NO. 07-60751

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAUL S. MINOR,

Defendant-Appellant.

On Appeal from the United States District Court for
the Southern District of Mississippi, Jackson Division
C.A. No. 3:03-CR-00120 (HTW)

BRIEF OF APPELLANT PAUL S. MINOR

MCDERMOTT WILL & EMERY LLP

ABBE DAVID LOWELL
CHRISTOPHER D. MAN
PAUL M. THOMPSON
600 Thirteenth Street, N.W.
Washington, DC 20005-3096
Tel: (202) 756-8000
Fax: (202) 756-8087

OBIAMAKA P. OKWUMABUA
340 Madison Avenue
New York, NY 10173-1922
Tel: (212) 547-5400
Fax: (212) 547-5444

COUNSEL FOR DEFENDANT-APPELLANT PAUL S. MINOR

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record for Defendant-Appellant Paul S. Minor certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Parties:

1. Plaintiff-Appellee: United States of America

2. Defendant-Appellant: Paul S. Minor

Attorneys:

For Plaintiff-Appellee:

3. Ruth Morgan
   Office of the United States Attorney
   1575 20th Avenue
   Gulfport, MS 39501

4. David Fulcher
   Office of the United States Attorney
   188 East Capitol Street, Suite 500
   Jackson, MS 39201

5. Natashia Tidwell
   Peter Ainsworth
   U.S. Department of Justice
   Criminal Division, Public Integrity Section
   950 Pennsylvania Avenue, N.W.
   Washington, DC 20530-0001

6. Elizabeth D. Collery
   U.S. Department of Justice
   Criminal Division, Appellate Section
   950 Pennsylvania Avenue, N.W.
   Washington, DC 20530

For Defendant-Appellant Paul S. Minor:

7. Abbe David Lowell
Christopher D. Man
Paul M. Thompson
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, DC 20005-3096

8. Obiamaka P. Okwumabua
McDermott Will & Emery LLP
340 Madison Avenue
New York, NY 10173-1922
Tel: (212) 547-5400

9. J. Bradley Pigott (Minor's trial attorney during 2007 re-trial)
777 N. Congress Street
P.O. Box 22725
Jackson, MS 39202

10. Dennis Sweet (Minor's trial attorney during 2007 re-trial)
Sweet & Associates
200 South Lamar Street
Suite 200—North Tower
Jackson, MS 39201

Other Interested Parties:

11. United States Fidelity & Guaranty Company ("USF&G")

12. The People's Bank

13. Archie Marks

14. Diamond Offshore Company

Attorneys for USF&G:

15. Patrick Buchanan and the law firm of Brown, Watt & Buchanan P.A.

16. Wayne Drinkwater and the law firm of Bradley, Arant, Rose & White LLP

Attorneys for Diamond Offshore Drilling Company:

17. Richard Salloum and the law firm of Franke Rainey & Salloum

Co-Defendants and Their Counsel:

18. Mr. Minor's Co-Defendant Walter W. "Wes" Teel

19. Mr. Minor's Co-Defendant John H. Whitfield

20. Michael Crosby, Esq., Trial Counsel for John H. Whitfield

21. George Lucas, Esq., Trial Counsel for Walter W. "Wes" Teel

Respectfully submitted,

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Abbe David Lowell

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STATEMENT REGARDING ORAL ARGUMENT

This is a complex and high profile case with a record that spans three superseding indictments, two trials, and more than four years. Oral argument is necessary to fully apprise this Court of the extensive history of this case and to answer any questions relating to the complex legal issues involved. This Court has previously granted argument in similarly-complex white-collar criminal cases. See, e.g., United States v. Skilling, No. 06-20885 (5th Cir. April 2, 2008); United States v. Brown, 459 F.3d 509 (5th Cir. 2006), cert. denied, 127 S. Ct. 2249 (2007).

JURISDICTIONAL STATEMENT

Defendant-Appellant Paul S. Minor appeals from a final judgment of conviction and sentence entered by the Honorable Henry T. Wingate of the United States District Court for the Southern District of Mississippi on September 18, 2007. (D618 at 2982.)[1] Mr. Minor filed a timely notice of appeal on September 17, 2007. (D614 at 2976.) This Court has jurisdiction under 28 U.S.C. § 1291.

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[1] Citations in this brief are made as follows: "D" refers to the docket entry number assigned to any document filed in the United States District Court for the Southern District of Mississippi that has been made a part of the official record. Therefore, "D1 at 84" refers to Docket Entry #1 on the Southern District of Mississippi's docket for this matter at page 84. References to trial or pretrial hearing transcripts include the date of the proceeding, the relevant page number assigned by the court reporter for that particular transcript, and the docket entry number. Thus, "2/27/07 Tr. at 2237, D640," refers to page 2237 of the transcript of the proceedings held on February 27, 2007, located at Docket Entry #640. "SR" refers to any document added to the official record through Mr. Minor's Motion to Supplement the Record, granted on June 10, 2008. Thus, "SR2: Appellant's Proposed Jury Instructions" refers to Supplemental Record #2. Sealed documents are cited by date and title, and identified as "sealed."

QUESTIONS PRESENTED

1. Whether the district court committed reversible error when it failed to instruct the jury properly on bribery, thereby permitting the jury to convict Mr. Minor for conduct that was neither charged in the indictment nor considered bribery under federal law.

   (a) Mr. Minor preserved this issue below. (3/15/07 Tr. at 4075-86, D651; 3/27/07 Tr. at 4662-72, D658.)

   (b) This Court's review is de novo. United States v. Snyder, 930 F.2d 1090, 1093 (5th Cir. 1991).

2. Whether the district court deprived Mr. Minor of a fair trial when it excluded relevant and exculpatory evidence to rebut criminal intent and failed to instruct the jury on Mr. Minor's theory of the case.

   (a) Mr. Minor preserved this issue below. (See infