal charges. Tr. 2694-97. After Teel was acquitted, Minor reimbursed his attorney for \$10,000 of the expenses of his defense, sending a check on June 25, 2002. Tr. 2746, 3426-31; G6a-G6c. Teel sent Minor a thank you note right before this payment was made. Tr. 3547.

5. Teel Files False Campaign and Financial Disclosure Forms.

Like Whitfield, Teel failed to disclose the \$24,500 in loan proceeds on his financial disclosure forms, even though he did not intend to repay the loan. Tr. 2489; G25. He also did not disclose the cash payment of principal and interest that Minor made on this loan. Id.; G24. And Teel's campaign reports did not report the loan proceeds as a contribution from Minor. Tr. 2514-18; G29.

6. Minor and Teel Arrange for Payback with a \$1.5 million Settlement in Peoples Bank v. USF&G.

Meanwhile, Minor arranged to have Teel repay him by providing a favorable disposition in a pending Chancery Court case. The case, Peoples Bank v. USF&G, involved a dispute over insurance coverage. Tr. 2797. Peoples Bank was the defendant in a class action suit alleging that it had overcharged its customers for

collateral protection insurance,¹¹ and the bank's insurance carrier, United States Fidelity and Guaranty ("USF&G"), declined to defend the lawsuit or indemnify the bank. Tr. 2227; G48(B). Minor sued USF&G on behalf of the bank, alleging, inter alia, breach of contract and bad faith refusal to provide insurance coverage. Tr. 2668, 2763-64, 2836-37, 4324; G48(b).

a. Minor Files a Contract Dispute in Chancery Court and Hand Picks Chief Judge Randall to Decide It.

The Peoples Bank law suit was filed in August 1998, before Teel was elected to the Chancery Court. Although this was a commercial dispute involving contract interpretation, Minor chose to sue in Chancery Court, rather than Circuit Court, the normal forum for such cases. Tr. 2763-65. As with the Marks lawsuit, Minor bypassed the court's regular assignment procedures and hand-picked Chief Judge Randall, his preferred judge.

Randall had been appointed to the court in 1991 to fill a sudden vacancy. Tr. 2655. To get this appointment, Randall had sought out Minor's endorsement, knowing that Minor was very close to the Governor. Tr. 2657 ("I understood that if Paul Minor said appoint J.N. Randall * * * that I would be appointed."). When Randall got the appointment, Minor made sure he knew why, summoning Randall to

¹¹ Collateral protection insurance is insurance the bank obtains (and charges to the borrower) when the borrower fails to insure the bank's collateral. Tr. 2842-43; G51 at 2.

his office to receive the Governor's congratulatory call. Tr. 2658.

In the Peoples Bank litigation, Minor repeatedly exploited Randall's ensuing sense of obligation. Under Chancery Court rules, if a judge ruled on a motion before anything else had been done in the case, the matter normally was assigned to that judge. Tr. 2663, 2668. Minor therefore had Randall inform him of what day he (Randall) would be hearing motions. Tr. 3331-33; G48a. Minor then filed the Peoples Bank complaint on that date, with an accompanying "Motion to Set Expedited Hearing, Case Scheduling Order, and for Injunctive Relief." G48c. Randall signed a "Fiat" granting the motion and set a hearing before himself on October 23, 1998, thus effectively assuming control of the case. Tr. 2664-66; G48d.¹²

Randall had never handled an insurance dispute before and had never seen one in Chancery Court. Tr. 2670; see also Tr. 2830 (same as to defense counsel), 2837. Predictably, USF&G's counsel moved to transfer the case to Circuit Court. Tr. 2765. Judge Randall granted the motion on November 18, 1999, and the case was assigned to Circuit Judge Jerry Terry, thereby affording USF&G a jury trial. Tr. 2671, 2828.

Minor got "very upset" about the decision and, in an ex parte conversation, convinced Randall to take the case back. Tr. 2672-73, 2766. Minor told Randall that Judge Terry would "cut his nuts out," Tr. 2673, and claimed that he could show

¹² The "Fiat" signed by Judge Randall was substantially similar to the one signed by Whitfield in the Marks case. Compare WRE/7 with G48d.

through discovery that Chancery Court was an appropriate venue. Id. Thereafter, Randall transferred the case back to Chancery Court, against his law clerk's advice. Tr. 2676, 2673. Although Randall viewed his own decision as "very abnormal," the Mississippi Supreme Court subsequently denied USF&G's interlocutory appeal. Tr. 2766, 2800.

b. Minor Demands that the Peoples Bank Lawsuit Be Re-Assigned to Teel.

Back in Chancery Court, the case bogged down in discovery. Minor sought access to all USF&G's files relating to Peoples Bank's claim, and USF&G objected based on attorney-client privilege and work product. Tr. 2676. Randall assigned the discovery dispute to Teel. Tr. 2678, 2771, 4324; G49, G49A. Teel then entered an order rejecting USF&G's privilege claims and requiring it to disclose all of its files to Peoples Bank. Tr. 2772, 2813, 2830-31; G52.

When Randall learned that USF&G had been ordered to produce privileged documents, he decided to reconsider Teel's ruling, id. at 2775, 2680-82, and ordered Peoples Bank to return all the documents to USF&G so that it could make specific claims of privilege. Id. at 2775. This setback enraged Minor, who promptly returned to Randall's chambers for another ex parte conversation. Tr. 2776. Minor upbraided Randall, telling him that he had "f***'ed up this case," and demanded that he re-assign it to Teel. Tr. 2680-84. Although the conversation upset Randall, he quickly

complied with Minor's demand, reassigning the case to Teel the same day. Tr. 2687-88, 2776-78; G57.

- c. Teel Forces a Favorable Settlement in the Peoples Bank Case Shortly before the Mississippi Supreme Court Concludes that USF&G Had No Duty to Defend.

Shortly after Randall re-assigned the Peoples Bank litigation, USF&G hired Wayne Drinkwater to represent it. Tr. 2836. Drinkwater found it unusual that the suit had been brought in Chancery Court. Tr. 2837, 2839-40. For that reason, he investigated to determine if there was any relationship between the bank (or its lawyers) and Teel. Tr. 2838. Drinkwater failed to discover that Minor had paid off a \$25,000 loan for Teel, and neither Minor nor Teel disclosed this fact. Tr. 2838, 3033. Ibid. Had Drinkwater known this information, he might have suggested that Teel disqualify himself. Tr. 2839; see also Tr. 2782-83.

Drinkwater believed that Omnibank v. USF&G, a case then pending before the Mississippi Supreme Court, would ultimately determine the outcome of the Peoples Bank lawsuit. Tr. 2841-46. Omnibank involved USF&G's decision -- under the same contract -- to deny coverage to a different bank for the same kind of lawsuit. Tr. 2841.¹³ USF&G therefore moved to stay the Peoples Bank case until the

¹³ That case began in the federal district court for the Southern District of Mississippi, where Judge Gex concluded that USF&G had a contractual duty to defend Omnibank, but denied Omnibank's bad faith claim, thereby precluding punitive damages. Ramsey v. Omnibank, 215 F.3d 502, 504 (5th Cir. 2000). On

Mississippi Supreme Court decided Omnibank. Tr. 2846-47; G52A. While acknowledging that the motion was “well taken,” Teel effectively refused to await the Supreme Court’s decision, staying the case for only a month and declining to reschedule the impending trial. Tr. 2847-48; G52A. When the Mississippi Supreme Court failed to rule by September 1, 2001, USF&G faced an imminent trial. Tr. 2846-48.

Concerned about some very large verdicts recently entered in Mississippi trial courts, USF&G tried to settle. Tr. 2852-58. In the meantime, Teel granted summary judgment for Peoples Bank on December 18, 2001, concluding that USF&G had violated its insurance contract by not defending the bank. Tr. 2857; G51 at 9. Teel also indicated that the issues of bad faith and punitive damages would be decided in the upcoming trial, scheduled for early January 2002. Id. During this period, Drinkwater was unaware that Minor was assisting Teel with the pending criminal investigation of his misconduct. In particular, Drinkwater did not know that Minor had recently escorted Teel by private plane to meet with the Attorney General of Mississippi. Tr. 2854, 3033-34. Had he known, he would have found this fact “very

appeal, this Court certified the contract interpretation question to the Mississippi Supreme Court. Ibid.

disturbing, obviously,” and would have found it hard “to let that pass.” Tr. 2854-55.¹⁴

The parties appeared before Teel for a settlement conference on December 21, 2001. Tr. 2859. When, after lengthy negotiations, settlement looked unlikely, Teel called everyone together in his courtroom. Tr. 2861. He then announced that he was offended by USF&G’s conduct and stated that his “settlement” figure for the case was \$1.5 million, five times the amount of any actual damages. Tr. 2861-62, 2852, 3032. Drinkwater had never seen any judge who was to be the finder of fact make such an announcement during settlement negotiations and found this event “a surprise.” Tr. 2862-63.

Teel’s speech quickly ended the settlement discussions. USF&G offered \$1.5 million on the spot, reasoning that it could do no better (and likely would do worse) if it went to trial before Teel. Tr. 2863-67; G54, G141. Had Drinkwater known of the financial relationship between Teel and Minor, USF&G would not have settled for that amount. Tr. 3036. Minor received approximately \$500,000 in attorneys’ fees. Tr. 2229, 3414.

After the case settled, Minor presented Peoples Bank with a plaque that congratulated it on hiring him to “kick [USF&G’s] butt.” Tr. 2229-31; G102a. A few

¹⁴ Andy Carpenter, the Executive Vice President of Peoples Bank, recalled hearing Minor express concern one day that Teel might be leaving the bench soon. Minor also stated that they (i.e., the bank) needed to get the lawsuit settled. Tr. 2229.

months later, the Mississippi Supreme Court adopted USF&G's interpretation of the contract. Tr. 2848, 2869-71; see USF&G v. Omnibank, 812 So.2d 196 (Miss. March 28, 2002) (adopted in Ramsey v. Omnibank, 293 F.3d 760 (5th Cir. 2002)).

C. The Defense Version of the Case.

None of the defendants testified at trial. Instead, they offered the following defenses through arguments and evidence.

1. Minor's Defense. Minor portrayed himself as an "internationally" successful lawyer who worked on hundreds of cases, some of them "huge," and earned \$13 million in 1998. Tr. 2048, 2050, 2066, 4921-22.¹⁵ He argued that he guaranteed loans to Whitfield and Teel out of friendship, without expecting any benefit in return, Tr. 2052, 2063, 4920-21, and that the loans were not secret because Peoples Bank was aware of them. Tr. 2053-55, 2057, 2064, 4929-31. With respect to the cash repayments, Minor contended that either he did not make them, Tr. 4932-35, or that he made them only after Teel and Whitfield, to his disappointment, failed to repay the loans themselves. Tr. 2056, 2065-66, 3343-44, 4948. Minor suggested that he did not repay Teel's loan through Scruggs (notwithstanding Scruggs' contrary

¹⁵ Minor's opening statement also contained large amounts of flattering biographical information, most of which was never proven at trial. See Tr. 2047-49; see also Tr. 2086 (Whitfield notes in his opening that Minor's father "has been fighting for the rights of minorities * * * for 50 years."). Whitfield and Teel made similar unsubstantiated claims in their openings. Tr. 2073-75 (Whitfield), 2131-35 (Teel).

testimony and the obvious paper trail), Tr. 2058-59, but see Tr. 4946, and that Radlauer invented details of their conversation because he was mad at Minor for getting him involved with the FBI. Tr. 4937-38.

Minor suggested that an attorney with his “tremendous practice” would not bother with a bribery scheme that involved a single case each in Circuit and Chancery Courts. Tr. 4193, 4356-58, 4923, 4949-50. Minor likewise implied that he was too busy to have had much involvement in the Peoples Bank and Marks matters. Tr. 2050, 2066, 4923-25. Nonetheless, he argued, the cases were hard fought by Minor & Associates and the amounts rewarded or received were justified. Tr. 2051, 2059-61, 2068-70, 4939-41, 4945-46. Minor presented testimony from court administrators suggesting (based on their records rather than any independent recollection) that the Peoples Bank and Marks cases were assigned through ordinary procedures, and not as a result of the “Fiats” the judges signed. Tr. 4517-53, 4561-80; see also Tr. 4927-28, 4942-43.

2. Whitfield’s Defense. Whitfield argued that he was a “magnificent” judge, who was the victim of a political vendetta resulting from his decision to award Marks substantial damages. Tr. 2075, 2082, 4914. During opening arguments, Whitfield showed the jury a sign that said “This case is about Politics!”¹⁶

¹⁶ The district court noted that Whitfield’s attorney held this sign at an angle that precluded him from seeing it and noted, “I’m disturbed about that.” Tr.

Tr. 2088-89, 2099-2103; see also Tr. 4915 (government is attempting to “assassinate” Minor and Whitfield and the case is “travesty of justice” designed to “repress[]these men”). Whitfield also portrayed the loan guarantees as an act of friendship, suggesting that Minor wanted to help him become the first black Circuit Court judge in Southern Mississippi because of his interest in civil rights. Tr. 2083, 2087-88.

Whitfield suggested that he intended to pay back the loans before his divorce caused “unexpected” financial problems. Tr. 4873-74, 4878-79. He noted that he did make some payments on the \$40,000 loan and argued that any payment Minor may have made was “a loan on top of a loan.” Tr. 4877-78, 4904-05. Whitfield contended that the \$10,000 “position paper” payment and the \$15,000 “advance” were legitimate transactions, Tr. 4878-89, 4904-04, and argued that it was irrelevant that the loan payments were cash because bank transactions are private in any event, and the parties who opposed Minor in litigation had “no right” to inquire into Whitfield’s “personal business.” Tr. 2084, 4875. As for the Radlauer payoff, Whitfield denied knowing that Minor had actually repaid the loan, and argued that he believed himself to be obligated to Radlauer. He suggested that Minor may have found it difficult to ask Whitfield to repay him and therefore got Radlauer to stand in his place. Tr. 4911-

2103. However, it deferred ruling on a government contempt motion until the end of trial and no ruling was ever made. Tr. 2103. Whitfield’s sign is in the appellate record at C-1.

13. Whitfield denied that he needed to disclose these transactions with Minor on any state forms. Tr. 2085-86, 4874, 4900. As for his testimony during his divorce, Whitfield argued that the loans were irrelevant to the distribution of marital assets and were therefore his business alone. Tr. 4875-76, 4900.¹⁷

Whitfield vigorously defended the Marks verdict, Tr. 2089-94, 4880-84, 4908, portraying Marks as the helpless victim of a heartless corporation and vilifying Diamond Offshore's attorney, Richard Salloum. Tr. 4896 (suggesting that Salloum will "sit on a yacht and sip champagne for the rest of his life"), 4893 ("comparing Salloum's "logic" to reading the U.S. Constitution and saying that "separate is equal"). Whitfield argued at length that \$3.64 million was not an excessive verdict given Marks' injuries and that the Supreme Court's decision to reduce the verdict did not reflect poorly on his own decision. Tr. 2094, 4883-85, 4889-95.

3. Teel's Defense. Teel argued that Minor guaranteed the \$25,000 loan because he "was willing to make an investment in good judging," and hoped to

¹⁷ Aspects of this defense were inconsistent with Whitfield's pre-trial statements to the government and were raised only in closing arguments, after the government's opportunity to impeach Whitfield with his proffers had passed. Compare, e.g., Tr. 4878, 4905 (Whitfield suggests that the \$10,000 was for "legal work done on a case") with Whitfield PSR ¶ 47 (Whitfield acknowledges that no "position paper" was ever prepared), and Tr. 4877 (Whitfield claims that only one loan payment was "possibly" made by Minor) with Whitfield PSR ¶ 48 (Whitfield acknowledges his "understanding" with Minor that Whitfield would not have to repay the loans).

be repaid. Tr. 2134. Teel argued that the loan was not secret, merely private, Tr. 4850, and that he intended to pay it back but failed to do so because of his own financial problems. Tr. 4853. As proof of this intent, Teel noted that he only withdrew \$24,500 of the \$25,000 loan. Tr. 2134, 4869. Teel also suggested that the transaction could not be a bribe because he was not a judge when the loan was made. Tr. 2135-36, 2149, 4852, 4866.

Teel acknowledged that Minor made a cash payment on this loan. Tr. 2137, 4853. As for the pay-off through Scruggs, Teel suggested that he actually thought Scruggs (whom he did not know) had paid the loan with his own money. Tr. 2138, 3749, 4854. He indicated that he never contacted Scruggs about this loan because he knew that Scruggs was wealthy and figured he did not care. Tr. 2139, 4854. Teel described Minor's help with his state criminal investigation as a favor, not a bribe, and suggested that the \$10,000 Minor paid for his expenses could not be a payoff because Teel's lawyer actually asked for more. Tr. 4857-58. Teel also suggested that had he been bribed, he would not have thanked Minor for assisting with his defense. Tr. 4865.

With respect to the Peoples Bank case, Teel emphasized that the legal question at the heart of his summary judgment ruling was a close call. Tr. 2147, 2150, 4860. Teel also argued that he could not simply allow the case to "fester" while the

Mississippi Supreme Court decided this question, Tr. 2144, 4860, and suggested that USF&G settled because it was worried about the “climate in Mississippi,” not because he forced them to. Tr. 2147, 2150, 4859, 4863. He also relied on testimony from a Chancery Court bailiff that during mediations, Teel and other judges would sometimes separate the parties in different rooms and suggest what they thought a proper settlement would be. Tr. 4594-95, 4846, 4863. He defended the \$1.5 million amount as a reasonable compromise, and far less than Minor’s original demand. Tr. 2148 4864.

SUMMARY OF ARGUMENT

1. At Minor’s request, and consistent with United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc), the district court defined the duty of honest services underlying the mail and wire fraud counts in accordance with Mississippi bribery law. The instructions correctly defined bribery as a corrupt “intent to influence” the actions of a judge, and conveyed Minor’s theory of the defense by indicating that he could not be convicted of mail or wire fraud unless he corruptly intended to influence a judge to decide a case based on a bribe, rather than his honest view of the law and the facts. Contrary to Minor, to commit the crime of bribery, he did not need to know at the time of his payments to Whitfield and Teel the precise benefit he intended to receive in return. Moreover, the fact that Minor might not have

known the precise benefit he intended to receive does not make his actions a gratuity offense, rather than a bribe, because Minor acted with an “intent to influence” the judge’s actions, the essence of a bribe.

Because the instructions were based on a proposed instruction provided by Minor that defined bribery in terms of an “intent to influence” the actions of the judges, Minor has waived any claim that the instructions should have instead defined this crime in terms of an intent to receive a benefit “in exchange” for things of value. The instructions given ensured that the jury found a quid pro quo exchange in any event. Moreover, even if the instructions were incorrect, there was no “plain error,” because the Indictment and closing arguments clearly conveyed that the crimes charged involved exchanging things of value for favorable treatment in court cases.

By arguing below that the jury should be instructed in accordance with Mississippi law, Minor waived any claim that, under McCormick v. United States, 500 U.S. 257 (1991), he could not be convicted for any “campaign contributions” he provided absent proof of an express promise by a judicial defendant to award a favorable decision in exchange. In any event, Minor’s arguments under McCormick lack merit for numerous other reasons. First, McCormick applies only to campaign contributions, and Minor did not seek a definitive determination that any of his payments fit that category. Second, Evans v. United States, 504 U.S. 255, 268

(1992), clarified that McCormick was satisfied as long as a public official accepts a payment knowing that it was made in return for official acts. Third, McCormick has no application where, as here, bribery is defined under state law. And finally, McCormick construed the language of the Hobbs Act, 18 U.S.C. § 1951(b)(2), a statute not charged here, and the analysis underlying that decision does not carry over to this honest services mail and wire fraud prosecution under 18 U.S.C. §§ 1341, 1343 and 1346.

The district court's mail and wire fraud instructions did not permit the jury to convict Minor for offenses not charged in the indictment. The instructions defined a bribery offense, not a gratuity offense. Moreover, although the duty of honest services was defined in accordance with state bribery law, the instructions did not permit conviction based solely on a violation of state law, but rather required the jury to find all the elements of a mail or wire fraud offense. Nor is there any danger that the jury convicted based solely on the failure of Minor and Teel to file accurate annual statements of economic interest, as the district court correctly instructed the jury on the relevance of this evidence.

2. The jurisdictional element of 18 U.S.C. § 666 was properly charged, proven, and instructed. First, by tracking the statutory language of the offense, the Indictment encompassed all the elements of the offense and adequately informed defendants of

the charges. Second, the evidence was sufficient to establish that Whitfield and Teel were “agents” of the Mississippi Administrative Office of the Courts (“AOC”) – a covered agency – within the meaning of Section 666 based, inter alia, on the proof that Circuit and Chancery Court judges had the authority to hire and fire AOC employees and expend AOC funds. Third, the district court correctly instructed the jury that Section 666 does not require proof that an agent liable under the statute must have control over the use or spending of any federal funds. Neither the plain language of the statute nor United States v. Phillips, 219 F.3d 404 (5th Cir. 2000), supports Minor’s contrary claim.

3. The host of evidentiary challenges raised by the defendants, whether considered in isolation or cumulatively, do not constitute reversible error.

First, in light of the ample evidence establishing the prior and continuing relationships between Minor and his two codefendants, there was no reversible error in the exclusion of merely cumulative testimony from Minor’s office manager that Minor and Whitfield served together on the board of the local Legal Services Corporation.

Second, the district court did not abuse its discretion in excluding testimony that Minor had guaranteed a loan to a closely aligned law firm, where the record contained ample evidence that Minor had a “pattern” of guaranteeing loans to others

(e.g., Tr. 4175), and, in any event, “evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant.” United States v. Dobbs, 506 F.2d 445, 447 (5th Cir. 1975).

Third, the district court did not abuse its discretion in excluding defense expert testimony on the legal correctness of rulings in the Marks and Peoples Bank cases. Minor primarily challenges the exclusion of expert testimony from James George regarding the Marks case. George’s opinions, however, were not timely disclosed to the government and therefore properly excluded.

Fourth, the district court did not abuse its discretion in excluding evidence that most contributions to Mississippi judicial candidates came from attorneys, where such evidence was cumulative and largely irrelevant.

Fifth, there was no abuse of discretion in the exclusion of evidence that, during the time period of the bribery schemes, Minor had other cases that he could have filed in Whitfield’s court but did not do so. See Dobbs, 506 F.2d at 447 (proof of instances of a defendant’s noncriminal conduct is generally irrelevant).

Sixth, the district court did not abuse its discretion in excluding evidence of Minor’s skills as a lawyer, where such evidence was cumulative and in any event would not rebut proof of Minor’s corrupt motive to engage in the bribery schemes.

Seventh, there was no abuse of discretion in excluding evidence of the amount of attorneys' fees received by Richard Salloum, Diamond Offshore's attorney. Since the district court permitted defense counsel to explore Salloum's potential bias as Diamond Offshore's paid counsel in other ways, specific evidence about the amount of Salloum's bills was unnecessary.

Eighth, there was no reversible error in the fact that the FBI 302 interview report of Leonard Radlauer was not admitted into evidence at trial. The portion of the record on which Whitfield relies does not demonstrate that Whitfield asked for the report to be admitted, or that such a request was denied. Moreover, an FBI 302 report is inadmissible as impeachment evidence because it is not a prior statement of the interviewee (Radlauer), but instead is merely a statement of the FBI agent who prepared the report.

Ninth, the district court did not commit reversible error in excluding double hearsay statements contained in USF&G attorney Wayne Drinkwater's litigation report. Teel did not argue below, as he does now, that both layers of hearsay were covered by the business records exception, and he is unable to demonstrate plain error, particularly where defense counsel were able to elicit any non-hearsay aspects of the report on cross-examination of Drinkwater.

Tenth, the district court did not abuse its discretion in admitting testimony that Whitfield lied about the Peoples Bank loans in his divorce proceedings. His effort to conceal the Peoples Bank loans evidenced his guilty knowledge that the transactions were corrupt and was a central element of the scheme to defraud and conspiracy charged in the Indictment.

Eleventh, there was no reversible error in the admission of testimony from Salloum, Drinkwater and Radlauer. These witnesses presented fact testimony, not expert opinions. In any event, Whitfield had adequate notice of what these witnesses would say because he had the transcript of their testimony from the prior trial.

Twelfth, the district court did not abuse its discretion in admitting the government's summary charts. The charts were neither inaccurate nor based on non-record evidence, points that Whitfield does not contest.

4. This Court should reject Whitfield's Speedy Trial Act claim. At the outset, Whitfield failed properly to raise his claim in the district court. Furthermore, contrary to Whitfield, 70 days of non-excludable time did not pass between January 19, 2006 and June 1, 2006. Rather, the continuance granted with Whitfield's consent on February 10, 2006, tolled the clock, given the complexity of the case, the introduction of two new attorneys representing codefendant Minor, and the district court's earlier on-the-record balancing of the interests of justice to support the delay,

as well as other bases for tolling.

5. The district court did not err in denying Teel's motions to sever. First, given that RICO Count, the charges against Teel were properly joined with the charges against Whitfield under Fed. R. Crim. P. 8(b). Second, the district court did not abuse its discretion in denying Teel's motion to sever, where Teel failed to make any specific showing of prejudice.

6. Defendants' claims that the record of the 2005 trial demonstrates that the district court was biased in conducting the 2007 trial is utterly without support. It is within a trial judge's discretion to reconsider its rulings; the defendants often misstate or distort the record in making their comparisons; and any differences in the district court's rulings were justified by the specific facts and circumstances of the 2007 trial.

7. The district court acted within its discretion in excluding for cause a juror who repeatedly stated that she could not sit in judgment of others. Regardless, any error in the juror's exclusion would not warrant reversal. Jones v. Dretke, 375 F.3d 352, 355 (5th Cir. 2004). The exclusion of the juror was not the result of any purposeful religious discrimination, but rather because the juror indicated that her personal beliefs could prevent her from reaching a verdict.

8. The district court did not err in denying Whitfield's untimely motion to dismiss the Indictment based on his claim that the government presented false

testimony before the grand jury. By failing to raise his claim pretrial, even though he was in possession of the allegedly false grand jury testimony long before trial, Whitfield waived his challenge to the Indictment. See Fed. R. Crim. P. 12(b)(3)(B). In any event, Whitfield is unable to establish that Callender's grand jury testimony was false, or that he was prejudiced by any misstatement in the Indictment.

9. The Court should reject Whitfield's unpreserved claim that the evidence was insufficient to establish the mailing element of the mails and wire fraud charges. The evidence easily established that it was reasonably foreseeable to Whitfield that, upon his entering into the bribery scheme with Minor, documents relating to Minor's cases would be served by mail.

10. Defendants' claims of government misconduct, including that the U.S. Attorney labored under a conflict of interest and that their prosecutions were motivated by party politics, provide no grounds for reversal of their convictions. Defendants' claims are unsubstantiated and unconnected to any specific legal arguments for reversal, and therefore need not long detain this Court.

11. The defendants' sentencing claims all lack merit. First, United States v. Booker, 543 U.S. 220 (2005), and its progeny establish that the district court was not required to impose sentence based only on facts found by the jury beyond a reasonable doubt.

Second, the district court properly applied the bribery guideline, Guidelines § 2C1.1, in calculating the defendants' offense levels. The government alleged, and the jury found, that Minor arranged payments to Whitfield and Teel to influence their official actions and that the judges accepted the payments intending to be influenced in cases of interest to Minor. Contrary to defendants, their conduct involved bribery and not merely the giving and accepting of gratuities.

Third, the district court's determinations of the net benefits to be received from Minor's bribes for purposes of setting the offense levels was not clearly erroneous. With respect to the Teel bribery scheme, the district court did not clearly err in finding that the entire \$1.5 million settlement USF&G was forced to pay Peoples Bank was the proper net benefit. Given that the Mississippi Supreme Court ruled in favor of USF&G's interpretation of its insurance contract with Peoples Bank, the actual value of the bank's claim against USF&G was zero.

With respect to the Whitfield bribery scheme, the district court did not clearly err in concluding that the intended gain was the \$3.74 million award Whitfield initially granted to Marks, given the difficulties in ascertaining the real value of the Marks' claim in light of the defendants' wrongdoing. United States v. Stedman, 69 F.3d 737, 74-41 (5th Cir. 1995).

Fourth, the district court committed no procedural error in imposing an obstruction of justice enhancement on Minor and Whitfield. Contrary to their claims, the district court never indicated that it was not going to apply the enhancement, which was fully supported by the trial evidence of the efforts of Minor and Whitfield to coverup the bribery scheme.

Fifth, the district court did not clearly err in declining to grant Whitfield a reduction in offense level for acceptance of responsibility. Although Whitfield made some admissions in his initial interviews with the FBI, he went to trial and contested the government's charges that he had engaged in bribery, and therefore the district court was justified in concluding that he had not accepted responsibility for his actions.

Sixth, the district court did not abuse its discretion in declining to grant Whitfield a downward variance from the Guidelines based on family circumstances and medical history. The district court's decision is presumed reasonable, and Whitfield offers no extraordinary circumstances to undercut the district court's decision.

Seventh, the district court did not err in awarding USF&G \$1.5 million in restitution. The Mississippi Supreme Court's resolution of the legal issues demonstrated that the value of Peoples Bank's legal claim was zero, and the evidence

established that USF&G settled the case for \$1.5 million only because of the pressure applied by Teel.

Eighth, Minor's argument that his \$2.75 million fine was improper because the district court failed to give notice before departing upwards from the fine Guidelines and based the amount of the fine on Minor's socioeconomic status is without merit. In imposing the fine, the district court did not depart under the framework of the Guidelines, but instead varied from the Guidelines based on the sentencing criteria of 18 U.S.C. § 3553. A district court need not give prior notice before imposing a variance. See Irizarry v. United States, 128 S. Ct. 2198 (2008). Nor is the district court constrained by Guidelines § 5H1.10's prohibition on considering a defendant's socioeconomic status when it imposes a variance rather than a departure.

Finally, even if there was sentencing error below, no remand is required unless the error involved more than six offense levels for Minor or eight offense levels for Teel and Whitfield under the advisory Guidelines. The district court incorrectly used the 2001 version of the Guidelines in calculating the defendants' offense levels, rather than the Guidelines in effect at sentencing (which would have resulted in higher offense levels), because of ex post facto concerns. The ex post facto Clause, however, does not apply to an advisory Guidelines regime, and therefore the higher levels should have applied.

12. There is no basis for reassigning the case to a different judge in the event of a remand. There is no evidence that the district judge is biased or prejudiced against any defendant, and therefore reassignment would be unwarranted as well as an inefficient use of resources.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE ELEMENTS OF BRIBERY UNDER MISSISSIPPI LAW FOR PURPOSES OF THE MAIL AND WIRE FRAUD CHARGES.

Minor's principal claim on appeal (Br. 36-56) is that the district court misinstructed the jury on the elements of bribery. See also Whitfield Br. 54-57 (same); Teel Br. 11 (adopting Minor's argument). While conceding that the Indictment properly alleged a bribery scheme (Br. 37-38), Minor contends that the instructions failed to include an "explicit quid pro quo" requirement and thus permitted him to be convicted for conduct that was either First Amendment protected or merely a gratuity offense. As we explain below, Minor largely failed to preserve this challenge in the district court, and indeed, may have invited error by proposing the critical language on which the relevant instruction was modeled. Those objections that Minor did raise were properly rejected by the district court, and Minor fails to demonstrate that any objections to the district court's instructions that were not waived constitute plain error. See Fed. R. Crim. P. 52(b).

A. Standard of Review.

This Court reviews jury instructions for abuse of discretion, if the alleged error was preserved below. United States v. Daniels, 281 F.3d 168, 183 (5th Cir. 2002); United States v. Pennington, 20 F.3d 593, 600 (5th Cir. 1994). The Court will not reverse “unless the instructions taken as a whole do not correctly reflect the issues and law.” United States v. Simmons, 374 F.3d 313, 319 (5th Cir. 2004). Where an objection was not raised in the trial court, this Court reviews for plain error only. United States v. Fuchs, 467 F.3d 889, 900 (5th Cir. 2006). The “invited error” doctrine applies to jury instructions and precludes a party from challenging on appeal an instruction that it requested below. United States v. Baytank (Houston), Inc., 934 F.2d 599, 606-07 (5th Cir. 1991).

B. The District Court’s Bribery Instructions.

Before considering Minor’s challenges, we review the instructions actually given below. The Indictment charges “bribery” under three different theories: (1) honest services mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 1346; (2) bribery in connection with programs receiving federal funds, in violation of 18 U.S.C. § 666; and (3) state law bribery as a predicate act under the RICO charge. Although Minor now claims generically that the district court misdefined the crime of “bribery,” his instruction objections below focused on how bribery was

defined under Mississippi law for purposes of the mail and wire fraud charges. Tr. GRE/1 at 4662-76, 4695-4706, 4707-17. Minor's appellate brief (Br. 44) likewise addresses only the instructions relating to the mail and wire fraud charges. Accordingly, the validity of these instructions is the only issue properly preserved and presented on appeal.

The government's theory of mail and wire fraud involved the intangible right to honest services, which, this Court has held, must be premised on a violation of a state law duty. United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (en banc) ("We decide today that the services must be owed under state law * * * ."). Minor insisted below that he could not be convicted of mail or wire fraud unless "a reasonable juror could find beyond a reasonable doubt violations of these defendants of the elements of the Mississippi bribery statute." Tr. 4076; see also id. at 4077, GRE/1 at 4697. Accordingly, the district court instructed the jury that Mississippi bribery law defined the relevant "duty," stating that:

[i]n order to prove the scheme to defraud another of honest services through bribery, the government must prove beyond a reasonable doubt that the particular defendant entered into a corrupt¹⁸ agreement for Paul S. Minor to provide the particular judge with things of value specifically with the intent to influence the action or judgment of the judge on any question, matter, cause or proceedings which may be then or thereafter pending subject to the judge's action or judgment.

¹⁸ The jury was later instructed that "an act is done corruptly if it is done intentionally with an unlawful purpose." MRE/8 at 4786.

MRE/8 at 4770-71;¹⁹ see Mississippi Code §§ 97-11-11, 97-11-13, 97-11-53. The jury was then instructed, again in accordance with Mississippi law, that Minor could be guilty of bribery even if his offer was not accepted, and that a bribe could be offered through an intermediary:

To constitute the offense of offering a bribe, there need not be a mutual intent on the part of both the giver and the offeree or acceptor of the bribe. It is not necessary that the offer to bribe a public official be made directly and personally to him. It is sufficient that the act is done through the agency of others or through an intermediary.

MRE/8 at 4771; see McLemore v. State, 125 So.2d 86, 89 (Miss. 1960).

Next, the court instructed the jury on Minor's defense, limiting the crime of bribery as follows:

If the particular judge acted in a particular circumstance based upon his honest views not corrupted by a bribe, his actions do not constitute a deprivation of honest services under the mail and wire fraud statutes. Similarly, unless Mr. Minor acted corruptly to influence a particular judge on any question, matter, cause or proceeding which may be then or thereafter pending, subject to the judge's action or judgment, based on things of value provided by Minor rather than the judge's honest view of the law and the facts, then Mr. Minor's actions are not a deprivation of honest services.

Ibid.; see also id. at 4790-91 ("In addressing [whether the judges had a specific intent

¹⁹ This particular instruction, which defined bribery in terms of "an intent to influence the action or judgment of [a] judge," was echoed in other portions of the instructions. See MRE/8 at 4760-61 (setting forth elements of bribery under Miss. Code §§ 97-11-53 and 97-11-11); id. at 4784 (Section 666 requires proof that the defendant "corruptly * * * accept[ed] or agree[d] to accept anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions * * * .").

to take a bribe] you may consider whether the rulings [in the Peoples Bank and Marks cases] were accompanied by the Judges' honest belief in the law and facts of a particular case rather than a corrupt purpose.”).

In keeping with Mississippi law, these instructions defined bribery by specifically referring to the briber's (i.e., Minor's) “intent to influence” a public official. See Miss. Code. Ann. § 97-11-11. But the instructions also made clear that the state of mind required of the bribees, i.e., Whitfield and Teel, was an intent to be influenced, by requiring the jury to find that Whitfield and Teel shared Minor's own intent. MRE/8 at 4771 (jury must find that “the particular defendant entered into a corrupt agreement for Paul S. Minor to provide the particular judge with things of value specifically with the intent to influence the action or judgment of the judge * *”) (emphasis added). Indeed, the instructions even required that the judges must have actually followed through on this intent to be influenced by corruptly deciding a case based on things of value received from Minor, rather than their own good faith view of the law and facts. Ibid.²⁰

²⁰ In addition, the jury necessarily found that the judges accepted the bribes “intending to be influenced or rewarded,” by convicting them on the Section 666 counts, which required this state of mind. Tr. 4784.

C. The District Court’s Instructions Followed Mississippi and Federal Law, Fifth Circuit Pattern Instructions and a Proposed Jury Instruction Tendered by Minor.

In defining judicial bribery as a corrupt intent to influence a judge to decide a case based on the payment of money, rather than his “honest view of the law and the facts,” the court’s instructions broke no new ground. This definition conformed with Mississippi law, which prohibits offering or giving money to a judge “with intent to influence his vote, opinion, action, or judgment on any question,” Miss. Code § 97-11-11, as well as federal law, which defines bribery as “corruptly giv[ing] * * * anything of value to any public official * * * with intent to influence any official act.” 18 U.S.C. § 201(b)(1)(A); see 18 U.S.C. § 666 (same).

Likewise, the instruction conformed to the Fifth Circuit Pattern Jury Instruction for federal bribery offenses. Fifth Cir. Pattern Jury Instr. 2.12 (18 U.S.C. § 201(b)(1)). And the instruction was consistent with (and indeed was based upon) Minor’s own Proposed Instruction No. 12, which defined bribery as “a corrupt agreement * * * to provide the particular judge with things of value specifically to influence that judge’s vote, opinion, action, or judgment on a particular and identified case before the particular judge, * * * .” MRE/9 at 1 (emphasis added); see GRE/1 at 4662 (Minor’s counsel states that “[w]e submit that Instruction No. 12 properly defined bribery and its quid pro quo requirement”); id. at 4707 (district court

indicates that its instruction is a “modified” version of Minor’s Proposed Instruction No. 12).²¹ Finally, this instruction “comported closely with the common understanding of a ‘bribe,’ as ‘a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct especially of a person in a position of trust (as a public official),’ Webster’s Third New Int’l Dictionary (1986).” United States v. Jackson, 72 F.3d 1370, 1375 n.2 (9th Cir. 1995).

D. The District Court Instructed the Jury on Minor’s Theory of Defense.

Minor’s claim (Br. 78-79) that these instructions omitted his theory of the defense is incorrect. Minor suggests that his defense theory was that “gifts given out of friendship or loyalty are not bribes.” This theory was substantially covered by the instructions set forth above, which made clear that Minor could be convicted only if he corruptly intended to cause Whitfield or Teel to decide cases based on things of value he provided (and not their own good faith view of the law and facts). MRE/8 at 4771. The state of mind this instruction described is inconsistent with the intent to give a gift out of friendship or loyalty, and thus Minor’s defense was adequately covered by the district court’s instructions. United States v. Tomblin, 46 F.3d 1369, 1379-80 (5th Cir. 1995) (district court did not err in rejecting the defendant’s more

²¹ Minor’s proposed instruction included an additional requirement, namely, that the bribe involve “a particular and identified case.” As we discuss infra at 60-63, the district court correctly deleted this aspect of the proposed instruction.

focused bribery instruction when the general instruction given allowed the defendant to argue his defense that he did not intend to offer a bribe).

E. Minor’s Specific Objections to the Bribery Instruction.

Federal Rule of Criminal Procedure 30(d) provides that:

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. * * * Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

In keeping with this rule, the parties were permitted to object on the record to the district court’s proposed instructions. GRE/1 at 4656.²² With respect to how the mail and wire fraud instructions defined bribery, Minor advanced only two objections. First, Minor argued (vigorously and at length) that the money he provided to a judge was not a bribe under Mississippi law unless Minor knew at the time the money changed hands precisely what official action he intended to receive in return. Id. at 4665, 4669-4706, 4716; see, e.g., id. at 4703 (arguing that if the briber does not know “what specific thing he wants,” “[i]t would not be a violation of the Mississippi

²² This opportunity occurred after an untranscribed jury instruction conference, which took place over the course of three days. Because of its significance to this appeal, we have included all of the relevant portions of the instruction objections in our record excerpts on appeal. GRE/1.

bribery statutes”).²³ Second, Minor argued that the portion of the instruction that permitted him to be convicted for “offering a bribe,” even if his offer was not accepted, should not be given because it was inconsistent with the government’s theory of the case. Id. at 4707-15. Accordingly, these two arguments (and only these two arguments) were properly preserved below.

Significantly, Minor did not argue below, as he does now, that the district court’s instruction was inaccurate because it failed to define bribery as an intent to receive a favorable decision “in exchange” for payments. Nor did Minor contend that, because some of his payments were arguably “campaign contributions,” the First Amendment, rather than Mississippi law, controlled how bribery should be defined. Likewise, Minor did not claim that United States v. McCormick, 500 U.S. 257 (1991), a case interpreting the federal Hobbs Act, controlled here. Instead, Minor referenced McCormick only once during the instruction objections, claiming

²³ Minor made the same argument in connection with his Rule 29 motion. Tr. at 4077 (arguing that “the Mississippi bribery statute” “requires that there is a moment in time in which the defendant offers a thing of value and at the same moment in time, the defendant intends – intends a specific then identified thing to get, a specific quid and a specific quo contemporaneous in time”); id. at 4079 (“The Mississippi bribery statute requires at the same point in time for there to be a specific conveyance of value by a person who at that time has a specific thing they wish to get out of it.”); id. at 4081 (“[B]oth of these things have to be in the state of mind of the defendant at the same time, which is a specific offering of property and a specific question that they want determined.”); id. at 4083 (arguing that a valid conviction was impossible because no reasonable juror could find that “Mr. Minor in guaranteeing the loan [to Teel] had a specific ruling on a specific case in mind that he wanted”).

(incorrectly) that it required in federal extortion prosecutions the same “specific quid pro quo contemporaneous in time” that Minor claimed Mississippi bribery law required. GRE/1 at 4703-05.²⁴ In making this argument, Minor acknowledged that “we are not under that statute [i.e., the Hobbs Act],” and he only suggested vaguely that “some of the same values do apply.” Id. at 4705. This tepid claim failed to preserve any claim that federal law properly governed the definition of bribery, especially given Minor’s simultaneous insistence that state law must be applied. See, e.g., Id. at 4704 (Minor’s counsel argues that “[t]he important thing, of course, is what does the Mississippi bribery statute require?”).²⁵

²⁴ The instruction conference contains two other references to “McCormick,” but it is clear from the context that Minor’s counsel was discussing the Mississippi bribery case of McLemore v. State. Id. at 4710.

²⁵ Although Minor proposed three separate jury instructions on the meaning of bribery, none of them cited to McCormick. MRE/9. One of these instructions (No. 18), did include language similar to the holding of McCormick. See id. at Proposed Instruction No. 18 (“A payment is made corruptly only if it is in exchange for an explicit promise to perform or not perform an official act.”). But Minor failed to bring this language to the district court’s attention in his objections, or to make any argument as to why the court should include it in the instructions. See Fed. R. Crim. P. 30(d) (“A party who objects to * * * a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection * * * .”). Instead, Minor repeatedly suggested that Proposed Instruction No. 18 was aimed at the “same problem” as Instruction 12, that is, the purported requirement that the defendant know the specific benefit he intends to receive at the time the bribe is given. GRE/1 at 4672 (“The court is absolutely correct that the reason for our proposal of the language in 13 and 18 is pretty much to match the same problem.”); see id. at 4665 (“We did offer 13 and 18 for substantially the same reasons as 12, your honor.”); id. at 4664 (argument on 13 and 18 is “substantially the

F. Bribery Does Not Require that the Briber Know the Specific Benefit He Expects to Receive at the Time Money Changes Hands.

As noted above, Minor's defense strategy focused on the argument that, under Mississippi law, the briber had to intend to receive a specific act in exchange at the time the bribe was paid. Minor argued for a judgment of acquittal on this ground, Tr. 4076-4108, see supra at 58 n.23, and when that failed, tendered three separate instructions containing this requirement. MRE/9. Although properly preserved for appeal, this argument fails because (1) it makes no sense; and (2) it conflicts with existing law.

Minor's argument that the briber must have a specific benefit in mind at the time money changes hands would, if accepted, create a giant loophole in the law. In particular, this rule (as the district court aptly noted) would permit one with impunity to "put an official in [his] back pocket and use the influence later." Tr. 4082. The Second Circuit made a similar point, observing that requiring that "the specific act to be performed [be] identified at the time of the promise" could "subvert the ends of justice." United States v. Ganim, 510 F.3d 134, 147 (2d Cir. 2007). The court explained that, especially in cases involving "on-going schemes," this requirement

same argument [as 12]"). Thus, the court reasonably could have believed that, by modeling its instruction on Minor's Proposed Instruction No. 12, it had resolved all outstanding objections, other than Minor's claim that the specific benefit had to be defined at the time of the bribe.

“would legalize some of the most pervasive and entrenched corruption.” Ibid.

In any event, existing law simply does not support Minor’s claim. While Minor attempted to ground this limitation in Mississippi law, see, e.g., Tr. 4078-79, he could provide no case support, arguing instead that it was “implicit.” Id. at 4079 (“I’m not saying that the rule of law is made explicit in any of [the Mississippi bribery cases]. They don’t explicitly address this issue.”). On appeal, Minor abandons his reliance on state law, citing instead to McCormick, supra; Tomblin, supra; and United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999). Minor Br. 46. Minor fails to explain how these cases construing the meaning of a federal statute are relevant to a legal duty defined under Mississippi law. But assuming arguendo their relevance, none supports Minor’s claim.

As for McCormick, as we discuss infra at 73, that case concluded that a politician could not be prosecuted for extortion under the Hobbs Act based on the receipt of campaign contributions unless “the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” 500 U.S. at 273 (emphasis added). Whatever the current status of this language, see infra at 74-75, McCormick simply did not hold or even suggest that the “official act” in question had to be identified at the time of the bribe.

Tomblin provides even less support for Minor’s claim. Minor contends (Br. 46) that in Tomblin, “this Court held that bribery requires that the intended ‘official act’ tied to the bribe be specific, known, identified, and intended at the time that the thing of value is given to the public official,* * * .” See also Br. 41. This is seriously wrong. Not only did Tomblin not so hold, this Court’s decision specifically quoted United States v. Coyne, 4 F.3d 100, 114 (2d Cir. 1993), for the proposition that “the government does not have to prove an explicit promise to perform a particular act made at the time of payment. Rather, it is sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence * * * as specific opportunities arise.” 46 F.3d at 1381 n.19 (emphasis added).²⁶

Finally, the Supreme Court’s decision in United States v. Sun-Diamond Growers of California, 526 U.S. 398, 400, 404-06 (1999), is also inapposite. In Sun-Diamond, the Court interpreted 18 U.S.C. § 201(c)(1)(A) to require that a gratuity,

²⁶ Other federal courts have likewise rejected Minor’s argument, whether in honest services mail fraud, extortion under the Hobbs Act, or federal bribery. See, e.g., Coyne, 4 F.3d at 114; accord United States v. Tucker, 133 F.3d 1208, 1215 (9th Cir. 1998); United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998) (condemning “payments * * * made with the intent to retain the official’s services on an ‘as needed’ basis”); United States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007) (“[T]he government need not prove that each gift was provided with the intent to prompt a specific official act.”); United States v. Sawyer, 85 F.3d 713, 730 (1st Cir. 1996).

which, as discussed below, see infra at 63-64, may be nothing more than a reward to a government official, be given in connection with “some particular official act.” Id. at 406. To hold otherwise, the Court reasoned, would criminalize “token gifts to the President based on his official position and not linked to any identifiable act.” Ibid. But the Sun-Diamond Court specifically distinguished bribery statutes, noting that because these statutes require “intent ‘to influence’ an official act or ‘to be influenced’ in an official act,” they do not pose the same concerns. Id. at 404. Accordingly, as the Second Circuit recently held, there is no “principled reason” to extend Sun-Diamond “beyond the illegal gratuity context.” Ganim, 510 F.3d at 146-47.

G. The District Court’s Instructions Did Not Define a Gratuity Offense.

In a related vein, Minor argues (Br. 42, 46-51) that a payment to a public official in the expectation of a future benefit “not yet defined” is merely a gratuity, not a bribe. This is incorrect. In fact, the difference between a bribe and a gratuity depends on the “intent element.” Sun-Diamond, 526 U.S. at 404. As the Supreme Court has explained, “[b]ribery requires intent ‘to influence’ an official act or ‘to be influenced’ in an official act, while illegal gratuity requires only that the gratuity be given or accepted ‘for or because of’ an official act.” Ibid. Thus, “an illegal gratuity * * * may constitute merely a reward for some future act that the public official will

take (and may already have determined to take), or for a past act that he has already taken.” Id. at 405; see also Jennings, 160 F.3d at 1013 (“An illegal gratuity * * * is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event.”). The difference between a bribe and a gratuity, therefore, is not whether the official act is defined at the time of the payment, but rather whether the payment is intended to influence that act, or merely to reward it. United States v. Muldoon, 931 F.2d 282, 287 (4th Cir. 1991) (payor's intent to influence recipient's actions distinguishes bribe from gratuity). In this case, the jury instructions required that Minor have an intent to influence an official act, see supra at 52, and thus clearly defined a bribery offense.²⁷

H. The District Court Did Not Clearly Err in Failing to Instruct the Jury that Minor Must Intend that His Payments Be Made “in Exchange” for the Judge’s Official Action.

As noted above, see supra at 52-53, the requirement that the defendant act corruptly with “an intent to influence” a public official defines bribery under Mississippi law. Although the district court instructed the jury on this requirement using Minor’s proposed instruction as a model, Minor now contends that the jury also

²⁷ Minor apparently contends that when money is given to a government official with an expectation of a benefit, only two mental states are possible: (1) an intent to obtain a specific and identified official action; or (2) a “vague expectation of a future benefit.” Br. 47. This is not correct. Instead, the briber can have a concrete intent to obtain a future benefit (here, a favorable court decision), without knowing the precise form that benefit will take.

should have been instructed that it must find a quid pro quo, i.e., an intent to give (or receive) money “in exchange” for an official action. Minor Br. 33-34, 38, 39-41, 43, 45. There are multiple reasons why this argument fails.

First, any error in failing to so instruct the jury was invited by the defense. As noted above, Minor insisted that the jury be instructed on bribery under Mississippi law, and the district court obliged. Moreover, the language the district court used was modeled on an instruction Minor provided. See supra at 55-56. Accordingly, Minor should not be permitted to challenge the instructions given on the ground that they failed to properly define a bribery offense. United States v. Baytank (Houston), Inc., 934 F.2d 599, 606 (5th Cir. 1991) (holding, in connection with a jury instruction requested by the defense, that “[a] party generally may not invite error and then complain thereof”).

Second, the instructions ensured a jury finding of a quid pro quo in any event. In particular, the jury necessarily found (1) that Minor gave money to Whitfield and Teel with an intent to influence their official actions; and (2) that Whitfield and Teel accepted this money, intending to be influenced by it. MRE/8 4770-72, 4786; see supra at 54. These findings suffice to establish an exchange of money for an official act. Indeed, in Sun-Diamond, the Supreme Court specifically equated the two concepts, noting that “[b]ribery requires intent ‘to influence’ an official act or ‘to be

influenced' in an official act, * * * . In other words, for bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act.” 526 U.S. at 404-05 (emphasis in original). Likewise, in Tomblin, 46 F.3d at 1380 & n.17, this Court upheld a conviction on a bribery charge (Count 22) based on instructions that defined bribery as giving something of value “corruptly with intent to influence an official act,” concluding that the instructions “explain the reciprocity element of the quid pro quo.” Accord United States v. Alfisi, 308 F.3d 144, 150 (2d Cir. 2002) (instruction that bribery requires “a corrupt intention specifically to influence the outcome of the official act” “clearly set out the quid pro quo requirement”); see also United States v. Washington, 688 F.2d 953, 958 & n.4 (5th Cir. 1982); compare 5th Cir. Pattern Jury Instr. 212 (briber must act “corruptly with intent to influence an official act”) with id. at 213 (bribee must accept bribe “corruptly in return for being influenced”) (emphasis added).

Minor suggests (Br. 45) that the jury instructions did not contain a quid pro quo requirement because the district court did not believe that the crime of bribery required one. Minor bases this argument on the following remark by the district court: “Well, that’s why I think this language here is destructive because there need not be a meeting of the mind. And that then I feel completely undermines your argument on quid pro quo. A quid pro quo is a meeting of the mind.” GRE/1 at

4710. But when read in context, it becomes clear that the district court’s remark had nothing to do with whether bribery required an intent to receive something “in exchange.” Instead, the district court was reasoning that, because Mississippi law permitted conviction for attempted bribery (i.e., “there need not be a meeting of the mind”), this fact undermined Minor’s claim that the “quo” (i.e., the intended benefit) had to be identified at the time of the bribe. Ibid. (district court asks defense counsel: “You are saying there was no meeting of the mind because there was no understanding as to what the offer of the bribe would be. Isn’t that your argument?”).²⁸

Minor also contends (Br. 47) that the “intent to influence” language was inadequate here because it failed to “distinguish acts of goodwill from criminally corrupt intent.” But this argument ignores the remainder of the district court’s instruction. As noted above, the instructions did not simply require that Minor intend

²⁸ Although he preserved the claim below, see supra at 59, Minor does not appear directly to challenge the instruction that resulted from this discussion. See MRE/8 at 4771 (“To constitute the offense of offering a bribe, there need not be a mutual intent on the part of both the giver and the offeree or acceptor of the bribe.”). But assuming that Minor does intend to challenge this instruction, it was undeniably an accurate statement of Mississippi law. McLemore v. State, 125 So.2d 86, 89 (Miss. 1960) (“There need not be a mutual intent on the part of both the giver and the offeree or acceptor of the bribe. * * * It is immaterial whether an attempt or offer to bribe is successful.”). Moreover, even if the instruction had been incorrect, Minor was not prejudiced by it because, by convicting all defendants, the jury clearly found a “mutual intent.”

to influence the official actions of the judges. Instead, they required that he acted corruptly, intending for the judges to decide cases based on the money he paid them, rather than on their own honest view of the law and the facts. See supra at 53. These instructions eliminated any possibility that Minor was convicted based only on an intent to promote judicial “good will.”²⁹

Finally, even if instructional error occurred and the invited error doctrine somehow does not preclude review, Minor cannot show “plain error.” See Fed. R. Crim. P. 52(b).³⁰ As Minor himself emphasizes (Br. 37-38), the Indictment specifically alleged that Minor provided money to Whitfield and Teel “in return for favorable treatment in and relating to lawsuits.” See, e.g., Third Superseding

²⁹ Minor notes (Br. 45) that in United States v. Taylor, 993 F.2d 382, 385 (1993), the Fourth Circuit reversed a Hobbs Act conviction involving alleged campaign contributions because the instructions allowed an elected official to be convicted if “he was aware that the payments [to him] were intended to influence his official conduct.” Taylor is inapposite because the convictions of the judicial defendants here were based not only on their knowledge of Minor’s intent to influence them, but also on their own agreement to be influenced, i.e., to act in a particular case based on the bribe, rather than their honest view of the law and the facts. MRE/8 at 4771. See supra at 53.

Moreover, the Taylor court’s claim that “[a]ll payments to elected officials are intended to influence their official conduct,” id. at 385, is hyperbole. At least some campaign contributions, for example, are motivated by nothing more than support for the candidate and his ideas.

³⁰ At a minimum, plain error review applies to Minor’s claim since he did not object to the district court’s instruction on the ground that it failed to convey the concept of an “exchange.” See supra at 58.

Indictment at 3, 11 (MRE/3). Moreover, to ensure that the jury understood how the instructions related to the offenses charged, the district court read the Indictment (which Minor acknowledges contained a quid pro quo requirement) to the jury during the instructions, interspersing the specific counts with the related instructions.³¹ The government then made clear in closing argument that whether Minor gave, and the judges received, things of value “in return for favorable treatment on cases” was the central issue in the case. Tr. 4797-99.³² And Minor’s counsel emphasized the same point, stating “every count they have to prove bribery. As [AUSA] Fulcher said yesterday, they have to prove that he did it in exchange for those cases pending.” Tr. 4918-21. As a result, the jury necessarily understood that an intent to receive favorable treatment in return for money was part and parcel of the corrupt intent to influence to which the instructions referred. Under these circumstances, Minor cannot show that any instructional error affected his “substantial rights,” or that

³¹ In so doing, the district court “remind[ed] [the jury] again that an indictment is simply an accusation. It is not proof of anything. * * * The government has the burden of proof, and that burden of proof is beyond a reasonable doubt.” MRE/8 at 4724.

³² See also id. at 4801 (“Part of the scheme was that the judges would give a big verdict or settlement to Paul Minor in return for all that he had done for them.”); id. at 4812 (“They did it this way because it was a corrupt bargain.”); id. at 4829 (“it was a corrupt deal”); id. at 4952-55 (“The evidence in this case shows that Mr. Minor and these former judges had a deal. And implicit in this deal was the agreement that Paul Minor would supply the judges with money and other things of value; and in exchange, the judges would be called upon at a later date to rule favorably for him.”).

failure to correct the error would “seriously affect the fairness, integrity or public reputation of judicial proceedings.” United States v. Olano, 507 U.S. 725, 732 (1993).

I. The District Court Did Not Commit Reversible Error in Failing to Define Bribery Pursuant to the McCormick Decision.

Minor also contends (Br. 36-41) that, because some of his payments were allegedly “campaign contributions,” the jury instructions should have reflected the particular quid pro quo requirement applied by the Supreme Court in McCormick v. United States, 500 U.S. 257 (1991). Once again, the invited error doctrine applies because Minor asked that the instructions define bribery in accordance with state law. Indeed, as discussed above, Minor specifically acknowledged that McCormick was not directly applicable because it interpreted a separate federal statute not charged below. See supra at 58-59. Indeed, the defense had solid strategic reasons not to focus on McCormick. The quid pro quo requirement the Supreme Court elaborated in McCormick applies only to campaign contributions. 500 U.S. at 271. In this case, however, Minor provided financial assistance to both Whitfield and Teel that had nothing to do with their political campaigns. In fact, Minor made sure that Whitfield did not receive the \$100,000 loan until after he was re-elected, see supra at 11, and this loan was specifically intended for a personal expenditure (i.e., a downpayment

on a house). See supra at 11.³³ Accordingly, Minor’s capable defense counsel likely concluded that McCormick was, at best, of limited benefit to the defense. Moreover, counsel may well have concluded that attempting to invoke McCormick could prove counterproductive, focusing attention on the fact that neither Whitfield nor Teel ever declared any of Minor’s payments as a “campaign contribution,” see supra at 16, 26, and that only one of Minor’s numerous payments to Whitfield and Teel was classified in his own books as a political expense. Tr. 3558; PM-157.

Under these circumstances, Minor’s arguments based on McCormick should be considered waived, not just forfeited. These arguments have all the hallmarks of an issue manufactured for appeal by counsel who did not try the case below. Cf. Pankhurst, 118 F.3d at 351 (“In essence, what we are being presented with on appeal, in part, is appellate counsel’s quite different view of the case from that of trial counsel. It goes without saying that points raised at trial are the points that control on appeal.”). Although this tactic is never appropriate, it is especially improper where, as here, it presumes a factual finding (i.e., that Minor’s payments were

³³ Whitfield claims (Br. 55) that this loan was “in the context of the reelection race.” It was not. It was in the context of Whitfield’s divorce from his wife and his impending remarriage. Indeed, Whitfield’s counsel conceded below that the loan was not campaign related, assuring the district court that “neither Mr. Minor’s counsel nor me on behalf of John Whitfield would take a position contrary to the fact that the \$100,000 was not used for the campaign. It was used, as the government has identified, for the purchase of the house and some furniture.” 2/23/07 Tr. 1908.

“campaign contributions”) that the jury was never asked to make below.

In any event, these unpreserved arguments do not satisfy the “plain error” standard of Fed. R. Crim. P. 52(b).³⁴ At the outset, it is important to determine exactly what Minor believes that McCormick requires. Minor clearly (but incorrectly) contends (Br. 46) that under McCormick, the intended benefit must be defined at the time of the bribe. See supra at 61. In addition, Minor also contends that McCormick requires a “quid pro quo,” (i.e., an intent to engage in an exchange). See, e.g., Br. 33-34. The argument that the jury instructions omitted this requirement has already been addressed. See supra at 64-70. Finally, by repeatedly emphasizing McCormick’s reference to an “explicit promise,” Minor appears to contend (but does not clearly argue) that he could not be convicted of mail and wire fraud charges unless the defendants articulated an express promise to award a favorable decision in exchange for payments. See Minor Br. 40 (“For this reason, when the government seeks to transform campaign contributors into felons, it must prove an explicit quid pro quo. United States v. McCormick, 500 U.S. 257, 273 (1991).”).³⁵

³⁴ Minor did argue below that the definition of “bribery” should include a “quid pro quo” requirement. But he used that term as a short hand for his argument that the benefit had to be defined at the time of the bribe. See, e.g., GRE/1 at 4662-72.

³⁵ Minor not only did not make this argument below, he appeared to disavow it, stating during arguments on his motion for a judgment of acquittal: “Well, whether or not it’s communicated, the specific act that the briber expects, the briber

This argument (assuming Minor intends to make it) fails for three reasons: (1) McCormick does not require an express promise to perform an official act; (2) McCormick does not affect Mississippi law; and (3) McCormick does not apply outside the Hobbs Act context.

In McCormick, a state legislator was prosecuted for extortion “under color of official right,” under the Hobbs Act, 18 U.S.C. § 1951, based on his acceptance of a campaign contribution in exchange for support on legislation. 500 U.S. at 259-60. The jury was instructed that to convict, it needed to find only that the contributors had made the payment with the expectation that the legislator would take future action that benefitted them, and that the legislator “accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office.” Id. at 261 n.4 (emphasis added). Reversing the conviction, the Supreme Court held that receipt of campaign contributions is “vulnerable under the Act as having been taken under color of official right, * * * 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.” Id. at 273.

In so holding the Supreme Court expressed concern that the absence of a quid pro quo requirement “would open to prosecution not only conduct that has long been _____ has to have that in the briber’s mind of the specific thing they intend to get.” Tr. 4082 (emphasis added).

thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.” Id. at 272. By requiring an explicit quid pro quo, the Court protected honest legislators from criminal liability “when they act[ed] for the benefit of constituents or support[ed] legislation furthering the interests of some of their constituents, shortly before or after campaign contributions [we]re solicited and received from those beneficiaries.” Id. at 272.

The following Term, the Court held in Evans v. United States, 504 U.S. 255, 256-58 (1992), that an affirmative act of inducement by a public official, such as a demand or request for payment, is not an element of extortion “under color of official right.” The payments in Evans were purported contributions to the petitioner’s campaign for election to a county board. Id. at 257. Relying on the common-law definition of extortion, the Court held that, to prove extortion under color of official right, “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” Id. at 268. The Court also held that the district court’s instructions, which did not require the jury to find an express promise or agreement between the official and the payor, “satisfie[d] the quid pro quo requirement of McCormick.” Id.

_____As the Sixth Circuit has explained, Evans clarified that the McCormick quid pro quo standard “is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (i.e., merely knowing the payment was made in return for official acts is enough).” United States v. Blandford, 33 F.3d 685, 696 (6th Cir. 1994). Other courts agree that, under Evans, an “explicit” quid pro quo does not require an “express” agreement or promise, but rather requires only that the payor and official clearly understand the terms of the bargain. See, e.g., United States v. Giles, 246 F.3d 966, 972 (7th Cir. 2001); United States v. Tucker, 133 F.3d 1208, 1215 (9th Cir. 1998); United States v. Hairston, 46 F.3d 361, 365 (4th Cir. 1995). As a result, even where McCormick applies, the jury is not required to find an express promise by an official defendant. This makes good sense because, as Justice Kennedy has observed, a rule requiring an “express” agreement or promise would allow officials to evade criminal liability through “knowing winks and nods.” Evans, 504 U.S. at 274 (Kennedy, J., concurring); accord Carpenter, 961 F.2d at 827. The instructions here were consistent with Evans, because they required the jury to find that the judicial defendant intended to be influenced by the bribe, and indeed, actually was influenced by it. See supra at 54.

Moreover, McCormick has no application where, as here, bribery is defined under state law. In United States v. Jackson, 72 F.3d 1370 (9th Cir. 1995), a RICO

case, the defendant argued that the jury had to be given an explicit quid pro quo instruction to find that he had violated California bribery law by giving campaign contributions to a state senator. Id. at 1373, 1375-76. The California bribery statute resembles Mississippi law by prohibiting the giving of anything of value to a state legislator “with a corrupt intent to influence, unlawfully” the legislator “in his or her action, vote, or opinion, in any public or official capacity.” Id. at 1374 n.1 (quoting Cal. Penal Code §§ 7(6), 85). Emphasizing that “McCormick was a case of statutory construction,” the Ninth Circuit found that it had no impact on California bribery law, which did not otherwise require an explicit quid pro quo instruction. Id. at 1376. In addition, the court rejected the argument that this result violated the First Amendment, concluding that “the First Amendment does not imply an explicit quid pro quo element into every state bribery offense.” Ibid.; see also United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993) (“McCormick interpreted a federal statute; it created a rule for interpreting federal statutes, not a universal rule of statutory construction.”).

And even if a case interpreting a particular federal statute could somehow affect the meaning of state law, McCormick still would not govern here. McCormick construed the meaning of “under color of official right” in 18 U.S.C.

§ 1951(b)(2). McCormick, 500 U.S. at 273; see also Evans, 504 U.S. at 268 n.20

(“‘under color of official right’ * * * has a well-recognized common-law heritage”). The Mississippi bribery statute contains no such language. Rather, as noted above, that statute prohibits corruptly offering a bribe with the intent to influence official action. Moreover, at least as interpreted in the instructions provided here, the statute does not punish the giving or receiving of campaign contributions that are accompanied by a mere expectation or hope of future official action – the danger identified in McCormick, 500 U.S. at 272-73. See supra at 52-54.

Finally, McCormick does not apply to honest services mail and wire fraud prosecutions under 18 U.S.C. §§ 1341, 1343 and 1346, even when the underlying duty is not defined in terms of state bribery law. As noted above, McCormick construed the “under color of official right” language of the Hobbs Act. To date, no federal court of appeals has attempted to apply that decision to the mail and wire fraud statutes, which involve entirely different operative language.³⁶ Moreover, the

³⁶ A few unreported district court cases have applied McCormick to 18 U.S.C. § 1346. See Luzerne County Ret. Bd. v. Makowski, 2007 WL 4211445, *42-43 (M.D. Pa. Nov. 27, 2007); United States v. Malone, 2006 WL 2583293, *1-2 (D. Nev. Sept. 6, 2006). None of these cases, however, reconciles the Hobbs Act offense in McCormick with the different language and focus of the honest services statute.

Likewise, although the Seventh Circuit suggested in United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993), that, “absent some fairly explicit language otherwise,” federal bribery statutes should be interpreted in light of McCormick, that statement was dicta piled on top of dicta, as the defendant had not been convicted of any federal bribery offense, and the only bribery offense charged (pursuant to a RICO count) involved state law.

mail fraud instructions given here required the jury to find that the defendants knowingly created or participated in a scheme to defraud or deprive the State of Mississippi of the honest services of a judicial defendant, that they acted with a specific intent to defraud, and that the scheme to defraud employed false material representations. MRE/8 at 4770-71.³⁷ By requiring that the government prove a scheme to defraud, executed through materially false representations, these counts of the indictment avoided the danger, emphasized by the Court in McCormick, of criminalizing otherwise lawful conduct that is “unavoidable” as long as election campaigns are financed through private contributions.

For all these reasons, McCormick did not require that the jury instructions given here include, as an element of the mail and wire fraud schemes, an express promise by the judicial defendants to perform an official act. But assuming that the issue is not waived entirely, the only question presented is whether the district court “plainly” erred in not giving such an instruction. In light of the Supreme Court’s decision in Evans, and the fact that state law defined the relevant duty here, and the fact that McCormick involved the interpretation of a different federal statute, any

³⁷ The Indictment alleged that the defendants covered up and concealed the objectives of their fraudulent schemes by, inter alia, failing to disclose their financial relationship (including on required reports), concealing their financial relationship from opposing counsel and parties, using intermediaries, and creating false documents. MRE/3 at 22-28.

error that occurred here was not “plain,” i.e., “clear,” and “obvious.” United States v. Olano, 507 U.S. at 733.

J. The District Court’s Instructions Did Not Allow the Jury to Convict Mr. Minor for Crimes Not Charged in the Indictment.

Finally, Minor contends (Br. 49-55) that the mail and wire fraud instructions allowed the jury to convict him for crimes not charged in the Indictment, namely, (1) paying a gratuity; (2) violating state bribery laws; or (3) Whitfield’s and Teel’s violations of state judicial ethics rules. None of these claims has merit.³⁸

As noted above, by requiring proof of a corrupt intent to influence a judicial decision, the jury instructions defined bribery, not a gratuity offense. See supra at 63-64. Nor did the instructions permit conviction based solely on violations of Mississippi bribery laws. As noted above, see supra at 52, the instructions did define the judges’ duty of honest services in reference to state bribery law. See, e.g., MRE/8 at 4772 . But they did not “equate[] honest services fraud to a mere violation of the state’s bribery law.” Minor Br. 53 (emphasis added). Instead, the instructions fully described the elements of the mail and wire fraud offenses, including (1) that the defendant knowingly participate in a scheme to defraud the state of Mississippi of its right to honest services; (2) that he act with a specific intent to defraud; (3) that the

³⁸ The plain error standard of review applies to the second and third claims as Minor did not object to the instructions on these grounds.

defendant use (or cause someone else to use) the mail or wires; and (4) that the scheme to defraud employs false material representations. Tr. 4770-72, 4776-78. These instructions clearly explained “how Mississippi law relates to the federal offense charged,” United States v. Washington, 688 F.2d 953, 958 (5th Cir. 1982), and left no possibility that the defendants could have been convicted based solely on violations of state law.

Nor could the jury have convicted based on violations of state judicial ethics rules. The district court precluded the government from introducing evidence regarding the Mississippi judicial code. Tr. 1937. The jury was informed, however, about the judges’ obligation to file annual statements of economic interest, see supra at 16, 26, and the government argued that Whitfield and Teel filed statements that were false as part of their schemes to defraud. Tr. 4956-57. Contrary to Minor’s claim, however, the court carefully explained the relevance of this evidence, stating that “[t]he government relies upon such proof to support its allegation that the defendants violated the laws pertaining to bribery. Proof that a defendant failed to comply with the directives of a statement of economic interest, standing alone, is not proof that a federal law has been violated.” Tr. 4793 (emphasis added).

II. THE JURISDICTIONAL ELEMENT OF 18 U.S.C. § 666 WAS PROPERLY ALLEGED, PROVEN AND INSTRUCTED.

Minor (Br. 80-87) and Whitfield (Br. 15-38) challenge their convictions under

18 U.S.C. § 666, claiming (1) that the Indictment failed to describe these charges in sufficient detail; (2) that the evidence was insufficient to show an element of the Section 666 offenses; and (3) that the jury instructions were inaccurate. See also Teel Br. 11 (adopting Minor’s argument). Each of these claims fails for the reasons discussed below.

A. The Statute, the Indictment and the Verdict.

Counts 11-14 of the Indictment alleged that the defendants violated 18 U.S.C. § 666, a statute that prohibits, inter alia, the bribery of agents of certain state and local governments. MRE/3 at 28-31. Section 666(a)(1)(B) makes it a crime for: (1) “an agent of * * * a state, local, or Indian tribal government, or any agency thereof”; (2) “corruptly * * * [to] accept[] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business [or] transaction * * * of such * * * government, or agency involving any thing of value of \$5,000 or more”; if (3) “the * * * government, or agency received in any one year period, benefits in excess of \$10,000 under a Federal program * * * .”

A parallel provision, 18 U.S.C. § 666(a)(2), makes it unlawful (1) to give a bribe to anyone “with intent to influence or reward” an “agent” (as described above); (2) “in connection with any business [or] transaction * * * of such government, or agency involving anything of value of \$5,000 or more”; (3) if “the * * * government,

or agency received in any one year period, benefits in excess of \$10,000 under a Federal program * * * .”

Counts 11 and 13 of the Indictment alleged that, as “agent[s] of a subdivision of the judicial branch of the state government of Mississippi” that received the requisite federal program benefits, Whitfield and Teel corruptly accepted bribes in connection with “cases of interest to Minor.” MRE/3 at 28-30. Likewise, Counts 12 and 14 alleged that Minor knowingly and corruptly gave such bribes to “influence and reward” the judges in connection with such cases. Id. at 29-31.

With respect to the statutory requirement that the “government[] or agency receive[], in any one year period, benefits in excess of \$10,000,” under a federal program, the government pursued two separate theories at trial: (1) that the required federal funds were received by the Mississippi Administrative Office of the Courts (“AOC”); and (2) that the funds were received by Harrison County, Mississippi, which provided funding for the Circuit and Chancery Courts that employed Whitfield and Teel. The jury was then given a special verdict form that asked it to identify the source or sources of the funds. The completed form indicates that the jury accepted only the theory regarding the AOC. MRE/4 at 7.

B. The Indictment Alleged an Offense under Section 666.

Whitfield contends (Br. 17-20, 25-30) that the Section 666 charges failed to

provide him with adequate notice because they “did nothing more than track the statutory language”; were “silent as to how the government intended to prove that [Whitfield] was an agent as defined in the statute”; and “failed to provide him with adequate notice of the exact nature of the federal funds that were received by [the judicial branch].” Id. at 18-19.

This Court reviews a properly preserved challenge to the sufficiency of the indictment under a de novo standard of review. See United States v. Guzman-Ocampo, 236 F.3d 233, 236 (5th Cir. 2000); United States v. Asibor, 109 F.3d 1023, 1037 (5th Cir.1997). See also R115 (WR377); 2/2207 Tr. 1850.

The Indictment sufficiently alleged a crime under Section 666. “An indictment is sufficient if it contains the elements of the charged offense, fairly informs the defendant of the charges against him, and ensures that there is no risk of future prosecutions for the same offense. * * * Generally, an indictment which follows the language of the statute under which it is brought is sufficient to give a defendant notice of the crime of which he is charged.” United States v. Thomas, 348 F.3d 78, 82 (5th Cir. 2003) (internal quotes and citation omitted); see Fed. R. Crim. P. 7(c)(1) (“The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged * * * .”).

Here, the Section 666 charges tracked the applicable language of the statute.

Compare MRE/3 at 28-31, with 18 U.S.C. § 666(a) & (b). Moreover, these counts encompassed all the elements of the offense and adequately informed Whitfield of the charges. With respect to the element that supplied federal jurisdiction, i.e., the requirement that the “government, or agency” receive \$10,000 in federal funds, the Indictment was not required to allege any specific facts regarding how this requirement would be satisfied. See United States v. Williams, 679 F.2d 504, 506, 509 (5th Cir. 1982) (indictment can allege the interstate commerce element of a federal offense in conclusory terms).

In addition, we note that Whitfield clearly had actual notice of the government’s underlying theory on the Section 666 charges. See Whitfield Br. 19. As Whitfield’s own pleadings made clear, discovery materials provided early on identified the particular federal funds at issue in the case. D137 at 3 (WR524), D197 (WR1416). Moreover, at the district court’s request, the government filed a pleading on July 6, 2004, summarizing these discovery materials and specifically identifying the AOC as the relevant entity receiving federal funds. D242 at 2 (WR1592). Finally, by the time the Third Superseding Indictment was returned, Whitfield had already gone to trial on the Second Superseding Indictment and had even heard the testimony of the government’s witnesses regarding the AOC’s federal funding. Indeed, citing testimony from the first trial, Minor actually moved to dismiss two of

the Indictment's Section 666 counts on the ground that Whitfield and Teel were not "agents" of the AOC. D486 at 5-6 (MR2016-17). In short, all the defendants had ample notice of the government's theory of jurisdiction under Section 666 and every opportunity to prepare a defense on this charge.

C. The Evidence Was Sufficient to Find that Whitfield and Teel Were Agents of the Mississippi Administrative Office of the Courts.

Minor (Br. 81-84) and Whitfield (Br. 21-38) contend that they were entitled to a judgment of acquittal on the Section 666 counts because the evidence failed to show that Whitfield and Teel were "agents" of a "government or agency" that received more than \$10,000 in federal funds during a one-year period. See Fed. R. Crim. P. 29(a); D570 (MR2443). This Court reviews de novo the denial of a properly made Rule 29 motion. United States v. Valle, 538 F.3d 341, 344 (5th Cir. 2008). In conducting its review, "the 'relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Ibid. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original).

As noted above, the jury's verdict rested on a finding that the AOC received the required federal funding. The AOC was established by statute "to assist in the efficient administration of the nonjudicial business of the [Mississippi] courts," and to "improve the administration of justice in Mississippi, * * * ." Miss. Code Ann. §

9-21-1. Among the AOC's many duties is to "apply for and receive any grants or other assistance" for the Mississippi courts, including grants under Federal programs. Id. at § 9-21-3; see Tr. 2603.

There is no doubt that the AOC received the required federal funds during the relevant time period. Tr. 2595; G95A1 - G95A16. In fact, between 1998 to 2002, the AOC annually received between \$150,000 to \$420,000 in federal program funds relating to four separate programs: (1) a Court Improvement Plan that targeted youth courts; (2) a contract to collect information on cases involving aliens; (3) a subgrant from the U.S. Department of Justice to study juvenile defense in the court system; and (4) another subgrant from the U.S. Department of Justice to put display systems in Circuit Courts. Tr. 2596-97, 2628.

Likewise, it is undisputed that the AOC is an "agency," within the meaning of Section 666. The statute defines a "government agency" as "a subdivision of the executive, legislative, judicial, or other branch of government," 18 U.S.C. § 666(d)(2), and the AOC plainly meets this definition. See Tr. 2588 (the AOC's former Finance Director testifies that it is a "subdivision of the judicial branch of the state government of Mississippi").

Thus, the only question is whether Whitfield and Teel were "agents" of the AOC. The evidence was sufficient to prove this fact beyond a reasonable doubt. In

particular, the government presented testimony from Carolyn Briscoe, the AOC's Finance Director during the relevant time period. Tr. 2586-2603. Briscoe explained that, among other things, the AOC handled the "finances" for the entire Mississippi court system, including payroll, inventory, bill payment, budget preparation and all computer activities. Id. at 2586-89.³⁹ The AOC "process[ed] the payroll" for state judges, with their checks coming through the state Treasury at the AOC's request. Tr. 2589.

Briscoe further explained that each Circuit and Chancery Court judge was granted a \$40,000 annual "staff allowance" to pay court reporters, law clerks, secretaries and paralegals.⁴⁰ Tr. 2589-90, 2617; see also Miss. Code Ann. § 9-1-36(2). The individual judges decided how this money was to be spent and then submitted court orders outlining a payment plan to the AOC. See also Miss. Code Ann. § 9-1-36(3). The AOC had to "approve" these court orders before its finance department would process the payment plan. Tr. 2591. Briscoe explained, however, that the AOC "answer[ed] to the judges," including "the wishes of the Chancery and Circuit judges regarding their staff." Tr. 2605. Thus, "if a judge submitted a request

³⁹ Briscoe also indicated that the AOC performed non-finance tasks, such as case tracking. Id. at 2588.

⁴⁰ County governments also provided additional funding for this staff. Tr. 2590.

and to outline [sic] how a person was paid, if the funds were available, it was approved.” Tr. 2606. Such a request “was only turned down if there were not funds available to make the payment.” Id. In addition to the “staff allowance,” each judge received a \$4,000 office operating allowance and could request reimbursement of travel expenses. Tr. 2618; see also Miss. Code Ann. § 9-1-36(1).

Finally, Briscoe addressed the status of support staff members of the Circuit and Chancery Courts, explaining that such personnel were actually employees of the AOC. At the same time, Briscoe made clear, it was the judges themselves who appointed these employees, and who controlled them, because the employees worked “at the will and pleasure of the judge or judges who appointed them.” Tr. 2606-07, 2636; see Miss. Code Ann. § 9-1-36.

This evidence permitted the jury to find that Whitfield and Teel were “agents” of the AOC. The statute defines an “agent” as a “person authorized to act on behalf of another person or a government and * * * includes a servant or employee, and a partner, director, officer, manager, and representative.” 18 U.S.C. § 666(d)(1); see Tr. 4785 (jury instructions). Because Whitfield and Teel were able to hire (with approval) and to fire (without approval) employees of the AOC, they were “authorized to act on [its] behalf.” Cf. Canutillo Indep. School Dist. v. Leija, 101 F.3d 393, 401 (5th Cir. 1996) (in Title VII context, the term “agent” “mean[s]

someone who ‘serves in a supervisory position and exercises significant control over * * * hiring, firing, or conditions of employment’”) (quoting Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993)).

Whitfield and Teel were also “agents” of the AOC in the more specialized sense employed in United States v. Phillips, 219 F.3d 404 (5th Cir. 2000). Phillips held that the tax assessor for St. Helena Parish, Louisiana, was not an agent of the parish under Section 666 because the assessor’s salary and benefits were not provided by the parish; the parish had no control over the assessor’s duties or job; the assessor’s office received no federal funds; and the assessor had no ability to control or administer parish employees, programs or funds. Id. at 411-15.

After noting that Section 666(d)(1) broadly defines the term “agent,” the Court concluded that the statute should not be read “to suggest that the statute can reach any government employee who misappropriates purely local funds, without regard to how organizationally removed the employee is from the particular agency that administers the federal program.” Id. at 411. Accordingly, the Court determined that the agency question in that case turned on whether the defendant “was authorized to act on behalf of the parish with respect to its funds.” Id. at 411 & n.10; see id. at 415 (agency relationship must be tied to “the authority that a defendant has with respect to control

and expenditure of the funds of an entity that receives federal monies”).⁴¹

Phillips did not “impose a requirement under the statute that a defendant be authorized to act with respect to the agency’s funds,” suggesting that in other cases an agency relationship could be found based on different factors. 219 F.3d at 411 n.10. Nonetheless, even if the Court had imposed such a requirement, it would be satisfied here. As the discussion above makes clear, judges on the Circuit and Chancery Courts were authorized to act “with respect to the AOC’s funds,” (1) by spending up to \$40,000 of AOC money annually to pay employees, (2) by spending up to \$4,000 of AOC funds on office expenses, and (3) by incurring travel expenses reimbursable by the AOC. See supra at 87-88. Given the significant authority Whitfield and Teel exercised with respect to the expenditure of AOC funds, the two judges were not “organizationally removed” from the AOC.

D. The Statute Does Not Require that the Judicial Defendants Have Control over the Spending of any Federal Funds.

Finally, Minor contends (Br. 84-86) that the district court misinstructed the jury by stating that, “[u]nder 18 U.S.C. Section 666, it is not necessary for the particular judge defendant to have had any control over the use or spending of any federal

⁴¹ Phillips also noted that “the parish has no * * * control over the assessor’s duties or job.” 219 F.3d at 412. In this case, however, the AOC did have control over the judges as it approved the judge’s orders outlining their payment plans for staff allowances, and also approved the hiring of their new employees. See supra at 87.

funds.” Tr. 4786. Although Minor disputes this statement, he does not claim that the statutory language of Section 666 actually requires that the defendant exercise any control over federal funds. Instead, he argues that the Phillips case itself created this requirement. The passage he cites, however, indicates only that (in the context of that case) the defendant had to have authority “with respect to the control and expenditure of the funds of an entity that receives federal monies.” Br. 84 (citing Phillips, 219 F.3d at 415) (emphasis added). Nothing in this statement suggests that the defendant must have control over the federal funds themselves. In fact, the Phillips decision made clear that if the assessor had possessed a significant connection to the parish (by e.g., being controlled by the parish, or being able to control parish funds), the statute would be satisfied even though there clearly was no connection between the tax assessor and the federal food stamp benefits the parish received. 219 F.3d at 410. See also United States v. Westmoreland, 841 F.2d 572, 577 (5th Cir. 1988) (“[I]t is clear that Congress has cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do.”) (emphasis added); United States v. Lipscomb, 299 F.3d 303, 309-16 (5th Cir. 2002) (reaffirming Westmoreland); cf. Sabri v. United States, 541 U.S. 600, 604-608 (2004) (rejecting claim that Section 666(a)(2) is unconstitutional because it does not require proof of any connection between the bribe and the federal funds).

Finally, although this Court concluded that “[t]he particular program involved in the theft or bribery scheme need not be the recipient of federal funds,” United States v. Moeller, 987 F.2d 1134, 1137 (5th Cir. 1993), we note that such a nexus does exist here. Whitfield and Teel were officials of the Circuit and Chancery Courts of Mississippi, and these courts benefitted from federal funds received through the AOC during the relevant time period. In particular, funds received from the federal government were used to train Circuit and Chancery Court clerks on how to do case reporting on aliens. Tr. 2620-21, 2628. Likewise, the AOC received federal funds to install a display system in Whitfield’s courtroom within one year of the time when he was a judge (although the system itself was not installed in Whitfield’s courtroom until February 20, 2002). Tr. 2597-98, 2602, 2622-23, 2639-40.

III. THE DISTRICT COURT DID NOT COMMIT ANY REVERSIBLE EVIDENTIARY ERRORS.

Minor (Br. 56-78), Whitfield (57-73, 94) and Teel (Br. 24-34) raise a host of challenges to evidentiary rulings made by the district court. Whether considered individually or collectively, these claims provide no basis for reversing defendants’ convictions.

A. Standard of Review.

A district court has wide discretion in determining the relevance and materiality of evidence. Absent an abuse of discretion, its rulings on such matters should not be

disturbed. United States v. Lambert, 580 F.2d 740, 746 (5th Cir. 1978). Moreover, if this Court determines that evidence was improperly excluded, even a preserved error must then be evaluated for harmlessness. United States v. Scott, 678 F.2d 606, 612 (5th Cir. 1982).

B. Minor Was Permitted to Argue and Prove that He Had Pre-Existing Relationships with Whitfield and Teel.

Minor contends that the district court precluded him from showing that he had a “long-standing friendship with Judges Teel and Whitfield.” Br. 60. See also Whitfield Br. 94 (adopting Minor’s argument). This is untrue. The record contains ample evidence of Minor’s prior and continuing relationships with both of his co-defendants. See, e.g., Tr. 3580 (Minor told Radlauer he and Whitfield had a “pretty good relationship”); Tr. 4173 (Minor supported Whitfield when he first ran for judge in 1994); Tr. 4173 (Whitfield chose Minor to represent his mother in lawsuit); Tr. 4138-46 (Minor highly recommended Whitfield for position in private law firm); Tr. 4176 (Minor would refer divorce cases to Teel). Moreover, counsel for all defendants argued the significance of these relationships in opening and closing arguments. See, e.g., Tr. 2048 (Minor’s attorney refers to Minor founding the legal services corporation and his friendship with Whitfield “going back serving on those type boards and doing things together”) (Minor opening); Tr. 2051 (Minor’s attorney states that Teel and Minor were friends and had a long time professional relationship)

(Minor opening); Tr. 2083 (“It was well known that Paul Minor and John Whitfield were friends.”) (Whitfield opening); Tr. 2132 (Teel’s friend Minor referred domestic relationship cases to him) (Teel opening); Tr. 4921 (“The evidence is that he did it for his friends or to help.”) (Minor closing); Tr. 4914 (“Ladies and Gentlemen, we cannot let them attack friendship.”) (Whitfield closing).

The only specific ruling that Minor challenges is the district court’s decision to sustain an objection when his office manager, Janet Miller, was asked whether Whitfield and Minor “served together on any professional or community groups” before Whitfield took the bench. Tr. 4173.⁴² Miller presumably would have responded that the two men served together on the board of the local Legal Services Corporation. See Tr. 2048 (Minor opening). Assuming arguendo that Miller’s response was admissible, the evidence was cumulative and its exclusion had no significant effect on the trial. Indeed, right after the objection was sustained, Miller testified that Minor had supported Whitfield when he ran for office in 1994, and again in 1998, and that Whitfield had hired Minor to represent his mother in 2001. Tr. 4173-74. Accordingly, Minor was able to demonstrate that the two men had a

⁴² Without objection, Minor’s counsel was permitted to ask Andy Carpenter, a Peoples Bank executive, whether he was aware of “the boards and the different things that Mr. Minor and Mr. Whitfield over the year [sic] had done together and with each other.” Tr. 2238.

relationship that pre-dated the 1998 bank loans and continued thereafter.⁴³

C. Minor was Permitted to Argue and Prove that He Guaranteed Other Loans to Friends and Colleagues.

Minor similarly claims (Br. 61–66) that the trial court wrongly restricted evidence that he guaranteed other loans to friends and colleagues. See also Whitfield Br. 94 (adopting Minor’s argument). But once again, the record contains substantial evidence of this practice. In particular, Janet Miller testified to a “pattern” of Minor guaranteeing loans to people who worked in his office. Tr. 4175. Likewise, Andy Carpenter, an Executive Vice President of Peoples Bank, Tr. 2238, testified that Minor “backed up” loans to a number of other people, including employees. Based on this evidence, Minor argued in closing that “[w]e know through witnesses that guaranteeing loans for friends by Paul Minor is something he did.” Tr. 4929.

The record also shows that the defendants declined an opportunity to develop this evidence further. During a sidebar conference when Carpenter was testifying, the district court specifically told Whitfield’s counsel “you can ask [Carpenter] were there other loan guarantees to other judges, other persons in the community, etcetera.” Tr. 2344; see also Tr. 2341 (district court states: “I didn’t want the jury to think that

⁴³ Neither the prosecution nor the district court can be faulted for the lack of more compelling evidence of a strong friendship. As one of the government’s attorneys noted at sentencing, the government interviewed more than 150 witnesses and, as far as she could recall, not one stated that Minor and Whitfield were friends. 9/7/07 Sent. Tr. 444 (2SR/110).

this was -- these were the only two, quote/unquote, loan guarantees. And I think the defense is entitled to elicit at some point there are other loan guarantees.”). After taking a break to consult with other defense counsel, Whitfield’s counsel decided not to explore that area of questioning. Tr. 2344.⁴⁴

Minor notes (Br. 62-64) that the district court did not permit John Walker, another Mississippi plaintiff’s attorney, to testify about a line of credit that Minor guaranteed for his law firm beginning in 1994. Minor argues that this testimony should have been admitted because the loan “was very similar to the ones in this case,” and showed that Minor guaranteed loans to friends without expecting anything in return. Minor Br. 63. Neither claim is true. The loan was to Walker’s law firm, not to Walker, and Minor did not repay it -- let alone repay it with cash and conduits. Tr. 4345-47, 2005Tr. 6539-46. Moreover, Walker was not just a friend. Since 1985 -- when Walker referred Minor a Jones Act case -- the two men had enjoyed an on-going business relationship, collaborating closely on numerous cases. Tr. 4340-4342 (Walker and Minor worked together from 1988 to 2000); 2005Tr. 6538. Minor therefore reasonably could have expected to benefit personally from this guarantee.

⁴⁴ Defendants apparently abandoned this line of inquiry because, under questioning from the Court, Carpenter agreed with the government’s claim that these loan guarantees were different from the guarantees to Whitfield and Teel in that they were monthly installment loans repaid by the individuals who took them out. Tr. 2337, 2341, 2343.

Moreover, even assuming arguendo that there was some similarity between the loan guarantees, Walker's testimony about this loan was properly excluded. As this Court has held, "evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." United States v. Dobbs, 506 F.2d 445, 447 (5th Cir. 1975). That principle applies here. That Minor earlier had guaranteed a bona fide loan to a law firm does not show that his sham loans to Whitfield and Teel lacked a corrupt purpose. United States v. Lambert, 580 F.2d 740, 746 (5th Cir. 1978) (defendant charged with purchasing stolen cars cannot introduce evidence of other legitimate purchases to negate knowledge that charged cars were stolen). And even if the evidence was relevant, it was inadmissible because it was likely to confuse or mislead the jury and would have resulted in a time consuming side show regarding an unrelated transaction. Id.; see Fed. R. Evid. 403.

Minor also suggests that the court's decision not to admit Walker's testimony was racially motivated. Br. 62-63. The district court did express concern that Minor might want to call Walker to testify because "the jury is majority black and Mr. Walker is also black." Tr. 4273-74. This comment was not a shot in the dark. Instead, it referenced the 2005 trial, where Minor had Walker testify to various irrelevant matters designed to curry favor with the jury. 2005Tr. 6536 (Walker testifies that Minor was a "generous supporter" and member of the Magnolia Bar

Association, an association of African American lawyers); id. at 6541 (Walker testifies that Minor supplied his private plane so Congressman Thompson and the Rev. Jesse Jackson could campaign). Moreover, notwithstanding its concern that Walker's testimony might be used in this manner, the district court permitted him to testify, albeit not about the irrelevant loan guarantee.

Finally, any error in failing to admit Walker's testimony was harmless because Andy Carpenter, the Executive Vice President of Peoples Bank, testified about this same loan, Tr. 2239, and Minor referenced Carpenter's testimony in his closing, noting "Andy Carpenter told you there was a lawyer here in Jackson he guaranteed a loan for, John Walker who testified for you. That's what Andy Carpenter told you. He told you he guaranteed loans for friends." Tr. 4929.

D. The District Court Did Not Abuse Its Discretion in Excluding Expert Opinions that Were Not Disclosed to the Prosecution in a Timely Manner.

Next, Minor contends (Br. 66-71) that the district court precluded him from introducing expert testimony regarding the correctness of legal rulings entered by Whitfield and Teel. See also Whitfield Br. 94 (adopting Minor's argument). As Minor acknowledges, the district court did not hold that such testimony was necessarily inadmissible, and indeed indicated that it might be appropriate. 10/4/06 Tr. 28-30 (2SR/71); Tr. 1945. Instead, the court made fact specific rulings regarding

the particular testimony Minor offered. In doing so, the district court did not abuse its discretion. General Electric Co. v. Joiner, 522 U.S. 136, 139 (1997) (discussing standard of review for decisions regarding admissibility of expert testimony).

Minor focuses on the exclusion of James George, a proposed defense expert regarding the Marks case. On May 1, 2006, Minor's counsel identified George as a Jones Act expert who might testify as to "the legal validity * * * of judicial rulings" by Whitfield in that case. D478 at 2 (MR1708). When the government objected to this barebones designation, D487 at 13-17 (MR2046-50), Minor filed a supplemental report from George. GRE/6. This report made clear that George's opinion regarding Whitfield's decision was principally based upon his analysis of "the history of deliberation by [the Mississippi Supreme Court] when the Marks case was on appeal." Id. at 4; see Tr. 4369-73.

At trial, the government argued that "expert" testimony inquiring into the deliberations of the Mississippi Supreme Court was inadmissible under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993), and Fed. R. Evid. 704(b). Tr. 4380. The district court agreed. Tr. 4380-83 ("This designation flies in the face of Daubert. It is an effort to provide mental impressions of the Supreme Court, which speaks through its opinion.").⁴⁵

⁴⁵ Although the district court did not allow George to opine on the deliberations of the Mississippi Supreme Court, it did allow that court's opinion to

Minor does not challenge this ruling on appeal. Instead, he contends that George should have been permitted to opine on other matters, including the soundness of Judge Whitfield's rulings, that were not addressed in his written report. Minor Br. 68; see Tr. 4488-4503 (defense proffer of George's opinions). The district court did not abuse its discretion in refusing to allow these undisclosed opinions. Because expert testimony regarding the reasonableness of Whitfield's Marks ruling (including his \$3.6 million damage award) would have required rebuttal experts, the government was entitled to notice of such testimony in advance of trial. See Fed. R. Crim. P. 16(b)(1)(C); Tr. 4513-14; see also Tr. 4381 ("This [report] is supposed to outline the parameters of this expected testimony."). Moreover, although Minor argued below that George's undisclosed opinions should be admissible as "rebuttal" of opinions allegedly expressed by government witnesses, Tr. 4503, the district court correctly rejected this claim, noting that George's opinions concerned "matters that appeared in the last trial and certainly were matters expected to be matters of contention here in this trial." Tr. 4514.

Minor also challenges (Br. 67) but does not brief the district court's decision to exclude the testimony of Alben Hopkins, a lawyer specializing in insurance claims

be entered into evidence. MRE/12. Contrary to Minor's claim (Br. 70 n.16), the record does not show that the Mississippi Supreme Court initially voted to sustain the entire Marks verdict before it learned of the investigation underlying this prosecution.

who had been hired by Minor & Associates as an expert witness in the Peoples Bank case. Tr. 4421. Minor's failure to brief this issue constitutes a waiver on appeal. Proctor & Gamble Co. v. Amway Corp., 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument.").

Moreover, even if this claim were reviewable, the district court did not abuse its discretion in excluding Hopkins' testimony. Minor argued below that Hopkins should be permitted to testify that, in granting summary judgment for Peoples Bank, Teel had "correctly" applied the existing law. Tr. 4452-59. After extensive arguments,⁴⁶ the court rejected this testimony, concluding that it (1) was not calculated to aid the jury in resolving the ultimate issue; (2) was inconsistent with Fed. R. Evid 704(b); (3) would ask the jury to reject the Mississippi Supreme Court decision in the Omnibank case; and (4) was based on dubious methodology. Tr. 4514.

Minor has good reason to omit any specific arguments about the exclusion of Hopkins' testimony. Minor's counsel sought to admit this testimony not simply to show that Teel's decision was reasonable under existing law, but that it was actually

⁴⁶ Given space constraints and in light of Minor's failure to brief the point, we do not attempt to summarize these lengthy arguments, but note that they are in the record at Tr. 4438-83.

“legally correct,” notwithstanding the contrary decision from the Mississippi Supreme Court. Tr. 4465, see id. at 4461-62, 4464. Allowing an expert witness to dispute the correctness of the Mississippi Supreme Court’s decision would have been improper and risked confusing the jury. Moreover, had Hopkins merely testified that Teel’s summary judgment decision was reasonable under existing law, his testimony would have added nothing new. Indeed, the district court observed below that the record already established that whether USF&G had violated its insurance contract with Peoples Bank was a close call, Tr. 4458-59, 4476-77, and defense counsel appeared to concede this point. Tr. 4459. Accordingly, expert testimony was not needed regarding this fact because it was undisputed.⁴⁷ See Fed. R. Evid. 702 (expert testimony may be admitted if it will “assist the trier of fact to understand the evidence or determine a fact in issue”) (emphasis added).

Minor also complains (Br. 69-70) that the district court prevented him from cross-examining government witnesses about the soundness of the Marks and Peoples Bank cases. The only specific event Minor identifies, however, occurred during the cross-examination of Patrick Buchanan, an attorney who represented USF&G. When Minor’s counsel attempted to question Buchanan about “the propriety” of Judge

⁴⁷ Minor did not proffer Hopkins to opine about the issues at the heart of the case against Teel, namely, (1) Teel’s refusal to stay the Peoples Bank case pending the Mississippi Supreme Court’s decision; and (2) Teel’s conduct of the settlement discussions.

Teel's ruling disclosing USF&G's work product, the district court sustained the government's objection that this questioning exceeded the scope of direct. Tr. 2799. There was nothing improper about this routine ruling, as Minor tacitly concedes by failing to argue the point.

Moreover, Minor's broader argument (Br. 69) that "government witnesses offered conclusory, unsupported testimony intended to undermine the results in Marks and People's Bank" is inaccurate. In fact, the government avoided eliciting testimony that criticized specific rulings by Whitfield and Teel, viewing the underlying "correctness" of their decisions to be irrelevant. See United States v. Manton, 107 F.2d 834, 845-46 (2d Cir. 1939) ("Judicial action, whether just or unjust, right or wrong, is not for sale[.]"). And, to the extent that the testimony of government witnesses nonetheless reflected poorly on Whitfield and Teel, the defendants were free to explore the point in cross-examination. See, e.g., Tr. 3207 (court rules that defense can question Salloum about his claim that the Marks award was "substantial" in relation to the facts).⁴⁸

⁴⁸ Minor falsely claim (Br. 69-70, citing 3/7/07 Tr. 3085-90) that the government told the jury the Marks judgment was "exorbitant" and was remitted due to "irregularities."

E. The District Court Did Not Abuse Its Discretion in Excluding Cumulative Evidence Regarding Campaign Contributions from Attorneys.

Minor contends (Br. 72-73) that he should have been allowed to submit evidence showing that in 1998, approximately 55% of contributions to candidates for Circuit and Chancery Court came from attorneys. Tr. 4512. See also Whitfield Br. 94 (adopting Minor's argument). This testimony was irrelevant because the government never argued (or even intimated) that it was unusual for attorneys to make campaign contribution to judges. Moreover, the record already contained evidence that the majority of such contributions came from lawyers. Tr. 2545 (government witness testifies on cross-examination that most contributions to judicial candidates come from attorneys). Accordingly, even if this evidence was somehow relevant, its exclusion did not prejudice Minor.

F. The District Court Did Not Abuse Its Discretion in Excluding Evidence that Minor Brought Other Cases in which He Did Not Attempt to Bribe Whitfield.

Minor contends (Br. 74-76) that he should have been permitted to introduce evidence that, during the time period of the conspiracies, he had other cases that he could have filed in Whitfield's court, but did not. See also Whitfield Br. 94 (adopting Minor's argument). The district court properly excluded such evidence because, as noted above, see supra at 97, proof that the defendant did not engage in criminal

conduct on other occasions is generally inadmissible. Tr. 1948; see Marrero, 904 F.2d at 260; see also D563 (MR2424) (government motion in limine). As one court noted (in a ruling affirmed by the Second Circuit), “[T]he defendants cannot hope to use a process of elimination to defend themselves by presenting evidence of their noncriminal activities. Such evidence would only be relevant if the indictment charged them with ceaseless criminal conduct.” United States v. Scarpa, 913 F.2d 993, 1010-11 (2d Cir. 1990); see also Dobbs, 506 F.2d at 447.

G. The District Court Did Not Abuse Its Discretion in Excluding Evidence of Minor’s Skills as a Lawyer.

The district court properly excluded evidence that Minor was an expert in, and received awards relating to, Jones Act and insurance litigation. Minor Br. 76-77; see also Whitfield Br. 94 (adopting Minor’s argument). Such evidence does not “rebut” proof of a corrupt motive, as bribery provides a convenient shortcut to success for the skilled and unskilled alike. In any event, the record was replete with evidence that Minor was a good attorney, see, e.g., Tr. 3073 (Minor is “a very skilled and competent trial lawyer”); Tr. 3124 (Minor had “a very successful practice”), and the jury was therefore able to consider this fact for what it was worth.

H. The District Court Did Not Abuse Its Discretion in Refusing to Admit Evidence of the Amount of Attorneys’ Fees Received by Richard Salloum.

Whitfield contends (Br. 57-62) that the district court violated his Sixth

Amendment right to confrontation by excluding evidence regarding the specific amount Richard Salloum had been paid for his services as Diamond Offshore's attorney. See also Minor Notice of Adoption of Issues filed 10/24/08 ("Minor Notice of Adoption") (adopting Whitfield's argument). This ruling did not implicate the Confrontation Clause.

During a lengthy cross-examination spanning 161 transcript pages, Salloum was asked whether USF&G was paying him for the time he spent testifying. Tr. 3154. Salloum responded that he did not know whether he was going to charge his client. Tr. 3155. Salloum also did not recall whether he had "kept [his] hours" during the 2005 trial. Id. Later, Salloum acknowledged that he charged Diamond Offshore for his legal services, and that, "the more work [he did], the more [he got] paid." Tr. 3252.

When defense counsel attempted to introduce evidence regarding Salloum's bills to Diamond Offshore, the district court sustained the government's objection, ruling that the existing testimony was sufficient and that the amount Salloum had been paid was not relevant. Tr. 3308. This ruling did not violate the Sixth Amendment. While the Confrontation Clause protects a defendant's right to cross-examine witnesses, Davis v. Alaska, 415 U.S. 308, 315 (1974), "this right is subject to the wide latitude of trial judges to impose reasonable limits." Bigby v. Dretke, 402

F.3d 551, 573 (5th Cir. 2005) (citing Davis, 415 U.S. at 315). In particular, the district court has “broad discretion” to “preclude repetitive and unduly harassing interrogation.” Ibid.

That discretion was properly exercised here. The district court permitted defense counsel to explore Salloum’s potential bias as Diamond Offshore’s paid counsel. But specific evidence about Salloum’s bills was not needed to make this point. Moreover, absent any evidence that the bills were extraordinary or improper, admission of such private information would have been “unduly harassing” to the witness. Cf. Bigby, 402 F.3d at 573 (no Confrontation Clause violation when judge permits witness to be questioned about a civil lawsuit but does not admit the actual pleadings into evidence).

I. The FBI 302 Memorandum Was Not Admissible as Impeachment of Radlauer and No One Requested that It Be Admitted.

Citing to page 3729 of the trial transcript, Whitfield contends (Br. 64) that the district court refused to admit into evidence an FBI 302 interview report that impeached Radlauer’s testimony at trial. See also Minor Notice of Adoption (adopting Whitfield’s argument). The cited page, however, contains neither a request for the admission of this report, nor the denial of such a request.

Moreover, an examination of this portion of the transcript reveals that no request to admit this document was ever made. Instead, the record reflects that near

the end of Radlauer’s cross-examination, Minor’s counsel asked the district court to review the FBI’s interview reports relating to Radlauer to see if they contained inconsistent statements or exculpatory evidence. Tr. 3706-08. The district court did so and determined that “there is nothing inconsistent in the 302.” Tr. 3715; see id. at 3724. Later, when Whitfield’s counsel sought to subpoena the FBI agent who interviewed Radlauer, the government agreed to provide the agent’s notes for in camera review. Tr. 4113, 4120, 4187, 4288. After reviewing the notes, the district court concluded that they were not inconsistent with Radlauer’s testimony and declined to disclose their substance. Tr. 4584.⁴⁹

Thus, the record reflects that the defendants never received or sought to admit the FBI 302. Moreover, an FBI 302 is inadmissible as impeachment evidence because it is not a prior statement of the witness but rather a statement of the FBI agent who prepared it. See 18 U.S.C. § 3500(b); Fed. R. Crim. P. 16(a)(2). We note, however, that defense counsel had Radlauer’s grand jury testimony and his testimony from the 2005 trial. They were also free to (and did) cross-examine Radlauer about his contacts with the FBI. Tr. 3625-91, 3693-97, 3699-3705, 3734-3745. Accordingly, the defense had ample impeachment material relating to Radlauer.

Whitfield also contends (Br. 63, 64) that Radlauer’s testimony at the 2007 trial

⁴⁹ The district court placed a copy of the FBI 302 memorandum and the accompanying notes in the record on appeal under seal.

differed in important respects from his testimony at the 2005 trial. If true, such a discrepancy would create an opportunity for effective impeachment, but not an appellate issue. In any event, Whitfield fails to back up his claim. For example, Whitfield suggests that in 2007 Radlauer testified that Minor told him to lie to the FBI, while in 2005 Radlauer testified that Minor “specifically told him not to lie to the FBI but to tell the truth.” Br. 63-64 (emphasis in original). In fact, Radlauer’s testimony about what Minor told him was nearly identical at both trials. Compare 2005Tr.2452, 2502 with Tr. 3598; see supra at 21-22.

J. The District Court Did Not Abuse Its Discretion in Excluding Double Hearsay Statements Contained in Drinkwater’s Pretrial Report.

Teel contends (Br. 24-34) that the district court erred in excluding from evidence a pretrial report prepared by Wayne Drinkwater, USF&G’s attorney. TRE/6. See also Minor Notice of Adoption (adopting Teel’s argument). USF&G produced this report pursuant to a subpoena notwithstanding the attorney-client privilege, Tr. 2878, and defense counsel argued that it was admissible under the “business records” exception to the hearsay rule. Tr. 2880, 2927; see Fed. R. Evid. 803(6). But because the report relied on information received from others, portions of it were double hearsay. Tr. 2881. In addition, the district court questioned whether Drinkwater’s opinions were actually a “business record” of USF&G, which

did not entirely adopt his advice. Tr. 2881-83, 2908-10, 2988. The district court therefore declined to admit the entire document into evidence. Tr. 2881, 2911, 2988.

Minor's counsel then sought to admit only portions of the document, and tendered a highlighted version identifying those portions.⁵⁰ Tr. 2928. After reviewing this document, the district court stated: "I'm going to stick to my earlier pronouncement. What you have highlighted has too many references to double hearsay." Tr. 2929. Cross-examination resumed with defense counsel questioning Drinkwater extensively about the matters covered in his memo. Tr. 2929-62, 2967-75; see also Tr. 3009-30. Later, the district court noted that its ruling excluding the document "did not prejudice the defense, * * *" because "the salient portions in that memo which are not hearsay items have been covered." Tr. 2987-89. No one disagreed.

In light of this background, Teel's complaint is baseless. Due to the double hearsay problem, the document was clearly not admissible in its entirety. Moreover, Teel cannot show that the selected portions of the memo Minor sought to admit were (1) not double hearsay; or (2) the same as the portions Teel highlights in his own brief. See Teel Br. 26-27. Although Teel now attempts to demonstrate that the double hearsay portions were actually admissible because both layers of hearsay were

⁵⁰ The record on appeal does not appear to contain Minor's highlighted version of this document.

covered by the business records exception, no one raised this argument below and thus Teel's efforts to brief this claim comes too late. See Teel Br. 29-30. Finally, as the district court made clear, no one was prejudiced by its ruling because defense counsel were able to bring out any non-hearsay aspects of the report in Drinkwater's cross-examination. Compare, e.g., Teel Br. 26 (Drinkwater informed USF&G in the report that it had a "40-50% chance of prevailing on the duty to defend issue") with Tr. 3011 (same).⁵¹

K. The District Court Did Not Abuse Its Discretion in Admitting Testimony that Whitfield Lied about the Peoples Bank Loans in His Divorce Proceeding.

Whitfield contends (Br. 68-73) that the district court abused its discretion in admitting evidence that he lied about the Peoples Bank loans in his divorce proceeding. Tr. 1944-45 (ruling); see also Tr. 1899-92 (arguments); see supra at 11-12. Contrary to Whitfield's claim, this evidence was relevant, admissible and not unduly prejudicial.

Proof of Whitfield's false testimony was relevant for two reasons. First, Whitfield's efforts to conceal the Peoples Bank loans was a central element in the

⁵¹ Teel's brief describes this memo inaccurately, partly to conceal the hearsay problem. Compare, e.g., Teel Br. 27 ("Mr. Drinkwater opined that Judge Teel is a fair-minded man with no particular bias against insurance companies") with TRE/3 at 3 ("A former law partner of Judge Teel's has advised me that Judge Teel is a fair-minded man * * * .").

scheme to defraud alleged in the Indictment, MRE/3 at 23, and was also alleged as an overt act in the conspiracy charge. Id. at 6. Second, Whitfield's attempt to conceal the \$100,000 loan (and to hide Minor's role in the \$40,000 loan) was proof of his guilty knowledge that his \$140,000 windfall was not a legitimate transaction. United States v. Strickland, 509 F.2d 273, 276-77 (5th Cir. 1975).

Whitfield suggests (Br. 70) that he was merely attempting to conceal these loans from his wife. The testimony suggests otherwise, however, as Whitfield acknowledged the \$40,000 loan but then lied to conceal that Minor was the guarantor. Tr. 3868-69. In any event, while Whitfield was free to argue this explanation to the jury, it did not render proof of his false testimony irrelevant.

Whitfield also suggests (Br. 70) that this testimony was inadmissible under the co-conspirator exception to the hearsay rule because it was not in furtherance of his conspiracy with Minor. See Fed. R. Evid. 801(d)(2)(E). Whether or not this is true, see Tr. 3855 (district court finds the statements were in furtherance of the conspiracy), Whitfield's statements were plainly admissible under Fed. R. Evid. 801(d)(2)(A) as an admission by a party-opponent. United States v. Ballard, 779 F.2d 287, 291 (5th Cir. 1986).

Finally, evidence regarding this false testimony was not unduly prejudicial. The government's proof was limited to Whitfield's misleading statements about the

\$40,000 loan and his false claim that he did not provide financing for his house. Tr. 3859-78. No effort was made to inquire into the details of the divorce itself. Indeed, it was Whitfield's counsel who delved into the divorce on cross examination, attempting to elicit information that Whitfield was forced to pay an excessive amount of alimony and child support. Tr. 3887.⁵²

L. The Government Did Not Present “Expert” Testimony from Salloum, Drinkwater or Radlauer.

Whitfield argues (Br. 66-68) that the court erred in allowing what he characterizes as “expert” testimony from Salloum, Drinkwater and Radlauer. See also Minor Notice of Adoption (adopting Whitfield's argument). The testimony elicited from all three was fact testimony, not expert testimony. Salloum and Drinkwater testified as to their own actions while litigating opposite Minor in the Peoples Bank and Marks cases. See supra at 18-19, 30-33.⁵³ Radlauer testified about how Minor lured him into paying off the Whitfield loan and how Whitfield then mailed him a false promissory note. See supra at 20-23. Whitfield fails to identify any specific testimony from these witnesses that qualifies as “opinion” testimony under Fed. R.

⁵² Whitfield complains (Br. 71) that this testimony was admitted without any “limiting instructions,” but fails to allege that he requested such instructions.

⁵³ Even if the admission of Drinkwater's testimony were somehow error, Whitfield has no standing to complain since this testimony did not concern the charges against him.

Evid. 702. Moreover, the thrust of Whitfield's argument is that the government did not disclose these witnesses' testimony in advance of trial. Whitfield can hardly claim surprise, however, as each of these witnesses testified during the 2005 trial. Thus, Whitfield had something far better than an expert report from these witnesses -- he had a transcript of their prior testimony, which he was free to use at trial.

M. The District Court Did Not Abuse Its Discretion in Admitting the Government's Summary Charts.

Whitfield contends (Br. 79-81) that the district court erred in admitting charts that summarized the financial transactions at the heart of this case. See GRE/4. See also Minor Notice of Adoption (adopting Whitfield's argument). Whitfield does not contend that these charts were inaccurate or that they were based on evidence outside the record. Instead, he contends that the charts, and the summary witness who introduced them, were "cumulative" and "bolstered" other evidence presented by the government. The district court was entitled to conclude otherwise. United States v. Hart, 295 F.3d 451, 454-55 (5th Cir. 2002) (trial court has discretion to determine whether illustrative charts may be used pursuant to Fed.R. Evid. 1006). Moreover, contrary to Whitfield's claim, this Court has not "condemned the use of summary charts." Instead, in Hart, 295 F.3d at 458-59, the Court held that a witness could not present evidence that had not previously been admitted or presented to the jury through a summary chart and a supporting witness. Nothing similar happened here.

IV. THIS COURT SHOULD REJECT WHITFIELD'S SPEEDY TRIAL ACT CLAIM.

Whitfield contends (Br. 39-44) that the Indictment should be dismissed pursuant to the Speedy Trial Act, 18 U.S.C. §§ 3161-74, on the ground that the 70-day period the Act permits between arraignment and trial expired between January 19, 2006 and June 1, 2006.⁵⁴ Whitfield acknowledges that: (1) most of this period is covered by a continuance to which he consented; (2) the case was complex; and (3) the district court had earlier determined that, given this complexity, the ends of justice warranted exclusion of time under the Act. Nonetheless, Whitfield contends that dismissal is required because in granting a continuance on February 10, 2006, the district court did not explicitly reiterate this earlier "ends of justice" analysis. For the reasons addressed below, this claim should be rejected.

A. Standard of Review.

Factual findings under the Speedy Trial Act are reviewed for clear error, and legal conclusions are reviewed de novo. United States v. Bieganowski, 313 F.3d 264, 281 (5th Cir. 2002).

⁵⁴ Minor purports to adopt this claim. See Minor Notice of Adoption. But because Minor failed to join in this claim pretrial, he cannot now raise the issue on appeal. United States v. Westbrook, 119 F.3d 1176, 1183-86 (5th Cir. 1997) (distinguishing Speedy Trial Act violations from other types of error that may be preserved on appeal by codefendant's objections below).

B. Whitfield's Barebones Motion Failed to Preserve His Speedy Trial Act Claim.

Whitfield's present claim rests on a motion he filed on January 10, 2007, shortly before trial began. That pleading contained no analysis, merely stating that Whitfield "continues to assert his Speedy Trial Rights." D551 at 3 (WR2160). Moreover, in a footnote, Whitfield noted that he "did not oppose and actually joined in the most recent continuance," but complained that "his speedy trial rights and his right to an expedited retrial were violated long before the Court granted the most resent [sic] continuance." Id. at n.1.

In failing to identify when and how the Act was allegedly violated, this barebones motion failed to give the district court sufficient notice of the grounds for Whitfield's complaint. See 18 U.S.C. § 3162(a)(2) ("The defendant shall have the burden of proof of supporting [a Speedy Trial Act] motion."). Moreover, had Whitfield provided the district court with adequate notice of his specific claim under the Speedy Trial Act, any defect in the record could have been corrected below. See Zedner v. United States, 547 U.S. 489, 507 (2006) ("ends of justice" findings must be placed on the record by the time the court rules on the motion to dismiss). Under these circumstances, this Court should decline to hear Whitfield's claim.

C. The Continuance Granted with Whitfield's Consent on February 10, 2006 Tolled the Speedy Trial Act Clock.

Even if the Court decides to consider Whitfield's claim, it should be denied. Whitfield's brief focuses only on alleged violations of the Act occurring after the Third Superseding Indictment was filed on December 6, 2005, and before Minor filed a motion to dismiss on June 1, 2006. Br. 40. Accordingly, in reviewing his claim, this Court need not consider any periods of delay occurring outside this time period. United States v. Tannehill, 49 F.3d 1049, 1051-52 (5th Cir. 1995).

Under 18 U.S.C. § 3161(c)(1), trial must commence within 70 days from the date of the defendant's arraignment. Whitfield acknowledges that, after his arraignment on the Third Superseding Indictment, a magistrate judge properly excluded 30 days for discovery. And because Minor and Whitfield were charged in the same indictment, the 30-day discovery period for Minor was also attributable to Whitfield. United States v. Franklin, 148 F.3d 451, 455 (5th Cir. 1998); 18 U.S.C. § 3161(h)(7). Minor was arraigned after Whitfield on January 6, 2006. D462. Accordingly, the speedy trial clock did not begin to run until February 5, 2006, the day Minor's own 30-day discovery period expired. 2SR/41 at 1, D464 (MR1621).⁵⁵

⁵⁵ None of the defendants objected to the exclusion of the thirty days set out in the discovery orders. See United States v. Parker, 505 F.3d 323, 328 (5th Cir. 2007), cert. denied, 128 S.Ct. 1323 (2008) (30 days in discovery order entered without objection from defendant was excludable time under Speedy Trial Act). See Whitfield Br. 43 (conceding that the thirty-day discovery period should be excluded).

On February 9, 2006, Minor filed a motion for a continuance, which the district court granted the next day, thereby stopping the Speedy Trial Act clock. D468 (MR1632). Minor's motion requested that the trial date be continued so that his two attorneys, who had just entered appearances in this "manifestly complex" case, could have adequate preparation time. D468 at 2 (MR1633). On February 10, 2006, the court held a hearing on the continuance motion, at which Minor's two new attorneys made their first appearances. 2SR/65 at 3-4.⁵⁶ Minor's attorneys asked that the trial date be moved from March to August, stating that they not only had scheduling conflicts, but also that they needed more time to prepare for trial. Id. at 9-10.

Whitfield and his counsel informed the court that they were "not going to oppose" Minor's request to set the case in August. Id. at 11. Having received Whitfield's acquiescence, the district judge granted Minor's motion, stating:

Counsel, I'm persuaded to grant the continuance. And my reasons are as follows: That I know Mr. Sweet, who is new to this case, has the two conflicts that he mentioned earlier because they are both in my court. These cases will start on March 27th and probably not conclude until sometime late April or May. And that would – this continuance, should I move it close to August, would give new counsel, Mr. Sweet and Mr. Pigott, June and July to prepare for the upcoming trial.

Id. at 13. The court then set the trial for August 14, 2006. Id. at 12-13.

⁵⁶ Defendant Minor's original trial counsel, Abbe Lowell, was not involved in the case following the Third Superseding Indictment. Id. at 6. Accordingly, the lower court was aware that Minor's new lawyers would be entering this complex case without having been involved in his defense previously.

Whitfield contends (Br. 42-43) that this continuance did not toll the Speedy Trial Act clock because the district court did not engage in an explicit “ends of justice” analysis. See 18 U.S.C. § 3161(h)(8)(A). An on-the-record balancing of interests was not required, however, because the district court had already made an earlier finding that applied to the February 10, 2006 continuance.

Before the first trial, on September 22, 2003, the district court initially determined that the case was complex and that the ends of justice required additional preparation time:

Before the Court is a Joint Motion for Continuance filed by all Defendants save Defendant Whitfield, * * * . The Court grants the motion. This lawsuit features the Government’s prosecution of five separate Defendants on complex accusations allegedly structured on numerous documents. The parties have advised the Court that the Government intends to provide the defense with over 47 boxes of documents totaling some 45 thousand pages. The Defendants submit that an October trial setting will compromise their ability to prepare adequately for trial; that is to review all these documents, to interview and prepare witnesses all during the time of researching the applicable law relative to the dispositive motions and motions in limine. Therefore, the Court grants the Joint Motion for Continuance and sets the trial date for March 1, 2004. Inasmuch as the Defendants have requested this trial date then, of course, this period is excluded from the Speedy Trial Act. The Court has considered the objection of Mrs. Diaz who has requested and urged an earlier trial date. Although the Court is mindful of her circumstance, the Court finds, nonetheless, that the March 1, 2004, trial date best comports with the overall with the overall [sic] interest of justice. Defendant Whitfield has moved for a speedy trial, severance, and change of venue. This Court denies the Motion for a Speedy Trial wherein Mr. Whitfield asked this Court to allow him to be tried in October, 2003.

2SR/2 at 63-64.

A district court's finding that a case is complex "constitutes a sufficient ground to satisfy the statutory requirements for a continuance," United States v. Edelkind, 525 F.3d 388, 397 (5th Cir.), cert. denied, 129 S. Ct. 246 (2008), and can be reversed only if shown to be clear error. Id. Whitfield does not contend that this finding was erroneous. Indeed, he acknowledges the complexity of this case. Whitfield Br. 1 (comparing this case to the prosecution of Enron CEO Jeffrey Skilling); see also D30 (WR117) (Whitfield motion describing complexity of the case).

Whitfield contends (Br. 42-43), however, that this earlier finding did not carry forward to the retrial because discovery and motions practice was already complete. This argument ignores the fact that Minor had just acquired two new attorneys who were unfamiliar with the case. From the perspective of these attorneys, this case was just as complex after a three month trial as it had been in September 2003. Accordingly, the district court's earlier ends of justice finding applied to the February 2006 continuance. See United States v. Chalkias, 971 F.2d 1206, 1211 (6th Cir. 1992) (continuance justified by district court's findings that case was complex, numerous defendants were involved, and counsel for one defendant had been retained only one week before scheduled trial date) (cited with approval in Bieganowski, 313 F.3d at 282 n.15).

D. Whitfield's Consent Precludes Him from Challenging the February 10, 2006 Continuance.

While acknowledging his consent to the February 10, 2006 continuance, Whitfield suggests (Br. 41) that he cannot waive his Speedy Trial Act rights, “even by consenting to a continuance.” In Zedner v. United States, 547 U.S. 489, 492 (2006), the Supreme Court concluded that a “blanket prospective waiver” of rights under the Act was ineffective. But the Court also suggested that the defendant might be estopped from challenging a continuance he had requested if the grounds for his request would in fact justify an exclusion under the Act. Id. at 505-06. Here, although Whitfield did not request the continuance, he consented to a continuance that was clearly justified, given the undisputed complexity of the case and Minor’s decision to hire new counsel. Under these circumstances, Whitfield should not be permitted to rely on the resulting delay as a basis for dismissal. See United States v. Willis, 958 F.2d 60, 64 (5th Cir. 1992) (“the defendant should not be allowed to argue one legal theory or characterization of facts to obtain a continuance and then argue that the district court’s ruling was erroneous to seek dismissal under the Act”); see also United States v. Pringle, 751 F.2d 419, 434 (1st Cir. 1984) (“[D]efendants ought not to be able to claim relief on the basis of delays which they themselves deliberately caused.”) (quoting United States v. Kington, 875 F.2d 1091, 1107 (5th Cir. 1989)).

E. Delay Attributable to Minor's Inpatient Treatment for Substance Abuse Is also Excludable under the Speedy Trial Act.

The period from February 5, 2006 to June 1, 2006 does not contain 70 non-excludable days for another reason. Beginning April 14, 2006 and continuing past June 1, 2006, Minor was confined as an inpatient undergoing substance abuse treatment and psychological testing at a residential treatment facility known as "COPAC" in Brandon, Mississippi. D475.⁵⁷ This period of delay was excludable under 18 U.S.C. § 3161(h)(3)(A), which applies to delay resulting from the absence or unavailability of the defendant. We further note that when, on June 29, 2006, Minor's counsel requested another continuance, Whitfield's counsel informed the district court: "We don't object and we don't want to do anything to impede what's going on with respect to Mr. Minor's present situation." 2SR/67 at 45.

V. THE CHARGES AGAINST TEEL AND WHITFIELD WERE NOT MISJOINED AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING TEEL'S MOTION TO SEVER.

Teel's principal claim on appeal (Br. 12-24) is that the district court erred in denying his motions to sever. See D316 (TR450-61), D323 (TR463-73), D407 (TR595); D517 (TR764-65), D518 (TR 776-85); 10/4/06 Tr. 66 (2SR/71). See also

⁵⁷ Minor's confinement was the result of a petition to revoke his pretrial release filed on March 21, 2006 and decided on April 14, 2006, which resulted in another approximately three weeks of excludable time. 18 U.S.C. § 3161(h)(1)(F).

Minor Notice of Adoption (adopting Teel’s argument); Whitfield Br. 3-4 n.4 (same). Teel contends that the charges against him were misjoined with the charges against Whitfield, see Fed. R. Crim. P. 8(b), and that this joinder was prejudicial. This Court reviews a claim of misjoinder de novo, United States v. Blake, 941 F.2d 334, 337 (5th Cir. 1991), and the denial of a severance motion for abuse of discretion, a standard that is “exceedingly deferential” in this context. United States v. Tarango, 396 F.2d 666, 672 (5th Cir. 2005).

Under Fed. R. Crim. P. 8(b), two or more defendants may be charged in the same indictment if “they are alleged to have participated in the same act or transaction or in the same series of acts or transactions, constituting an offense or offenses.” “The critical inquiry is whether a ‘substantial identity of facts and participants’ exists.” United States v. Chavis, 772 F.2d 100, 111 (5th Cir. 1985).

Teel devotes much energy to arguing that Count One, which charged a conspiracy between Minor and Whitfield, and Count Two, which charged a conspiracy between Minor and Teel, “completely differ in details” and thus were not properly joined. Teel Br. 13-14, 15-17. Although we disagree,⁵⁸ this Court need not

⁵⁸ Teel’s conspiracy with Minor was part of the “same series of acts or transactions” as Whitfield’s conspiracy with Minor. The two bribery schemes occurred during the same time period and involved similar loans, loan payments and schemes to retire the loans through intermediaries. In addition, the two conspiracies involved overlapping evidence. See, e.g., supra at 24 (Minor makes payments on loans to both men during same trip to bank).

decide this issue because the Indictment also contained a substantive RICO count. This RICO count alleged that Minor conducted the affairs of his law office through a pattern of racketeering activity, which included both the bribery of Whitfield and the bribery of Teel. MRE/3 at 16, 17-22. The RICO charge therefore established a connection between all of the defendants, making joinder appropriate. United States v. Welch, 656 F.2d 1039, 1049-53 (5th Cir. 1981); see United States v. Houle, 237 F.3d 71, 75 (1st Cir. 2001); United States v. Irizarry, 341 F.3d 273, 290 (3d Cir. 2003).

Teel also argues that the district court abused its discretion in failing to sever his trial. See Fed. R. Crim. P. 14(a) (court “may” sever defendant’s trial “[i]f the joinder of * * * defendants in an indictment * * * appears to prejudice a defendant”). “There is a preference in the federal system for joint trials of defendants who are indicted together.” Zafiro v. United States, 506 U.S. 534, 537 (1993). Moreover, where two defendants were properly joined in one indictment, severance is warranted “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” Id. at 539; see also United States v. Simmons, 374 F.3d 313, 317 (5th Cir. 2004) (“To demonstrate reversible error, * * * a defendant must show ‘clear, specific and compelling prejudice that resulted in an unfair trial.’”).

Teel argues first that a joint trial posed an unacceptable “danger[] for transference of guilt” to him from the Whitfield scheme. Teel Br. 19 (quoting Kotteakos v. United States, 328 U.S. 750, 774 (1946)). He contends that this danger existed because the Minor/Whitfield scheme involved (1) more money; (2) loans unrelated to a political campaign; and (3) the damaging testimony from Radlauer about Minor’s and Whitfield’s coverup attempt. Teel Br. 20-21. Although the evidence relating to the two schemes was not identical, there was no serious imbalance of proof regarding Minor’s bribery of Whitfield and Teel. Moreover, as Teel tacitly acknowledges (Br. 21), the “spillover effect” of evidence regarding a co-defendant is rarely sufficient to constitute “substantial prejudice,” especially where, as here, the court provides a limiting instruction. Tr. 4790; see United States v. Mitchell, 484 F.3d 762, 775-76 (5th Cir. 2007); United States v. Bieganowski, 313 F.3d at 287 (“A spillover effect, by itself, is an insufficient predicate for a motion to sever.”).⁵⁹

Teel also argues (Br. 21-24) that the district court should have granted a severance because his son, a prison guard, had been charged with murdering an

⁵⁹ Although Teel cites United States v. Tarango, 396 F.3d 666 (5th Cir. 2005), that case is inapposite because it involved (1) the trial court’s discretionary decision to grant a new trial; (2) a “profound disparity of evidence,” id. at 673 n.11; and (3) a far more culpable co-defendant who absconded, leaving his office manager to be tried alongside an “empty chair.” Id. at 674.

inmate, and Whitfield and his defense attorney were representing the victim's family in civil litigation. According to Teel (Br. 21-23), this circumstance "made it practically impossible for [him] to effectively participate in the defense of the claims against him," especially since, in his view, the two men pursued the civil case in an "aggressive, ruthless and public manner." Teel Br. 21-23.

Teel fails, however, to demonstrate any actual prejudice resulting from this circumstance. In particular, Teel does not identify a single instance in which animosity relating to this civil lawsuit impaired his defense. Indeed, our own review of the transcript uncovered no obvious evidence of hostility between Teel, Whitfield or their respective counsel. To the contrary, the transcript suggests that the defendants all cooperated in presenting a joint defense. Moreover, assuming arguendo that hostility did exist, it would not justify a severance. United States v. Boyd, 610 F.2d 521, 526 (8th Cir. 1979) ("The mere fact that there is hostility among the defendants * * * is not grounds to require separate trials."); see also United States v. DeVeu, 734 F.2d 1023, 1027-28 (5th Cir. 1984) (claim that co-defendant and his lawyer "displayed such an antagonistic attitude toward [the defendant] at trial that he felt he was being attacked by a second prosecution team" did not justify a severance). Accordingly, the district court did not abuse its discretion in denying Teel's severance motions.

VI. THE RECORD OF THE 2005 TRIAL DOES NOT DEMONSTRATE ANY ACTUAL BIAS ON THE PART OF THE DISTRICT COURT.

Minor (Br. 22-27), Whitfield (69-72) and Teel (Br. 25-30) all complain that the 2007 trial differed in significant respects from the 2005 trial. As a legal matter this argument leaves something to be desired. A retrial need not be a carbon copy of the original proceeding, nor can criminal defendants estop the district court from reconsidering prior rulings at a new trial. Defendants do not debate this point. Instead, they apparently ask this Court to infer from the alleged differences in the two trials that the district court harbored actual bias towards them and thus deliberately sabotaged their retrial. Minor Br. 114-19. This Court should reject this baseless attack on the integrity of the district court. In fact, as we demonstrate below, the evidence at the two proceedings was largely the same, and none of the minor differences that do exist justifies an inference of bias or impropriety.

A. Evidence of “Criminal Intent.”

Minor alleges (Br. 15-16, 23) that he was permitted to rebut the government’s evidence of “criminal intent” in 2005 while the district court excluded the same evidence in 2007. But Minor actually identifies only one specific instance where evidence introduced in 2005 was later excluded, namely, Walker’s testimony about the loan guarantee for his law firm. See supra at 95, 98. The difference in this one ruling can be explained by the fact that, by 2007, the court had heard Walker’s actual

testimony and could better evaluate whether this evidence was relevant.⁶⁰

B. Evidence Regarding the Peoples Bank and Marks Cases.

Minor devotes three pages of this brief (Br. 16-18) to describing the 2005 evidence regarding the Peoples Bank and Marks cases. But precisely the same discussion could have been prepared using the 2007 trial transcript. Minor then contends that in 2007, the district court “prevented [him] from offering evidence and fully cross-examining witnesses” on the facts underlying these cases. Minor supports this claim (Br. 22) with only one citation to five pages from Salloum’s cross-examination. The transcript pages cited merely show that the district court sustained objections to argumentative and irrelevant questions from Whitfield’s counsel.⁶¹ In fact, as we have already noted above, the cross-examination of Salloum was extensive, and counsel were permitted to examine him about the merits of Marks’

⁶⁰ Minor cites (Br. 15-16) to the 2005 testimony of a Peoples Bank employee who stated that she “would assume” Minor had a close relationship with Whitfield based on the loan guarantee. 2005Tr. 2369. In 2007, Minor did not bother to elicit this unhelpful remark. Tr. 2428-47. Minor also cites to Miller’s 2005 testimony that Minor supported Whitfield’s campaigns. 2005Tr. 2812-14. Miller gave the same testimony in 2007. Tr. 4173-74. Finally, Minor cites to testimony in 2005 from bank employees regarding loan guarantees to others. 2005Tr 2397, 2241-43. Defendants decided not to elicit such testimony in 2007 after the district court ruled that they could do so. See supra at 95, 96. In addition, Minor reiterates his claims regarding certain evidence excluded in 2007 (Br. 23), but then fails to show that any of this evidence was offered in 2005.

⁶¹ We include these pages in our record excerpts so that this Court can judge the district court’s rulings for itself. GRE/3.

claim, Judge Whitfield's decision, and the opinion of the Mississippi Supreme Court.

See supra at 103, 105-07.⁶²

C. Evidence Relating to Whitfield's Divorce.

Minor (Br. 24) and Whitfield (Br. 68-73) both contend that the district judge excluded evidence from Whitfield's divorce proceeding in 2005 but then "changed his mind" and admitted such evidence in 2007. Whitfield Br. 70. In fact, the government offered different evidence at the two proceedings. In 2005, the government asked that the jury be allowed to infer that Whitfield had concealed the \$100,000 loan because it was not listed as an asset on the divorce decree. 2005Tr. 5536. The district court was not "comfortable" with permitting this inference without knowing what Whitfield was asked at the hearing. Id. at 5537. But by 2007, the government had located the hearing transcript itself, which the court correctly admitted as direct proof of Whitfield's false testimony. See supra at 11-12, 111-12.⁶³

⁶² Minor also claims (Br. 22) that he was not permitted in 2007 to introduce expert testimony on the soundness of the Marks verdict but fails to note that no such testimony was offered in 2005, which also belies its purported significance.

⁶³ Minor complains (Br. 23-24) that in 2005 the earlier prosecution of Teel was referred to as a "serious" matter while in 2007 it was revealed to be a criminal case. He fails, however, to acknowledge or address the district court's reasoning, which included (1) that in 2007 the Indictment referenced this proceeding, which "plac[ed] it on a different footing;" and (2) the 2005 ruling had required "the witnesses * * * to dance around it and figure out how to express it in terms that would not offend my ruling." Tr. 1940. Minor also contends (Br. 23) that in 2005 the district court prohibited the government from going into the details of this case, but then

Accordingly, the district court did not “change [its] mind” but rather reasonably distinguished between two different types of proof.

D. Drinkwater’s Litigation Report.

Teel notes (Br. 25-26) that the district court admitted Drinkwater’s litigation report in 2005, but excluded it in 2007. But this document was admitted in 2005 only with “limitations” that precluded admission of the double hearsay portions. Tr. 2928 (“It says admitted with limitations in ‘05. And I had the same concerns last time.”). Since the district court permitted counsel to elicit in 2007 all the relevant portions of the report that did not contain double hearsay, the net effect of its rulings was the same. See supra at 109-11.

E. Evidence Relating to “State Ethics Rules.”

Minor contends (Br. 25) that the district court “changed its ruling on the admission of state ethics rules.” But once again, the rulings that he cites involved different evidence. In 2005, the district court excluded proof of several specific canons of the Mississippi judicial code relevant to the case against Justice Diaz. 2005Tr. 3116. In 2007, the district court decided it was “content to stick with [its] prior ruling,” and thus required the government to modify the Indictment to delete any references to the judicial code. Tr. 1936. At the same time, the district court

strangely cites to a portion of the 2007 transcript.

permitted the government to admit evidence regarding other matters, including the duty to file statements of economic interest, that were central to the mail fraud theory. This 2007 ruling was not inconsistent with the district court's actions in 2005. Minor manages to create the impression that these two rulings somehow contradict one another only by lumping them together under the general heading of "state ethics rules."

F. The 2005 Jury Instructions.

Minor argues most strenuously (Br. 26-27) that the 2005 and 2007 jury instructions differed. The fact that these instructions are not identical is hardly surprising given that jury instructions are the end result of a collaborative process. Indeed, in 2007, the district court noted, in reference to the mail and wire fraud instructions, that "we had reached some consensus last time I tried this case. And we don't have the same consensus here. And so I'm going to rewrite an instruction on bribery." Tr. 4671. Moreover, Minor's comparative "analysis" of these instructions is riddled with errors and distortions. See Minor Br. Add. A. For example, in support of his claim that the 2005 "bribery" instructions contained a "quid pro quo" requirement, Minor cites to a remark the district court made to one potential juror during the 2005 voir dire, falsely representing it to be a jury instruction. See Minor Addendum A at 1 (citing 5/13/05 Tr. at 747, D682). Likewise, Minor compares

language from the 2005 RICO instructions to the 2007 mail fraud instruction, a misleading tactic that gets him nowhere since the instructions are consistent. Ibid. (citing 8/3/05 Tr. at 7678, D720) (RICO instruction defining bribery under Mississippi law as the “intent to influence the judge”).

Most serious of all, however, is Minor’s claim that in 2007, the district court gave “no instruction” on the defense theory of the case. In fact, as we noted above, the district court did instruct the jury on the defense theory, noting that no deprivation of honest services occurred unless Minor corruptly intended to cause a judge to decide a case based on things of value he provided, rather than his own “honest view of the law and the facts.” See supra at 56. Although this instruction did not specifically state (as did the 2005 instructions), that “a gift or favor bestowed on a judge solely out of friendship [or] to promote good will” was not a bribe, 2005Tr. 7711, that concept was fully covered by the instruction given, as we explain above. See supra at 56, 67-68.⁶⁴

⁶⁴ Nor did the 2005 instructions contain the idea, for which Minor argued so hard in 2007, that the specific benefit he intended had to be identified at the time of the bribe. See MRE/7 at 7711 (act is not a bribe “unless it is intended at the time it is given * * * to effect a specific act the judge officially will take in a case before him or may take in a case that may be brought before him”).

We note that Minor does identify one significant difference between the 2005 and 2007 instructions. In 2005, the jury was instructed that a finding of guilt required proof of “specific criminal intent,” i.e., an intent to “violat[e] the law.” MRE/7 at 7722 (“A person’s good faith belief that his actions do not violate any federal law is a complete defense.”). We agree that this instruction was highly favorable to the defense. Indeed, it might possibly account for the 2005 mistrial. But the instruction was simply wrong. In fact, none of the offenses charged require this kind of “specific intent.” United States v. Paradies, 98 F.3d 1266, 1284 (11th Cir. 1996) (mail fraud); United States v. Baker, 63 F.3d 1478, 1492-93 (9th Cir. 1995) (RICO). The failure to give an incorrect instruction on the critical issue of mens rea is neither error nor proof of judicial bias.

VII. THE DISTRICT COURT’S DECISION TO EXCLUDE FOR CAUSE A JUROR WHO REPEATEDLY STATED THAT SHE COULD NOT SIT IN JUDGMENT OF OTHERS DOES NOT MERIT REVERSAL.

Minor challenges (Br. 87-90) the district court’s decision to exclude for cause a prospective juror who stated that her belief that she should not sit in judgment of others would affect her ability to decide the case. See also Teel Br. 4 (adopting Minor’s argument); Whitfield Br. 3 n.3 (same). Because the question of a juror’s impartiality “is essentially one of credibility, and therefore largely one of demeanor,” the trial court’s resolution of this question is entitled to “special deference” on appeal.

Patton v. Yount, 467 U.S. 1025, 1038 (1984); Wainwright v. Witt, 469 U.S. 412, 426 (1985) (“deference must be paid to the trial judge who sees and hears the juror”).

When questioned by government counsel, Juror 81 repeatedly stated that she believed that she should not sit in judgment of other people and that this belief would affect her ability to serve:

Q. Okay, Do you think it would affect your ability to be a good juror in this case?

A. I feel that it would. I wouldn't want to be the one to hold up, you know, whatever decision would be.

Q. Yeah, Because you feel like your feelings that you shouldn't judge people --

A. Yes, Ma'am.

Q. – would affect your ability to deliberate and reach a verdict?

A. Yes, Ma'am.

Q. And you feel pretty strongly about that?

A. Yes, Ma'am.

GRE/2 at 1380-81. Defense counsel then tried to establish that Juror 81's religion did not “require[] or demand[]” that she take this position. Id. at 1382. Juror 81 responded: “That’s what I believe, I mean, the Bible says, you know, judge not.” Ibid. Defense counsel then asked her whether, if selected, Juror 81 could “find the facts” and “follow the law,” to which she replied, “Well, I guess I would have to.”

Tr. 1383. When asked if it would help her to focus on whether the defendant's conduct (rather than the defendant) was "guilty or not guilty," the juror replied "I don't believe so." Ibid.

Given these statements, the district court properly excused the juror. Juror 81 clearly stated that her beliefs would affect her ability to deliberate and reach a verdict. Moreover, while she grudgingly acknowledged that she would "find the facts" and "follow the law," if forced to do so, it is not clear whether she understood that "find[ing] the facts" meant pronouncing judgment. Indeed, when the question was framed in terms of finding conduct "guilty" or "not guilty," Juror 81 reasserted her position. Under these circumstances, the district court was entitled to excuse her. See United States v. Pappas, 639 F.2d 1, 4 (1st Cir. 1981) (district court properly excused juror who stated that he could not "serve in the judgment of his fellow man"); see also United States v. Lawrence, 618 F.2d 986, 988 (2d Cir. 1980) (criticizing judge who failed to excuse juror after she stated that she could not pronounce judgment on another individual because of religious scruples).

In any event, as Minor tacitly acknowledges (Br. 89), even if the district court erred in excluding this potential juror, reversal of his conviction is not warranted. Instead, "[a]s a general rule, a trial court's erroneous venire rulings do not constitute reversible constitutional error 'so long as the jury that sits is impartial.'" Jones v.

Dretke, 375 F.3d 352, 355 (5th Cir. 2004) (quoting United States v. Martinez-Salazar, 528 U.S. 304, 313 (2000)); accord United States v. Prati, 861 F.2d 82, 87 (5th Cir. 1988). Accordingly, even if erroneous, the exclusion of Juror 81 does not warrant a new trial. See United States v. Joseph, 892 F.2d 118, 124 (D.C. Cir. 1989) (arguably improper exclusion of a juror who said that, given a conflict between the Lord and the judge, the Lord would prevail, does not provide any basis for disturbing a guilty verdict).

Minor attempts to avoid this result by accusing the district court of “purposeful discrimination” based on Juror 81's “religious belief,” and “unmoored by any concern for [her] impartiality.” Br. 88-89. The record refutes this claim. Juror 81 was excluded because she indicated that her beliefs could prevent her from reaching a verdict. Moreover, the colloquy between the district court and Juror 81 reveals no animus towards her religion, nor any belief by the district court that adherents to her religion are unfit to serve. Accordingly, Minor’s claim of “purposeful” religious discrimination is baseless.⁶⁵

⁶⁵ Minor contends (Br. 88) that he argued below that the appropriate test was whether the juror could follow the law, and that the district court disagreed. In fact, the district court only rejected Minor’s claim that the juror could not be excused unless her “organized religion” (as opposed to her “personal religion”) forbade jury service. It was this argument to which the district court responded “that’s not the test.” Tr. 1385.

VIII. THE DISTRICT COURT DID NOT ERR IN DENYING WHITFIELD'S UNTIMELY MOTION TO DISMISS THE INDICTMENT.

During trial, Whitfield moved to dismiss the Indictment on the ground that the government had allegedly presented perjured testimony to the grand jury about the “Fiat” he signed at the start of the Marks case. D569 (WR2180). Whitfield then renewed this claim in his motion for a judgment of acquittal or a new trial. D575 (WR2204); see D590 (WR2273). This motion was untimely and lacked merit in any event. See Whitfield Br. 44-52; see also Minor Notice of Adoption (adopting Whitfield’s argument).

A. Background.

Whitfield’s motion to dismiss relied on Paragraph 14 of the Indictment which alleged, as an overt act, that the “Fiat” signed by Whitfield on February 10, 1999, “authorized the immediate payment of money for medical expenses” to Marks. MRE/3 at 7. This was incorrect. In fact, although the underlying motion filed by Minor & Associates referred to Marks’ need “to obtain proper and adequate medical care and rehabilitation,” GRE/5, the accompanying “Fiat” did not require the payment of medical expenses, but rather set a hearing date for May 3, 1999. WRE/8. No party mentioned this discrepancy before trial. Moreover, although the defendants were given the grand jury testimony of FBI Special Agent Steve Callender many weeks before trial, Whitfield never alleged that Callender’s testimony about the “Fiat” was

false, let alone perjurious. D590 at 6 (WR2278).

During cross-examination of Salloum, Whitfield's counsel questioned him about the meaning of the "Fiat," and Salloum freely and repeatedly acknowledged that it did not authorize the immediate payment of medical expenses. Tr. 3248; id. at 3250 (Salloum states that the "Fiat" "says something different" than the Indictment); see also id. at 3302, 3152 (Salloum testifies that the purpose of the motion is to obtain a hearing). Eight days later, Whitfield moved to dismiss the Indictment for prosecutorial misconduct, alleging that Callender's testimony before the grand jury about the "Fiat" "was "completely false." D569 at 2 (WR2181); see also Tr. 4114-18, 4601-03, 4611-13, 4638.

B. Whitfield's Motion to Dismiss Was Untimely.

This Court should not consider Whitfield's attack on the Indictment because his mid-trial motion to dismiss was untimely. Fed. R. Crim. P. 12(b)(3)(B) provides that "a motion alleging a defect in the indictment or information" "must be raised before trial." Challenges to an indictment not raised in compliance with this rule are deemed waived. United States v. Cathey, 591 F.2d 268, 271 n.1 (5th Cir. 1971). Here, Whitfield's claim that the Indictment was obtained through the use of perjured testimony "allege[s] a defect in the indictment," and thus was required to be brought before trial.

In his arguments below, Whitfield contended that his motion was timely because it merely “supplemented” an earlier motion. Tr. 4618. But this earlier motion sought to dismiss a prior indictment on different grounds and was denied before the return of the Third Superseding Indictment. Moreover, the Third Superseding Indictment was the only indictment to contain the incorrect language about the “Fiat.” D590 at 7 (WR2279). Whitfield also argued that his motion was timely because he could not challenge the Indictment’s factual allegation regarding the “Fiat” until after Salloum testified that it was false. D591 at 4 (2288). But Whitfield’s motion to dismiss was based on the claim that the government presented false testimony before the grand jury, not that the Indictment contained a statement that the government’s trial evidence established was incorrect.⁶⁶ Because Whitfield had Callender’s grand jury testimony well in advance of trial, he had every opportunity to raise this claim in a timely manner, particularly in light of the fact that, as a judge and the author of the “Fiat,” Whitfield was fully aware of the contents and legal effect of the “Fiat” long before Salloum testified at trial.

C. The Government Did Not Present False Testimony to the Grand Jury.

In any event, Callender’s testimony was not false, let alone perjured. In

⁶⁶ Moreover, a defendant cannot move to dismiss an indictment during trial simply because it contains an allegation that, in light of the evidence, turns out to be incorrect.

response to a question about what his investigation had revealed about getting the “Fiat” signed by Judge Whitfield, Callender informed the grand jury that “the fiat was presented to Judge Whitfield in order to get payment for medical expenses.” Whitfield Br. 46. Callender did not purport to tell the jury what the “Fiat” accomplished. Instead, his remark addressed why it was presented to Whitfield. Callender’s explanation was consistent with the accompanying motion, which stated that “the issues concerning the Plaintiffs’ rights and the Defendant’s obligations are of great importance to the Plaintiffs as it potentially affects the Plaintiffs’ ability to obtain proper and adequate medical care and rehabilitation for his on-the-job injury.” GRE/5 at 1. This language certainly seemed to suggest that the attached “Fiat” had something to do with obtaining adequate medical care and rehabilitation. Indeed, Minor argued below that this was the motion’s purpose. Tr. 3151-52, 3177-78. Accordingly, Callender’s grand jury testimony was not false.

D. The Indictment’s Error about the Legal Effect of the “Fiat” Did Not Prejudice Whitfield.

Although the Indictment did contain an error of fact, this error proved to be a net benefit to Whitfield at trial. Any harm that might have arisen from the error was cured by Salloum’s unequivocal (and uncontradicted) testimony that the “Fiat” did not award the payment of medical expenses. Moreover, Whitfield made extensive use of the government’s error in closing arguments, telling the jury that the “government

wanted to believe” that the “Fiat” awarded medical expenses when “it says nothing like that,” Tr. 4883; arguing that the “Fiat” “disprove[d] the government’s case,” Tr. 4900; noting that the Indictment contained a “false” overt act, Tr. 4901; and finally arguing that “if [he] were not a government employee, [the government’s trial attorney] would be fired.” Tr. 4905; see ibid. (“[I]f this [indictment] were a test in school, we would give them an F.”); see also Tr. 3298 (Whitfield’s counsel asks Salloum: “Don’t you think that if you’re going to * * * put an allegation in the indictment, that you should -- at least common sense tells you to read the fiat or order you’re talking about before you put it in the indictment?”). In short, to the extent this error mattered at trial, it assisted the defense by permitting it to argue that the prosecution had been mishandled.

IX. THERE WAS NO “MANIFEST MISCARRIAGE OF JUSTICE” WITH REGARD TO THE GOVERNMENT’S PROOF THAT THE MAILINGS ALLEGED IN COUNTS FOUR, FIVE AND SIX WERE FORESEEABLE TO WHITFIELD.

Citing to United States v. McDowell, 498 F.3d 308 (5th Cir. 2007), Whitfield contends (Br. 84-89) that the evidence was insufficient to show that “he knew, much less intended, that the U.S. mails would be used to further a scheme to defraud any one.” Id. at 85. Because Whitfield failed to raise this basis for an acquittal at trial, it may be reviewed “only under the extremely narrow manifest-miscarriage-of-justice

standard.” McDowell, 498 F.3d at 313.⁶⁷

Under any standard of review, Whitfield’s claim fails. Contrary to Whitfield’s claim (Br. 85), a conviction under the mail fraud statutes does not require proof that he “knew the mails were to be used and that he had an active role in using the mail.” Instead, the mailing requirement is satisfied as long as use of the mails “can reasonably be foreseen, even though not actually intended.” United States v. Shaid, 730 F.2d 225, 229 (5th Cir. 1984); accord Fifth Cir. Pattern Jury Instr. 2.59 (defendant “causes” mails to be used “where such use can reasonably be foreseen, even though the defendant did not intend or request the mails to be used”).

That standard is easily satisfied here. The scheme alleged and proved at trial involved Whitfield accepting bribes with an intent to be influenced in connection with cases of interest to Minor. Having entered into such a scheme, it was foreseeable to Whitfield (or so the jury could find) that documents relating to Minor’s cases before him would be served by mail. Since Counts Four, Five and Six all involved mailings in connection with the Marks case, the requirement that Whitfield

⁶⁷ Whitfield did move for a judgment of acquittal on the mail fraud charges below, but on other grounds, including the claim that the mailings themselves had to be fraudulent. Tr. 4086-93. With respect to Count Five, Whitfield seemed to argue that the mailing at issue (a subpoena sent by defense counsel in the Marks case) was not foreseeable because, under Mississippi law, subpoenas had to be personally served. Tr. 4091; but see Tr. 3064 (trial testimony that document subpoenas are commonly served by mail). Even if this argument was sufficient to preserve Whitfield’s sufficiency claim, it applied to Count Five only.

“caused” those mailings was satisfied here. See MRE/3 at 24.

Whitfield’s reliance on McDowell is misplaced. The defendant in that case was charged, on an aiding and abetting theory, with knowingly using the mails to deliver obscene materials. This Court reversed his convictions because the government failed to show that he knew that the obscene materials would be delivered through the mail. 498 F.3d at 314-16. In so holding, the Court emphasized that in a case requiring a “knowing” act, “aiding-and-abetting liability requires knowledge of all elements of the underlying crime.” Id. at 315. McDowell is therefore inapposite because (1) the underlying statute here does not require the government to prove a knowing act; and (2) we are not contending that an aiding and abetting theory alters the mens rea for the underlying crime.⁶⁸

X. DEFENDANTS’ MISCONDUCT CLAIMS PROVIDE NO BASIS FOR REVERSAL.

Minor (Br. 114-15) and Whitfield (Br. 81-84) complain that they were the victims of government misconduct. In particular, they suggest that (1) U.S. Attorney

⁶⁸ Whitfield also contends (Br. 52-54) that the jury instructions constructively amended the Indictment because they failed to differentiate between the two conspiracies charged in the Indictment. See also Minor Notice of Adoption (adopting Whitfield’s argument). Because Whitfield fails to identify where he preserved this claim below, review is for plain error only. No plain error exists because the instructions and the verdict form made clear that the Indictment alleged two separate conspiracies. MRE/1 at 4737 (“Count 1 contends that Paul Minor and John Whitfield conspired. Count 2 alleges that Paul Minor and Walter W. “Wes” Teel conspired.”); MRE/4 (Verdict Form).

Dunn Lampton suffered from a conflict of interest; (2) Minor was the victim of selective prosecution; and (3) the charges against them were related to party politics. Although the defendants raise serious charges, they do not make any correspondingly serious effort to support them. Instead, they simply level unsubstantiated claims not tied to any argument for reversal. This Court should reject this transparent attempt to obtain nullification on appeal.

Since the misconduct claims are not properly briefed, we do not provide a detailed response. Instead, we note only the following points. First, the charge that U.S. Attorney Lampton suffered from a conflict of interest is moot because, by the time the Third Superseding Indictment issued, the Justice Department's Public Integrity Section had assumed responsibility for the case. Tr. 1899, 2998.⁶⁹ As for the selective prosecution claim, this argument rested on the government's failure to prosecute Minor's close friend, Richard Scruggs, whom Minor alleged had provided similar loan guarantees to judges. Minor Br. 115. Now that Scruggs has been convicted of attempting to bribe a judge in a separate prosecution, see supra at 20, n.8. Minor's claim of inconsistent treatment has lost any force it ever had.

⁶⁹ Although the trial team included two attorneys from the Southern District of Mississippi, they were supervised by the Public Integrity Section, not U.S. Attorney Lampton.

Moreover, the district court was not required (or even authorized) to hold an evidentiary hearing regarding the “politics and motives” of the U.S. Attorney’s Office. Whitfield Br. 81; see id. at 83; Minor Br. 116-18. The power to prosecute criminal cases is committed to the Executive Branch, see U.S. Const., Art. III, § 3, and a district court has extremely limited authority to investigate its charging decisions. See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (as long as probable cause exists, “the decision whether or not to prosecute and what charges to file or bring before the grand jury, generally rests entirely in [the prosecutor’s] discretion”); see also Wayte v. United States, 470 U.S. 598, 607 (1985). Moreover, while the Constitution places some constraints on the government’s charging decisions, defendants bear a heavy burden when they seek discovery relating to such claims. See United States v. Armstrong, 517 U.S. 456, 468-70 (1996) (imposing a “rigorous standard for discovery in aid of a selective prosecution claim”). A defendant must present solid, non-frivolous evidence “sufficient to create a reasonable doubt about the constitutionality of a prosecution.” United States v. Hayes, 589 F.2d 811, 819 (5th Cir. 1979). No evidentiary hearing was held here because defendants failed to present such evidence below.⁷⁰

⁷⁰ In arguing (Br. 37) that the proceedings below were “inherently unfair,” Teel notes that the jury was allowed to review the Indictment during deliberations. See also Minor Notice of Adoption (adopting Teel’s argument); Whitfield Br. 3-4 n.3 (same). This Court follows “the general rule that the trial court may, in the exercise

Finally, Minor contends (Br. 114) that this Court should reverse because “the public has come to question the reliability of [his] indictment, conviction, and sentence.” This Court decides cases based on the record, not a criminal defendant’s perception of how the public perceives his case. As for the media sources on which Minor relies, there is no reason to believe that they reflect actual public perceptions. And assuming arduendo that they do, then the public has been misinformed, a cause for concern but not for reversal of Minor’s convictions. See, e.g., Scott Horton, A Minor Injustice, www.harpers.org (Oct. 3, 2007) (comparing Minor to the hero of The Count of Monte Cristo, while failing to note his cash loan payments, the phony “position paper,” or the conduit payoffs).⁷¹

XI. THE DISTRICT COURT COMMITTED NO REVERSIBLE ERROR AT SENTENCING.

Collectively, the defendants have raised eight separate challenges to the sentences imposed below. All of these claims lack merit. Moreover, because the

of discretion, allow the indictment to be taken into the jury room.” Bruce v. United States, 351 F.2d 318, 320 (5th Cir. 1965). Moreover, although the district court did not provide the jury with a copy of the instructions, it made clear that it would do so if the jury asked for them. Tr. 4985, 4992. This also was not error. United States v. Sotelo, 97 F.3d 782, 792-93 (5th Cir. 1996).

⁷¹ Minor notes (Br. 115) that the Justice Department’s Office of Professional Responsibility is investigating his claims. The existence of this investigation merely demonstrates that Minor’s charges are being heard in the proper forum.

Presentence Reports (PSRs) prepared by the Probation Office incorrectly used the 2001 Sentencing Guidelines instead of the 2006 version, resulting in a six to eight level decrease in the defendants' Guidelines levels, resentencing would not be appropriate even assuming arguendo that any error occurred.

A. The District Court Was Not Limited at Sentencing to Factual Findings Made by the Jury.

Citing to Cunningham v. California, 127 S. Ct. 856 (2007), and United States v. Booker, 543 U.S. 220 (2005), Minor contends that the district court erred in basing his Guidelines sentencing range on “judge-made factual findings, found by a mere preponderance of the evidence.” Minor Br. 92-96; Teel Br. 4 n.4, 34-35 (adopting Minor's sentencing arguments); Whitfield Br. 89 (same). The district court's sentencing procedure complied with the law. Because Minor was sentenced well below the applicable statutory maxima (without applying any enhancements), he has no Sixth Amendment claim under Apprendi v. New Jersey, 530 U.S. 466 (2000). Minor PSR at 1 (combined 80 year statutory maximum); see also Whitfield PSR at 1 (combined 35 year statutory maximum); Teel PSR at 1 (combined 25 year statutory maximum).

Moreover, because the district court understood that the Guidelines were advisory, see 9/7/07 Sent. Tr. 446 (2SR/110), it was entitled to base the Guidelines calculations on its own factual findings and to sentence Minor to any term of

imprisonment up to the statutory maximum. Booker, 543 U.S. at 233, Cunningham, 127 S. Ct. at 866-868; see also Apprendi, 530 U.S. at 481. As this Court has put it, “Booker contemplates that, with the mandatory use of the Guidelines excised, the Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing.” United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2006). Accordingly, Minor’s argument “no longer serves as a legitimate basis for appeal.” United States v. Fambro, 526 F.3d 836, 851 & n.96 (5th Cir. 2008) (quoting United States v. Pineda-Arrellano, 492 F.3d 624, 626 (5th Cir. 2007)).

Based on Justice Scalia’s concurring opinion in United States v. Gall, 128 S. Ct. 586, 602-03 (2007), Minor also argues (Br. 93) that “[t]he door * * * remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” See also Rita v. United States, 127 S. Ct. 2456, 2479 (2007) (Scalia, J., concurring). No other justice endorsed this hypothetical “as applied” challenge to judicial fact-finding, and, indeed, Justice Scalia’s suggestion conflicts with other sentencing precedents. Booker, 543 U.S. at 233 (“[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”); Cunningham, 127 S. Ct. at 866; Rita, 127 S. Ct. at 2465-67.

And even if an “as applied” challenge were theoretically available, such a claim would fail here because Minor’s crimes could reasonably merit a 132-month sentence and a \$2,750,000 fine solely based on conduct found by the jury. In particular, the jury concluded that Minor corrupted two separate state court judges to decide cases based on the money and valuable items he provided, rather than their good faith views of the law and the facts. In the district court’s words, “[the jury found] that Minor and [the] other two defendants essentially put justice up for sale.” 9/7/07 Sent. Tr. 449 (2SR/110). The court went on to note “the ripples that this misconduct would have upon the system of justice,” including “the fears of the public that the rich and powerful can dictate the outcome of litigation.” Id. at 451; see also id. at 452 (Minor’s judicial bribery scheme “undermin[ed] the trust of the citizens of the state of Mississippi [in] its elected officials to meet the ends of justice in a fair and impartial manner for all its citizens”). Under these circumstances, the sentence imposed was not unreasonable. See United States v. Muhammad, 120 F.3d 688, 700 n.4 (7th Cir. 1997) (“Our government suffers severely, albeit unquantifiably, whenever someone callously abuses the integrity of our judicial system for his own personal gain.”).

B. The District Court Properly Applied the Bribery Guideline at Sentencing.

In determining the appropriate Guidelines offense level, the PSRs grouped all

of the offenses of conviction and applied the 2001 version of Guidelines § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe). See, e.g., Minor PSR ¶ 68. The district court agreed with this approach, 8/2/07 Sent. Tr. 136 (2SR/108), but Minor contends that it should instead have applied Guidelines § 2C1.2 (Offering, Giving, Soliciting or Receiving a Gratuity). Minor Br. 96-99; see Teel Br. 35 (adopting Minor's argument).

When more than one Guideline potentially applies, “the district court is charged with choosing * * * the one that is most appropriate based on the nature of the offense conduct.” United States v. Moeller, 80 F.3d 1053, 1061 (5th Cir. 1996); see Guidelines § 2C1.7(c)(4). Because this is “a factual determination,” this Court will review for clear error only. United States v. Agostino, 132 F.3d 1183, 1195 (7th Cir. 1997); see Moeller, 80 F.3d at 1061-62.

No error occurred here -- let alone clear error -- because this case was charged, tried, argued and instructed on a bribery theory. See supra at 50, 51-54, 68-69. The government alleged, and the jury found, that Minor arranged payments to Whitfield and Teel, disguised as “loans,” to influence their official actions, and that they accepted these payments intending to be influenced in cases of interest to Minor. This is “bribery” under the Guidelines, just as it is under both federal and state criminal law. See Guidelines § 2C1.1, comment. (background) (“This section applies

to a person who offers or gives a bribe * * * to “influence [the] official actions [of a public official].”); compare Guidelines § 2C1.2 (“A corrupt purpose is not an element of [the gratuity] offense.”); see also United States v. Anderson, 517 F.3d 953, 961 (7th Cir. 2008) (bribery guideline applies if “the payer’s intent is to influence or affect future actions,” while gratuity guideline applies if “the payer intends the money as a reward for actions the payee has already taken, or is already committed to take”). Accordingly, the district court did not clearly err in using the bribery Guideline here.

C. The District Court’s Net Benefit Calculations Are Not Clearly Erroneous.

Next, Minor contends (Br. 99-106) that the district court erred in determining the net benefit to be received from Minor’s bribes. See also Teel Br. 35 (adopting Minor’s argument). Guidelines § 2C1.1(b)(2)(A) directs that the base offense level for bribery offenses should be enhanced based on “the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest.” An application note defines the “benefit” as the “net value of such a benefit.” Guidelines § 2C1.1, comment. n.2. The court need only make a “reasonable estimate” of this “net benefit.” Guidelines § 2B1.1, comment. n.2(C). As this Court has noted, “The district court need not determine the value of the benefit with precision.” United States v. Griffin, 324 F.3d 330, 366 (5th Cir. 2003). A district court’s interpretations of the sentencing guidelines

are conclusions of law, reviewed de novo, United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), but its loss calculation “is a factual finding that this court reviews for clear error.” United States v. Caldwell, 302 F.3d 399, 418 (5th Cir. 2002).⁷²

1. The Teel Bribery Scheme.

With respect to Minor’s bribery of Teel, the PSR concluded that the entire \$1.5 million settlement USF&G paid to Peoples Bank was the relevant benefit. Minor PSR ¶ 70. The district court agreed, 8/3/07 Sent. Tr. 241 (2SR/110), and its determination was not clearly erroneous. Minor contends (Br. 100) that the district court was required to “net out” from the \$1.5 million figure “any amounts payable by [USF&G] based on the merits of the case[].” See also Teel Br. 35 (adopting Minor’s argument). Assuming arguendo that Minor is correct, doing this calculation does not affect the end result.

As noted above, the Mississippi Supreme Court ultimately ruled in favor of USF&G’s interpretation of its insurance contract with Peoples Bank. See supra at 32-33. Accordingly, the actual value of the bank’s claim against USF&G was zero. Moreover, the Peoples Bank case settled before this fact became clear only because

⁷² Minor contends that the Guidelines required the district court to determine “loss.” See, e.g., Minor Br. 99, 100, 101. Likewise, in the proceedings below, the parties, the court and the Probation Office frequently referred to the “loss” from the offense. See, e.g., Minor PSR ¶ 70; 8/2/07 Sent. Tr.140 (2SR/108); 8/3/07 Sent. Tr. 210 (2SR/109). As noted above, however, the proper calculation is the net benefit Minor received or intended to receive, not the “loss” his conduct inflicted.

Teel issued summary judgment for the bank and then insisted on holding a punitive damages trial while the dispositive issue was pending in the Mississippi Supreme Court. See supra at 31-32. Had Teel simply granted USF&G the stay it requested, it would have become obvious even before the litigation concluded that the claim had no value. In short, because Teel's actions forced USF&G to settle a worthless claim for \$1.5 million, there is nothing to "net" out of the actual benefit Teel conferred on Minor and his client.

Nor is there any merit to Minor's claim (Br. 103) that the district court should have reduced this \$1.5 million amount by the cost of the legal services he provided to Peoples Bank. To begin with, it is unlikely that performing this calculation would alter the offense levels for either Minor or Teel. Minor neither proffers an estimate of his costs nor attempts to show how subtracting these costs could affect his Guidelines range.⁷³ In any event, Minor's argument is wrong. Guideline § 2C1.1(b)(2)(A) instructs the district court to determine the net benefit "received or to be received in return for the [bribe]." (Emphasis added.) Thus, the value of Minor's services must be subtracted from the benefit received only if they were a "cost" of the bribery scheme itself. That test is not satisfied here, however, because Minor would have

⁷³ Under Guidelines § 2B1.1, any benefit between \$1,000,000 and \$2,500,000 increases the base offense level by 16. It seems highly unlikely that Minor's cost of providing legal services to Peoples Bank exceeded \$500,000, and thus, including these amounts would not affect the bottom line.

pursued the Peoples Bank litigation even if he had not bribed Teel.⁷⁴ In fact, the litigation had already commenced before the bribes were paid. Accordingly, the district court was not required to “net” the cost of Minor’s legal services from the benefit he received.⁷⁵

2. The Whitfield Bribery Scheme.

As for the bribes paid to Whitfield, the PSR determined that the intended benefit should be \$1,600,000, i.e., the amount of the verdict as reduced by the Mississippi

⁷⁴ In explaining the concept of net benefit, the commentary to Guidelines § 2C1.1 notes that, where a contract “was awarded in return for a bribe,” the value of the benefit received is the profit on the contract. The costs of performing on the contract are subtracted because, but for the bribe, there would be no contract. Here, however, the Peoples Bank case existed independently of the bribe, so the costs of the litigation are not “direct costs” of the bribery scheme. Compare United States v. Landers, 68 F.3d 882, 884 (5th Cir. 1995) (applying net benefit approach to contracts obtained through bribery).

Guidelines § 2B1.1, App. Note 2(E)(i), which states that in a fraud case, “[l]oss shall be reduced by * * * the services rendered[] by the defendant,” is even further off point. See Minor Br. 103. Minor did not render USF&G any “services” by suing it.

⁷⁵ A numerical example illustrates the point. Assume arguendo that the legal services Minor provided to Peoples Bank cost him \$100,000. Had Minor not bribed Teel, the Mississippi Supreme Court decision would have issued before the Peoples Bank litigation terminated, and Minor would have lost \$100,000. Because of the bribery, the recover was \$1,400,000, i.e., \$1,500,000, minus \$100,000 in legal services. Thus, the net benefit conferred by the bribery was the full \$1,500,000, i.e., the difference between -100,000 and 1,400,000.

Supreme Court. Minor PSR ¶ 70; see supra at 19.⁷⁶ This time, the district court rejected the PSR's approach, concluding instead that the "intended gain" was \$3.74 million, i.e., the full amount Whitfield awarded to Marks before he reduced the verdict to \$3.6 million. 8/3/07 Sent. Tr. 241 (2SR/109). Minor argued below that this figure must be adjusted by subtracting the underlying "value" of Marks' Jones Act claim, id. at 239, but the district court disagreed, observing that:

I don't know how I could listen to some experts talk about some case in the abstract and tell me what the value of the case was supposed to have been when those persons would not know the strength of the expected testimony or the credibility of the expected testimony. So I reject that approach entirely, that the court would have to do something like that.

Id. at 240-41. The court likewise rejected Minor's alternative argument that it should use the value of "the loans and the payoffs" to Whitfield, stating that "in a case which deals with bribery, * * * the intended loss is the amount of money, the amount of goods that the parties expected to enjoy." Id. at 241-42.

The district court's "intended benefit" approach was not clearly erroneous. Minor insists (Br. 100-01) that the district court was required to hold a mini-trial on the Marks case, complete with expert witnesses on Jones Act litigation. But this Court has previously declined to impose similarly unreasonable burdens on sentencing

⁷⁶ The PSR concluded that the reduced verdict was the appropriate intended benefit because Minor "in all likelihood" anticipated that an appellate court would reduce Whitfield's award. Minor PSR Add. at 2. The record contains no evidence, however, to suggest that Minor thought a reduction in Whitfield's award was likely.

courts. In United States v. Stedman, 69 F.3d 737 (5th Cir. 1995), for example, the defendant's fraudulent activities concealed the deteriorating condition of a bank, which ultimately failed. This Court concluded that the district court could use "the total losses that the bank suffered on the [relevant] loans," in sentencing, and was not required to determine which portion of the loss was "unavoidable." Id. at 740-41. The Court reasoned that "[r]ealistically, no one can assess such a thing precisely; and we refuse to ask sentencing courts to undertake such Herculean tasks or to afford the benefit of the doubt to bank officers who engage in wrongful conduct. As the district court aptly noted, the 'wrongdoer is not entitled to complain that [the losses] cannot be measured with the exactness and precision that would be possible'" if the wrongdoing had not occurred. Ibid.; see also United States v. Morrow, 177 F.3d 272, 300 (5th Cir. 1999).

The same analysis applies here. The Mississippi Supreme Court's decision made clear that the maximum potential value of Marks' claim was \$1.6 million. But Diamond Offshore disputed liability, and the real value of the case could also have been zero, or any amount in between. Absent a fair trial, no one could assign the case a dollar value. Indeed, although Minor now claims that the "required task" of "netting" the loss merely "required some effort," Br. 101, he argued below that it was simply "not feasible given the multitudes of unknowns." D601 at 2 (MR2586); see

ibid. (“Suffice it to say, none of this can really be done.”). Given this uncertainty, and because the essence of the offense was Minor’s determination to obtain a multi-million dollar verdict regardless of what Marks’ claim was actually worth, the district court was entitled to use the maximum potential benefit of the bribe as “benefit * * * to be received” under Guidelines § 2C1.1(2)(A). This is especially true because here, as in Stedman, it was defendants’ conduct in corrupting the Marks trial that prevented any accurate assessment of what Marks’ claim was really worth.⁷⁷

Finally, there is no merit to Minor’s claim (Br. 100, 103-106) that, given the district court’s “admi[ssion] [that] it could not conduct a real loss analysis,” the Guidelines “dictated” that it substitute the value of the bribes paid for “intended benefit.” The district court did not “admit” that it could not conduct a “real loss analysis.” It simply held, on the facts of this case, that a mini-trial on the Marks case was unnecessary.⁷⁸ Moreover, even if using the “net benefit” approach did require the

⁷⁷ Indeed, Whitfield informed the FBI that before the Marks case went to trial, Minor told him at a social function that he (Minor) thought the case was “well worth \$4 million or \$5 million.” Whitfield PSR ¶ 48. Accordingly, the district court reasonably could have set the intended benefit at a higher amount.

⁷⁸ Minor cites only one case involving judicial bribery, and it is inapposite. In United States v. Frega, 179 F.3d 793 (9th Cir. 1999), an attorney bribed two California judges over the course of twelve years. Due to the length of the bribery scheme, “[t]he government did not * * * connect any particular payment with any particular result.” Id. at 812. The appellate court found that, under these circumstances, the district court acted within its discretion in using the value of the bribes paid to determine Frega’s sentence. Frega does not mandate a different result

district court to subtract the “value” of Marks’ claim, that approach could still be applied here. As noted above, the Mississippi Supreme Court’s decision set the maximum possible value of Marks’ claim at \$1.6 million. Since Whitfield actually awarded \$3.6 million, the minimum intended benefit of the bribery scheme was \$2 million, i.e., the difference between the amount Whitfield awarded and the maximum possible value of the Marks case (without bribery).

Reducing the intended benefit of the Whitfield scheme to \$2 million has no effect on Minor’s sentence, because the total benefit related to his crimes (including the Teel bribery) still exceeds \$2.5 million, the threshold for an 18-level Guidelines enhancement. See Minor PSR ¶ 70. It would, however, reduce Whitfield’s offense level by 2, subjecting him to an enhancement of 16 levels. For the reasons identified below, however, any error in calculating Whitfield’s advisory Guidelines range was more than offset by the error in using the 2001 Guidelines. See infra at 167-70. Thus, even if this Court should conclude that the district court was required to estimate and subtract the value of Marks’ claim, re-sentencing is not required.

D. The District Court Did Not Commit “Procedural Error” in Concluding that Minor and Whitfield Obstructed Justice.

Next, Minor challenges (Br. 106-108) the district court’s decision to enhance

here as the government did connect specific payments to particular cases, and the district court’s decision to calculate the benefit using a different method is equally entitled to deference on appeal.

his advisory Guidelines for obstructing justice. Minor does not (and cannot) argue that the enhancement was unwarranted. Minor (and Whitfield) clearly obstructed justice by creating a false promissory note and attempting to induce Radlauer to accept it. See supra at 19-23; Minor PSR ¶¶62-65.⁷⁹ Instead, Minor argues that the district court committed “significant procedural error,” by (1) imposing the enhancement after earlier indicating that it would not do so; and (2) failing to “identify[] what conduct [it] believed Mr. Minor engaged in that amounted to obstruction of justice.” Br. 107. Neither claim has merit.

The district court did not issue conflicting rulings on the obstruction enhancement. Although Minor claims that it ruled, at the August 3, 2007 sentencing hearing, that it would not apply the obstruction enhancement, he is wrong. Instead, the court declined to adopt two different enhancements at that hearing, namely use of sophisticated means and an upward departure for pervasive government corruption. 8/3/07 Sent. Tr. 149, 164-65, 170-72 (2SR/109). Moreover, in explaining why it was rejecting these enhancements, the court indicated that they would “bump up against” or “crisscross[]” the obstruction of justice enhancement the PSR recommended. Id.

⁷⁹ Whitfield does contend (Br. 91-92) that this enhancement was improper, arguing that until he met with the U.S. Attorney’s Office, he “believed that Radlauer had paid off the loan to Minor with his own funds and that Whitfield was indebted to Radlauer for paying off his debts.” Given the trial evidence, the district court did not clearly err in finding otherwise.

at 172. The court then indicated that it was “persuaded by the presentence report’s approach which * * * did not include these two enhancements.” Id. at 173. Because the PSR did recommend the obstruction enhancement, Minor PSR ¶ 73, these remarks placed Minor and Whitfield on notice that the district court intended to apply that enhancement.

Second, Minor’s counsel clearly did not believe that the district court had rejected the obstruction enhancement because, when the hearing resumed, he stated that he did not think the court had discussed this enhancement yet. 9/6/07 Sent. Tr. 366 (2SR/110). When the court began to reply “I thought I denied the –,” Whitfield’s counsel interrupted and stated: “I thought so too. I thought last time you set those enhancements, including the request for an upward departure, they were.” Id. at 366. This exchange established nothing since the court did not finish its sentence, and defense counsel’s interrupting remark was hopelessly unclear.

Minor also notes that, during closing arguments, his own counsel suggested that the court had “yesterday [i.e., on September 6]” signaled that it had already ruled against the obstruction enhancement. 9/7/07 Sent. Tr. 437 (2SR/110).⁸⁰ Minor notes that no one objected to this remark, but this is hardly surprisingly since neither the

⁸⁰ Whitfield’s counsel apparently did not share this view. In his own closing argument he simply urged the court not to apply the obstruction enhancement. Id. at 403-05.

district court nor the prosecution made any substantive remarks at all during a defense closing argument that spanned 26 transcript pages. Id. at 416-41. Moreover, the government had earlier indicated (in its own closing argument) its contrary view that the district court did intend to apply the obstruction of justice enhancement. Id. at 385.

In short, the district court never ruled against the obstruction enhancement. Moreover, even if the court had changed its mind, doing so would not constitute a “a procedural error.” In applying the Guidelines, the sentencing court can tentatively rule one way and then later reach a different conclusion. See, e.g., United States v. Gotti, 459 F.3d 296, 347 (2d Cir. 2006). The PSR put Minor on notice that the obstruction enhancement might apply, and Minor could, and did, argue against it. 9/7/07 Sent. Tr. 437 (2SR/110).

Nor is there any merit to Minor’s claim that the district court failed to “adequately explain the chosen sentence,” because “there is nothing in the record identifying [the obstructionist conduct].” Br. 107-08. As noted above, the district court indicated that it intended to apply “the presentence report’s approach” to enhancements. See supra at 160. The PSR described the conduct that constituted obstruction, and the government emphasized this same conduct again in arguments at sentencing. 9/7/07 Sent. Tr. 385 (2SR/110) (“[I]nstead they chose to obstruct justice

by creating and backdating a false promissory note to further hide the evidence of their crimes.”). Moreover, in sentencing Whitfield, the district court indicated that the obstruction enhancement concerned the “promissory note” which purported to show Whitfield’s indebtedness to Radlauer instead of Minor. 9/7/07 Sent. Tr. 468 (2SR/110). The factual basis for the enhancement was thus abundantly clear.

E. The District Court Did Not Clearly Err in Declining to Reduce Whitfield’s Offense Level for Acceptance of Responsibility.

Whitfield contends (Br. 92-93) that he was entitled to a two, if not three, level reduction of his offense level based on his acceptance of responsibility. See Guidelines § 3E1.1. Whitfield bases this argument primarily on his meetings with federal agents before any indictment was returned. Whitfield did confirm in these interviews certain significant aspects of the government’s case.⁸¹ But his statements fell short of accepting responsibility for the bribery scheme charged by the government and found by the jury. See Whitfield PSR ¶ 48. Thereafter, Whitfield chose to go to trial, where his arguments to the jury repeatedly contradicted his statements to the FBI. See supra at 36 n.17; see also 9/6/07 Sent. Tr. 364 (2SR/110) (district court notes that “[t]he jury never had the benefit of that proffer”).

⁸¹ The memoranda indicate that Whitfield admitted that (1) Minor promised Whitfield that Whitfield would never have to pay back the loans; (2) Minor supplied the cash used to make most of the loan payments; (3) no \$10,000 “position paper” was ever prepared; and (4) Whitfield knew the money he accepted was for “future political influence.” Whitfield PSR ¶¶ 48-51.

Under these circumstances, the district court was not required to find that Whitfield accepted responsibility. A district court's determination as to whether a defendant has accepted responsibility is afforded "great deference" on review, a standard that is even more deferential than a pure clearly erroneous standard. United States v. Cordero, 465 F.3d 626, 630 (5th Cir. 2006). Only in "rare situations" can a defendant clearly demonstrate acceptance of responsibility even though he chooses to go to trial. Guidelines § 3E1.1, comment. n.2. Because Whitfield contested at trial the central element of the offenses charged, namely, his acceptance of a bribe with an intent to be influenced, the district court's conclusion that he did not accept responsibility for his crimes should not be disturbed on appeal.⁸²

F. The District Court Did Not Abuse Its Discretion in Declining to Vary from the Guidelines in Sentencing Whitfield.

Whitfield also contends (Br. 94) that the district court erred in not varying from the Sentencing Guidelines based on his family circumstances and medical history. Because Whitfield was sentenced within the applicable Guidelines range, the district court's decision is entitled to a presumption of reasonableness. United States v. Campos-Maldonado, 531 F.3d 337, 338 (5th Cir.), cert. denied, 129 S.Ct. 328 (2008);

⁸² Whitfield also contends (Br. 93) that he should not have received a two-level increase for accepting more than one bribe. See Guidelines § 2C1.1(b)(1). Whitfield's final PSR did not propose such an increase, see PSR at ¶¶ 62-71, nor did the district court impose one.

Rita, 127 S. Ct. at 2466-68. Whitfield provides no reason that the presumption should not be applied here. In particular, although Whitfield contends that “the trial court advised Mr. Whitfield that it would grant his request for a departure,” Br. 94, he provides no citation in support of this claim, and our own review of the sentencing transcript fails to disclose such a remark.

G. The District Court Based Its Restitution Award upon the Actual Loss Incurred by USF&G.

Minor contends (Br. 108-11) that the district court erred in awarding USF&G \$1.5 million in restitution. See also Teel Br. 36 (adopting Minor’s argument). According to Minor, “[w]ithout resolving the merits of the legal issues in the case, the work done by Mr. Minor’s firm, or the settlement decision made by USF&G, the district court could not properly determine that USF&G was a ‘victim’ and order Minor to pay restitution, * * * .” This argument fails because, as noted above, see supra at 152-53, the Mississippi Supreme Court conclusively resolved “the merits of the legal issues in the case.” As for “the work done by Mr. Minor’s firm,” the amount of restitution is based on USF&G’s “loss,” which is not diminished by whatever efforts Minor expended on behalf of Peoples Bank. See 18 U.S.C. § 3663(b)(1)(B)(i); see id. at § 3663(a)(1)(B)(i)(I). Finally, the existing record made clear that USF&G decided to settle for \$1.5 million (an amount far exceeding any actual damages the bank could claim) because Teel, the ultimate trier of fact, forced them to. See supra

at 30, 33. In short, the restitution award was based on solid record evidence, not “speculation.”

H. The District Court Did Not Depart Upwards in Imposing a Fine that Was Above the Advisory Guidelines Range but Within the Applicable Statutory Maximum.

In sentencing Minor, the district court imposed “a fine of \$250,000 per count, for a total fine of \$2,750,000.” 9/7/07 Sent. Tr. 453 (2SR/110). The amount of this fine was authorized by the various statutes of conviction, see Minor PSR at 1, but exceeded the advisory Guidelines range. Id. at ¶ 130. The district court explained that it:

has considered the advisory guidelines range, which is \$17,500 to \$175,000, in addition to the sentencing factors in 18 USC §3553A. The court recognizes the need for the amount of the fine to be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive to this defendant who has substantial assets, and income and will provide -- and that the fine will provide deterrence to other criminal activity. Therefore the court is going to step aside from the guidelines with regard to the fine and the court is going to impose a fine under the statute.

9/7/07 Sent. Tr. 453 (2SR/110).

Minor challenges this fine (Br. 112) as an “unnoticed upward departure based on a factor deemed impermissible by this Court and the Sentencing Commission,” namely, his “socioeconomic status.” Prior to Booker, this Court (and other courts) had concluded that, in fining the defendant, the district court could not depart upward

based solely on his wealth. See United States v. Painter, 375 F.3d 336, 338-39 (5th Cir. 2004); United States v. Graham, 946 F.2d 19, 21-22 (4th Cir. 1991). These cases reasoned that Guidelines § 5H1.10 specifically prohibited any reliance on “a defendant’s socioeconomic status,” and thus, a departure based on the defendant’s wealth was not authorized under the narrow authority provided in 18 U.S.C. § 3553(b) (authorizing departure only if court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission). Painter, 375 F.3d at 339; Graham, 946 F.2d at 21-22.

These cases do not control here. The district court did not depart under the Guidelines; instead it varied from the Guidelines, choosing “to step aside from the guidelines with regard to the fine” and to focus instead on the factors identified in Section 3553. 9/7/07 Sent. Tr. 453 (2SR/110); see Irizarry v. United States, 128 S. Ct. 2198, 2202 (2008) (term “departure” under the Guidelines “refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines”). “When a court enhances or detracts from the recommended range through application of § 3553(a) factors, * * * the increase or decrease is called a ‘variance.’” United States v. Atencio, 476 F.3d 1099, 1101 n.1 (10th Cir. 2007), overruled on other grounds by Irizarry v. United States, 128 S. Ct. 2198 (2008); see also United States v. Vampire Nation, 451 F.3d 189, 195 n.2 (3d Cir.), cert. denied, 549 U.S. 970 (2006).

Because the district court did not purport to impose a fine within the advisory Guidelines framework, Guidelines § 5H1.10 did not bar it from considering Minor's wealth in setting a fine. Kimbrough v. United States, 128 S. Ct. 558, 560, 575 (2007) (district courts may vary from advisory Guidelines range based on policy considerations, including disagreements with the Guidelines); see also 18 U.S.C. § 3572(a) ("In determining whether to impose a fine, and the amount * * * the court shall consider * * * (1) the defendant's income, earning capacity, and financial resources; * * *.").⁸³

I. A Remand Is Not Required to Correct any Sentencing Error that Resulted in Less than a Seven Level Increase in an Offense Level.

Even if this Court concludes that the district court committed a sentencing error below, it should nonetheless affirm the judgments unless the error involved more than a six (for Minor) or eight (for Whitfield and Teel) level increase in the advisory Guidelines range. The Probation Office used the 2001 version of the Sentencing Guidelines, reasoning that applying the Guidelines in effect on the date of sentencing would violate the ex post facto Clause. See, e.g., Minor PSR at 26; see Guidelines §1B1.11(b)(1). The district court then relied on the PSR's calculations, implicitly agreeing with this ex post facto analysis. Had the district court used the 2006

⁸³ Because Minor has not challenged, either here or in the district court, the reasonableness of the variance, that issue is not before the court.

Guidelines, each defendant's base offense level would have been increased by six or eight levels.⁸⁴ Because, as we explain below, the district court should have used the current Guidelines, the defendants' sentences should not be disturbed unless the magnitude of any sentencing error exceeds six or eight levels.⁸⁵

As is relevant here, the ex post facto Clause protects against the imposition of punishments greater than those which could have been imposed at the time the crime was committed. Collins v. Youngblood, 497 U.S. 37, 45-46 (1990). In Miller v. Florida, 482 U.S. 423, 424 (1987), the Supreme Court concluded that this clause prohibited Florida from applying post-offense changes to sentencing guidelines that established a "presumptive sentence" under Florida law. Federal courts, including this one, then applied Miller to the mandatory federal Guidelines system. See, e.g., United States v. Armstead, 114 F.3d 504, 510 (5th Cir. 1997).

But the ex post facto Clause no longer applies under the new sentencing regime.

⁸⁴ Under the 2006 Guidelines, for example, Minor would have had a base offense level of 12, a two-level adjustment for offering more than one bribe, an 18-level adjustment for the benefit received, a four-level adjustment for bribing an elected public official, and a two-level adjustment for obstruction of justice, resulting in a total offense level of 38, six levels higher than under the 2001 Guidelines. See U.S.S.G. Federal Sentencing Guidelines Manual (2006), Guideline § 2C1.1; compare Minor PSR ¶¶ 68-78.

⁸⁵ Although we did not argue below that the district court should apply the 2006 Guidelines or cross-appeal on this ground, this Court may still decide the issue because an appellee may defend the judgment on any ground supported by the record below. Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 804 (5th Cir. 1997).

Since the Supreme Court decided Booker, the Guidelines are neither mandatory nor binding on the sentencing court. Rather, they are just one of a number of factors a court must consider in imposing a reasonable sentence. Kimbrough, 128 S.Ct. at 564. A court is not entitled to rely solely upon the Guidelines range, but must make an independent determination of the appropriate sentence in light of all the factors set forth in 18 U.S.C. § 3553(a). Rita, 127 S. Ct. at 2465. Moreover, “a sentence outside the Guidelines carries no presumption of unreasonableness,” Irizarry, 128 S. Ct. at 2202, and courts may vary from the Guidelines whenever they determine they are not reasonable in light of the Section 3553 factors. Kimbrough, 128 S.Ct. at 570, 576. As the ex post facto Clause applies to laws that bind the court, it follows from these post-Booker changes in the sentencing scheme that amendments to the Guidelines no longer implicate that clause. United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006) (holding post-Booker that the ex post facto Clause does not apply to the advisory Sentencing Guidelines); see also United States v. Barton, 455 F.3d 649, 655 n.4 (6th Cir. 2006) (“Now that the Guidelines are advisory, the Guidelines calculation provides no such guarantee of an increased sentence, which means that the Guidelines are no longer akin to statutes in their authoritativeness. As such, the ex post facto Clause itself is not implicated.”); United States v. Rodarte-Vasquez, 488 F.3d 316, 324-25 (5th Cir. 2007) (Jones, C.J., concurring) (agreeing with the DeMaree analysis);

but see United States v. Turner, 2008 WL 5101309, *4 (D.C. Cir. 2008) (ex post facto Clause still applies to use of advisory Guidelines); see also United States v. Carter, 490 F.3d 641, 643 (8th Cir. 2007).

Several circuits, including this one, have relied on pre-Booker case law in assuming that the ex post facto rules continue to apply and have ruled accordingly without any apparent analysis of the issue. See United States v. Reasor, 418 F.3d 466, 479 (5th Cir. 2005); see Demaree, 459 F.2d at 793 (citing cases from other courts). As Judge Jones has noted, “Reasor is not necessarily controlling * * * because it was decided shortly after Booker, and the sentence had to be reversed for reconsideration due to vacated convictions, regardless of ex post facto concerns.” Rodarte-Vasquez, 488 F.3d at 325 n.2. Accordingly, this Court has the discretion to decide the issue in the context of this case.

XII. THE RECORD DOES NOT DEMONSTRATE ANY BASIS FOR REASSIGNING THIS CASE ON REMAND.

Finally, Minor contends (Br. 116-19) that the district court’s rulings created “the appearance of bias and impropriety,” and argues that the case should be reassigned on remand. In our view, no remand is required at all. But should the Court disagree, there is no cause for reassignment. As this Court has noted, the power to reassign is an “extraordinary” one that is “rarely invoked.” In re: DaimlerChrysler Corp., 294 F.3d 697, 700 (5th Cir. 2002). Because there is no evidence here of “overt

impartiality, bias, or prejudice by the district court,” reassignment would be unwarranted. Benchmark Electronics, Inc. v. J.M. Huber Corp., 343 F.3d 719, 731 (5th Cir. 2003). Moreover, assigning the case to a new judge on remand would cause “waste and duplication, out of proportion to any gain in preserving the appearance of fairness.” In re: DaimlerChrysler Corp., 294 F.3d at 700-01 (setting forth two different tests for reassignment).

CONCLUSION

For the foregoing reasons, the judgments of conviction should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief contains 43,032 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The United States has previously filed a motion for leave to exceed the type-volume limitations.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced font using WordPerfect 12 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT.....	i
TABLE OF CONTENTS.	ii
TABLE OF AUTHORITIES.....	x
JURISDICTIONAL STATEMENT.	1
STATEMENT OF THE ISSUES.	1
STATEMENT OF THE CASE.....	6
STATEMENT OF FACTS.	8
A. The Whitfield Bribery Scheme.....	10
1. Minor Arranges for Whitfield to Receive \$140,000 from Peoples Bank.	10
2. Whitfield Lies under Oath to Conceal the Loan Transactions.	11
3. Minor Assumes Responsibility for the Loans to Whitfield, Using Cash Payments to Conceal his Role.	12
4. Whitfield Files False Financial and Campaign Disclosure Forms.	16
5. Minor and Whitfield Arrange for Payback by a \$3.64 Million Award in Marks v. Diamond Offshore.....	17
6. The Whitfield Bribery Scheme Unravels, and Minor and Whitfield Attempt a Coverup.	19

B.	The Teel Bribery Scheme.	23
1.	Minor Secures \$25,000 to Finance Teel’s Campaign.	23
2.	Minor Renews the Loan, Paying Principal and Interest with Cash.	24
3.	Minor Repays the Teel Loan, Using Richard Scruggs as a Strawman.	24
4.	Minor Provides Teel with Financial Assistance in Connection with a Criminal Proceeding and Investigation. . . .	25
5.	Teel Files False Campaign and Financial Disclosure Forms. . .	26
6.	Minor and Teel Arrange for Payback with a \$1.5 Million Settlement in Peoples Bank v. USF&G.	26
a.	Minor Files a Contract Dispute in Chancery Court and Hand Picks Chief Judge Randall to Decide It.	27
b.	Minor Demands that the Peoples Bank Lawsuit Be Re-Assigned to Teel.	29
c.	Teel Forces a Favorable Settlement in the Peoples Bank Case Shortly Before the Mississippi Supreme Court Concludes that USF&G Had No Duty to Defend.	30
C.	The Defense Version of the Case.	33
1.	Minor’s Defense.	33
2.	Whitfield’s Defense.	34
3.	Teel’s Defense.	36

SUMMARY OF ARGUMENT..... 38

ARGUMENT..... 50

I. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE ELEMENTS OF BRIBERY UNDER MISSISSIPPI LAW FOR PURPOSES OF THE MAIL AND WIRE FRAUD CHARGES. 50

A. Standard of Review. 51

B. The District Court’s Bribery Instructions. 51

C. The District Court’s Instructions Followed Mississippi and Federal Law, Fifth Circuit Pattern Instructions and a Proposed Jury Instruction Tendered by Minor. 55

D. The District Court Instructed the Jury on Minor’s Theory of Defense. 56

E. Minor’s Specific Objections to the Bribery Instruction..... 57

F. Bribery Does Not Require that the Briber Know the Specific Benefit He Expects to Receive at the Time Money Changes Hands..... 60

G. The District Court’s Instructions Did Not Define a Gratuity Offense..... 63

H. The District Court Did Not Clearly Err in Failing to Instruct the Jury that Minor Must Intend that His Payments Be Made “in Exchange” for the Judge’s Official Action. 64

I. The District Court Did Not Commit Reversible Error in Failing to Define Bribery Pursuant to the McCormick Decision. 70

J.	The District Court’s Instructions Did Not Allow the Jury to Convict Mr. Minor for Crimes Not Charged in the Indictment.....	79
II.	THE JURISDICTIONAL ELEMENT OF 18 U.S.C. § 666 WAS PROPERLY ALLEGED, PROVEN AND INSTRUCTED.....	80
A.	The Statute, the Indictment and the Verdict.	81
B.	The Indictment Alleged an Offense under Section 666.....	82
C.	The Evidence Was Sufficient to Find that Whitfield and Teel Were Agents of the Mississippi Administrative Office of the Courts.	85
D.	The Statute Does Not Require that the Judicial Defendants Have Control over the Spending of any Federal Funds.....	90
III.	THE DISTRICT COURT DID NOT COMMIT ANY REVERSIBLE EVIDENTIARY ERRORS.	92
A.	Standard of Review.	92
B.	Minor Was Permitted to Argue and Prove that He Had Pre-Existing Relationships with Whitfield and Teel.....	93
C.	Minor was Permitted to Argue and Prove that He Guaranteed Other Loans to Friends and Colleagues.	95
D.	The District Court Did Not Abuse Its Discretion in Excluding Expert Opinions that Were Not Disclosed to the Prosecution in a Timely Manner.	98
E.	The District Court Did Not Abuse Its Discretion in Excluding Cumulative Evidence Regarding Campaign Contributions from Attorneys.	104

F.	The District Court Did Not Abuse Its Discretion in Excluding Evidence that Minor Brought Other Cases in which He Did Not Attempt to Bribe Whitfield.	104
G.	The District Court Did Not Abuse Its Discretion in Excluding Evidence of Minor’s Skills as a Lawyer.. . . .	105
H.	The District Court Did Not Abuse Its Discretion in Refusing to Admit Evidence of the Amount of Attorneys’ Fees Received by Richard Salloum.	105
I.	The FBI 302 Memorandum Was Not Admissible as Impeachment of Radlauer and No One Requested that It Be Admitted.	107
J.	The District Court Did Not Abuse Its Discretion in Excluding Double Hearsay Statements Contained in Drinkwater’s Pretrial Report.	109
K.	The District Court Did Not Abuse Its Discretion in Admitting Testimony that Whitfield Lied about the Peoples Bank Loans in His Divorce Proceeding.	111
L.	The Government Did Not Present “Expert” Testimony from Salloum, Drinkwater or Radlauer.	113
M.	The District Court Did Not Abuse Its Discretion in Admitting the Government’s Summary Charts.	114
IV.	THIS COURT SHOULD REJECT WHITFIELD’S SPEEDY TRIAL ACT CLAIM.	115
A.	Standard of Review.	115
B.	Whitfield’s Barebones Motion Failed to Preserve His Speedy Trial Act Claim.	116

C.	The Continuance Granted with Whitfield’s Consent on February 10, 2006 Tolled the Speedy Trial Act Clock.	117
D.	Whitfield’s Consent Precludes Him from Challenging the February 10, 2006 Continuance.	121
E.	Delay Attributable to Minor’s Inpatient Treatment for Substance Abuse is also Excludable under the Speedy Trial Act.	122
V.	THE CHARGES AGAINST TEEL AND WHITFIELD WERE NOT MISJOINED AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING TEEL’S MOTION TO SEVER.	122
VI.	THE RECORD OF THE 2005 TRIAL DOES NOT DEMONSTRATE ANY ACTUAL BIAS ON THE PART OF THE DISTRICT COURT.	127
A.	Evidence of “Criminal Intent”.	127
B.	Evidence Regarding the <u>Peoples Bank</u> and <u>Marks</u> Cases.	128
C.	Evidence Relating to Whitfield’s Divorce.	129
D.	Drinkwater’s Litigation Report.	130
E.	Evidence Relating to “State Ethics Rules”.	130
F.	The 2005 Jury Instructions.	131
VII.	THE DISTRICT COURT’S DECISION TO EXCLUDE FOR CAUSE A JUROR WHO REPEATEDLY STATED THAT SHE COULD NOT SIT IN JUDGMENT OF OTHERS DOES NOT MERIT REVERSAL.	133

VIII.	THE DISTRICT COURT DID NOT ERR IN DENYING WHITFIELD’S UNTIMELY MOTION TO DISMISS THE INDICTMENT.	137
A.	Background.. . . .	137
B.	Whitfield’s Motion to Dismiss Was Untimely.. . . .	138
C.	The Government Did Not Present False Testimony to the Grand Jury.	139
D.	The Indictment’s Error about the Legal Effect of the “Fiat” Did Not Prejudice Whitfield.	140
IX.	THERE WAS NO “MANIFEST MISCARRIAGE OF JUSTICE” WITH REGARD TO THE GOVERNMENT’S PROOF THAT THE MAILINGS ALLEGED IN COUNTS FOUR, FIVE AND SIX WERE FORESEEABLE TO WHITFIELD.	141
X.	DEFENDANTS’ MISCONDUCT CLAIMS PROVIDE NO BASIS FOR REVERSAL.. . . .	143
XI.	THE DISTRICT COURT COMMITTED NO REVERSIBLE ERROR AT SENTENCING.. . . .	146
A.	The District Court Was Not Limited at Sentencing to Factual Findings Made by the Jury.	147
B.	The District Court Properly Applied the Bribery Guideline at Sentencing.	149
C.	The District Court’s Net Benefit Calculations Are Not Clearly Erroneous.. . . .	151
1.	The Teel Bribery Scheme.. . . .	152
2.	The Whitfield Bribery Scheme.	154

D.	The District Court Did Not Commit “Procedural Error” in Concluding that Minor and Whitfield Obstructed Justice.	158
E.	The District Court Did Not Clearly Err in Declining to Reduce Whitfield’s Offense Level for Acceptance of Responsibility.	162
F.	The District Court Did Not Abuse Its Discretion in Declining to Vary from the Guidelines in Sentencing Whitfield.	163
G.	The District Court Based Its Restitution Award upon the Actual Loss Incurred by USF&G.	163
H.	The District Court Did Not Depart Upwards in Imposing a Fine that Was Above the Advisory Guidelines Range but Within the Applicable Statutory Maximum.	165
I.	A Remand Is Not Required to Correct any Sentencing Error that Resulted in Less than a Seven Level Increase in an Offense Level.	167
XII.	THE RECORD DOES NOT DEMONSTRATE ANY BASIS FOR REASSIGNING THIS CASE ON REMAND.	170
	CONCLUSION.	171
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000).....	147, 148
<u>Benchmark Electronics, Inc. v. J.M. Huber Corp.</u> , 343 F.3d 719 (5th Cir. 2003).	171
<u>Bigby v. Dretke</u> , 402 F.3d 551 (5th Cir. 2005).....	106, 107, 108
<u>Bordenkircher v. Hayes</u> , 434 U.S. 357 (1978).	145
<u>Bruce v. United States</u> , 351 F.2d 318 (5th Cir. 1965).	146
<u>Canutillo Independent School District v. Leija</u> , 101 F.3d 393 (5th Cir. 1996).	88
<u>Collins v. Youngblood</u> , 497 U.S. 37 (1990).....	168
<u>United States v. Landers</u> , 68 F.3d 882 (5th Cir. 1995).....	154
<u>Cunningham v. California</u> , 127 S. Ct. 856 (2007).	147, 148
<u>In re: DaimlerChrysler Corp.</u> , 294 F.3d 697 (5th Cir. 2002).	170, 171
<u>Daubert v. Merrell Dow Pharmaceuticals, Inc.</u> , 509 U.S. 579 (1993).	99
<u>Davis v. Alaska</u> , 415 U.S. 308 (1974).....	106
<u>Evans v. United States</u> , 504 U.S. 255 (1992).	passim
<u>Foreman v. Babcock & Wilcox Co.</u> , 117 F.3d 800 (5th Cir. 1997).	168
<u>General Electric Co. v. Joiner</u> , 522 U.S. 136 (1997).	199
<u>Glasser v. United States</u> , 315 U.S. 60 (1942).....	8

<u>Irizarry v. United States</u> , 128 S. Ct. 2198 (2008).....	49, 166, 169
<u>Jackson v. Virginia</u> , 443 U.S. 307 (1979).....	85
<u>Jones v. Dretke</u> , 375 F.3d 352 (5th Cir. 2004).....	45, 135
<u>Kimbrough v. United States</u> , 128 S. Ct. 558 (2007).....	167, 169
<u>Kotteakos v. United States</u> , 328 U.S. 750 (1946).....	125
<u>Luzerne County Ret. Bd. v. Makowski</u> , 2007 WL 4211445, 42-43.....	77
<u>Miller v. Florida</u> , 482 U.S. 423 (1987).....	168
<u>Patton v. Yount</u> , 467 U.S. 1025 (1984).....	134
<u>Proctor & Gamble Co. v. Amway Corp.</u> , 376 F.3d 496 (5th Cir. 2004).....	101
<u>Ramsey v. Omnibank</u> , 215 F.3d 502 (5th Cir. 2000).....	30, 31
<u>Ramsey v. Omnibank</u> , 293 F.3d 760 (5th Cir. 2002).....	33
<u>Rita v. United States</u> , 127 S. Ct. 2456 (2007).....	148, 164, 169
<u>Sabri v. United States</u> , 541 U.S. 600 (2004).....	91
<u>United States v. Agostino</u> , 132 F.3d 1183 (7th Cir. 1997).....	150
<u>United States v. Alfisi</u> , 308 F.3d 144 (2d Cir. 2002).....	66
<u>United States v. Allen</u> , 10 F.3d 405 (7th Cir. 1993).....	76, 77
<u>United States v. Anderson</u> , 517 F.3d 953 (7th Cir. 2008).....	151
<u>United States v. Armstead</u> , 114 F.3d 504 (5th Cir. 1997).....	168

<u>United States v. Armstrong</u> , 517 U.S. 456 (1996).	145
<u>United States v. Asibor</u> , 109 F.3d 1023 (5th Cir.1997).	83
<u>United States v. Atencio</u> , 476 F.3d 1099 (10th Cir. 2007).	166
<u>United States v. Baker</u> , 63 F.3d 1478 (9th Cir. 1995).	133
<u>United States v. Ballard</u> , 779 F.2d 287 (5th Cir. 1986).	112
<u>United States v. Barton</u> , 455 F.3d 649 (6th Cir. 2006).	169
<u>United States v. Baytank (Houston), Inc.</u> , 934 F.2d 599 (5th Cir. 1991).	51, 65
<u>United States v. Bieganowski</u> , 313 F.3d 264 (5th Cir. 2002).	115, 116, 125
<u>United States v. Blake</u> , 941 F.2d 334 (5th Cir. 1991).	123
<u>United States v. Blandford</u> , 33 F.3d 685 (6th Cir. 1994).	75
<u>United States v. Booker</u> , 543 U.S. 220 (2005).	46, 147, 148
<u>United States v. Boyd</u> , 610 F.2d 521 (8th Cir. 1979).	126
<u>United States v. Brumley</u> , 116 F.3d 728 (5th Cir. 1997).	38, 52
<u>United States v. Caldwell</u> , 302 F.3d 399 (5th Cir. 2002).	152
<u>United States v. Campos-Maldonado</u> , 531 F.3d 337 (5th Cir.), <u>cert. denied</u> , 129 S. Ct. 328 (2008).	163
<u>United States v. Carter</u> , 490 F.3d 641 (8th Cir. 2007).	170
<u>United States v. Cathey</u> , 591 F.2d 268 (5th Cir. 1971).	138
<u>United States v. Chalkias</u> , 971 F.2d 1206 (6th Cir. 1992).	120

<u>United States v. Chavis</u> , 772 F.2d 100 (5th Cir. 1985).....	123
<u>United States v. Cordero</u> , 465 F.3d 626 (5th Cir. 2006).....	163
<u>United States v. Coyne</u> , 4 F.3d 100 (2d Cir. 1993).....	62
<u>United States v. Daniels</u> , 281 F.3d 168 (5th Cir. 2002).	51
<u>United States v. DeVeau</u> , 734 F.2d 1023 (5th Cir. 1984).....	126
<u>United States v. Demaree</u> , 459 F.3d 791 (7th Cir. 2006).	169
<u>United States v. Dobbs</u> , 506 F.2d 445 (5th Cir. 1975).	42, 97, 105, 106
<u>United States v. Edelkind</u> , 525 F.3d 388 (5th Cir.), <u>cert. denied</u> , 129 S. Ct. 246 (2008)..	120
<u>United States v. Fambro</u> , 526 F.3d 836 (5th Cir. 2008).	148
<u>United States v. Franklin</u> , 148 F.3d 451 (5th Cir. 1998).	117
<u>United States v. Frega</u> , 179 F.3d 793 (9th Cir. 1999).....	157
<u>United States v. Fuchs</u> , 467 F.3d 889 (5th Cir. 2006).	51
<u>United States v. Gall</u> , 128 S. Ct. 586 (2007).....	148
<u>United States v. Ganim</u> , 510 F.3d 134 (2d Cir. 2007).	60, 61, 63
<u>United States v. Giles</u> , 246 F.3d 966 (7th Cir. 2001).	75
<u>United States v. Gotti</u> , 459 F.3d 296 (2d Cir. 2006).....	161
<u>United States v. Graham</u> , 946 F.2d 19 (4th Cir. 1991).....	166
<u>United States v. Griffin</u> , 324 F.3d 330 (5th Cir. 2003).....	151

<u>United States v. Guzman-Ocampo</u> , 236 F.3d 233 (5th Cir. 2000).	83
<u>United States v. Hairston</u> , 46 F.3d 361 (4th Cir. 1995).	75
<u>United States v. Hart</u> , 295 F.3d 451 (5th Cir. 2002).	114
<u>United States v. Hayes</u> , 589 F.2d 811 (5th Cir. 1979).	145
<u>United States v. Houle</u> , 237 F.3d 71 (1st Cir. 2001).	124
<u>United States v. Irizarry</u> , 341 F.3d 273 (3d Cir. 2003).	124
<u>United States v. Jackson</u> , 72 F.3d 1370 (9th Cir. 1995).	56, 75, 76
<u>United States v. Jennings</u> , 160 F.3d 1006 (4th Cir. 1998).	62, 64
<u>United States v. Joseph</u> , 892 F.2d 118 (D.C. Cir. 1989).	136, 138
<u>United States v. Kemp</u> , 500 F.3d 257 (3d Cir. 2007).	62
<u>United States v. Lambert</u> , 580 F.2d 740 (5th Cir. 1978).	93, 97
<u>United States v. Lawrence</u> , 618 F.2d 986 (2d Cir. 1980).	135
<u>United States v. Lipscomb</u> , 299 F.3d 303 (5th Cir. 2002).	91
<u>United States v. Malone</u> , 2006 WL 2583293, (D. Nev. Sept. 6, 2006).	77
<u>United States v. Manton</u> , 107 F.2d 834 (2d Cir. 1939).	103
<u>United States v. Mares</u> , 402 F.3d 511 (5th Cir. 2006).	148
<u>United States v. Martinez-Salazar</u> , 528 U.S. 304 (2000).	136
<u>United States v. McCaskey</u> , 9 F.3d 368 (5th Cir. 1993).	152

<u>United States v. McCormick</u> , 500 U.S. 257 (1991).	passim
<u>United States v. McDowell</u> , 498 F.3d 308 (5th Cir. 2007)..	141, 142, 143
<u>United States v. Mitchell</u> , 484 F.3d 762 (5th Cir. 2007).	125
<u>United States v. Moeller</u> , 80 F.3d 1053 (5th Cir. 1996)..	150
<u>United States v. Moeller</u> , 987 F.2d 1134 (5th Cir. 1993)..	92
<u>United States v. Morrow</u> , 177 F.3d 272 (5th Cir. 1999)..	156
<u>United States v. Muhammad</u> , 120 F.3d 688 (7th Cir. 1997)..	149
<u>United States v. Muldoon</u> , 931 F.2d 282 (4th Cir. 1991)..	64
<u>United States v. Olano</u> , 507 U.S. 725 (1993).	70, 79
<u>United States v. Painter</u> , 375 F.3d 336 (5th Cir. 2004).	165, 166
<u>United States v. Pappas</u> , 639 F.2d 1 (1st Cir. 1981)..	135
<u>United States v. Paradies</u> , 98 F.3d 1266 (11th Cir. 1996).	133
<u>United States v. Parker</u> , 505 F.3d 323 (5th Cir. 2007), <u>cert. denied</u> , 128 S.Ct. 1323 (2008).	117
<u>United States v. Pennington</u> , 20 F.3d 593 (5th Cir. 1994).	51
<u>United States v. Phillips</u> , 219 F.3d 404 (5th Cir. 2000).	41, 89, 90, 91
<u>United States v. Pineda-Arellano</u> , 492 F.3d 624 (5th Cir. 2007).	148
<u>United States v. Prati</u> , 861 F.2d 82 (5th Cir. 1988).	136
<u>United States v. Pringle</u> , 751 F.2d 419 (1st Cir. 1984)..	121

<u>United States v. Reasor</u> , 418 F.3d 466 (5th Cir. 2005).....	170
<u>United States v. Rodarte-Vasquez</u> , 488 F.3d 316 (5th Cir. 2007).	169, 170
<u>United States v. Sawyer</u> , 85 F.3d 713 (1st Cir. 1996).	62
<u>United States v. Scarpa</u> , 913 F.2d 993 (2d Cir. 1990).	105
<u>United States v. Scott</u> , 678 F.2d 606 (5th Cir. 1982).	93
<u>United States v. Shaid</u> , 730 F.2d 225 (5th Cir. 1984).....	142
<u>United States v. Simmons</u> , 374 F.3d 313 (5th Cir. 2004).....	51, 124
<u>United States v. Sotelo</u> , 97 F.3d 782 (5th Cir. 1996).	146
<u>United States v. Stedman</u> , 69 F.3d 737 (5th Cir. 1995).	47, 156
<u>United States v. Strickland</u> , 509 F.2d 273 (5th Cir. 1975).....	112
<u>United States v. Sun-Diamond Growers of California</u> , 526 U.S. 398 (1999).	passim
<u>United States v. Tannehill</u> , 49 F.3d 1049 (5th Cir. 1995).	117
<u>United States v. Tarango</u> , 396 F.2d 666 (5th Cir. 2005)..	123, 125
<u>United States v. Taylor</u> , 993 F.2d 382 (1993).....	68
<u>United States v. Thomas</u> , 348 F.3d 78 (5th Cir. 2003).....	83
<u>United States v. Tomblin</u> , 46 F.3d 1369 (5th Cir. 1995).	56, 62, 66
<u>United States v. Tucker</u> , 133 F.3d 1208 (9th Cir. 1998)..	62, 75
<u>United States v. Turner</u> , 2008 WL 5101309, 4 (D.C. Cir. 2008).	169

<u>United States v. Valle</u> , 538 F.3d 341 (5th Cir. 2008).....	85
<u>United States v. Vampire Nation</u> , 451 F.3d 189 (3d Cir.), cert. denied, 549 U.S. 970 (2006).	166
<u>United States v. Washington</u> , 688 F.2d 953 (5th Cir. 1982).	66, 80
<u>United States v. Welch</u> , 656 F.2d 1039 (5th Cir. 1981).....	124
<u>United States v. Westbrook</u> , 119 F.3d 1176 (5th Cir. 1997).	115
<u>United States v. Westmoreland</u> , 841 F.2d 572 (5th Cir. 1988).....	91
<u>United States v. Willis</u> , 958 F.2d 60 (5th Cir. 1992).	121
<u>United States v. Williams</u> , 679 F.2d 504 (5th Cir. 1982).	84
<u>United States v. Zweig</u> , 562 F.2d 962 (5th Cir. 1977).	8
<u>Wainwright v. Witt</u> , 469 U.S. 412 (1985).....	134
<u>Wayte v. United States</u> , 470 U.S. 598 (1985).....	145
<u>Zafiro v. United States</u> , 506 U.S. 534 (1993).	124
<u>Zedner v. United States</u> , 547 U.S. 489 (2006).	116, 121

STATE CASES

<u>McLemore v. State</u> , 125 So. 2d 86 (Miss. 1960).	53, 67
<u>USF&G v. Omnibank</u> , 812 So. 2d 196 (Miss. March 28, 2002).	33

FEDERAL STATUTES AND SENTENCING GUIDELINES

18 U.S.C. § 201(b)(1).55, 62
18 U.S.C. § 666.	passim
18 U.S.C. § 1341.	40, 51, 77
18 U.S.C. § 1343.	40, 51, 77
18 U.S.C. § 1346.	40, 51, 77
18 U.S.C. § 1951(b)(2).	40, 73
18 U.S.C. § 3161(c)(1).	passim
18 U.S.C. § 3162(a)(2).	116
18 U.S.C. § 3231.	1
18 U.S.C. § 3500(b).	108
18 U.S.C. § 3553.	49, 166, 169
18 U.S.C. § 3572(a).	167
18 U.S.C. § 3663(b)(1)(B)(i).	164
18 U.S.C. § 3742(a).	1
28 U.S.C. § 1291.	1
Fed. R. App. P. 32(a)(7)(B)(iii).	172
Fed. R. Crim. P. 7(c)(1).	83
Fed. R. Crim. P. 8(b).	45, 123

Fed. R. Crim. P. 12(b)(3)(B).	46, 138
Fed. R. Crim. P. 14(a).	124
Fed. R. Crim. P. 16(b)(1)(C).	100, 108
Fed. R. Crim. P. 30(d).	59
Fed. R. Crim. P. 52(b).	50, 68, 72
Fed. R. Evid. 403.	97
Fed. R. Evid. 702.	102, 113
Fed. R. Evid. 704(b).	99, 101, 102
Fed. R. Evid. 801(d)(2)(E).	112
Fed. R. Evid. 803(6).	109
Fed.R. Evid. 1006.	114
Sentencing Guidelines § 1B1.11(b)(1).	167
Sentencing Guidelines § 2B1.1.	passim
Sentencing Guidelines § 2C1.1.	150, 151, 168
Sentencing Guidelines § 2C1.1(2)(A).	157
Sentencing Guidelines § 2C1.1(b)(2)(A).	151, 153
Sentencing Guidelines § 2C1.2.	150, 151
Sentencing Guidelines § 2C1.7(b)(1).	163

Sentencing Guidelines § 2C1.7(c)(4). 150

Sentencing Guidelines § 5H1.10. 166, 167

MISCELLANEOUS

U.S. Const., Art. III, § 3. 145

Miss. Code Ann. § 9-1-36(2). 87, 88

Miss. Code. Ann. § 97-11-11. passim

Miss. Code Ann. § 9-21-1. 85, 86

Scott Horton, [A Minor Injustice](http://www.harpers.org), www.harpers.org (Oct. 3, 2007) 146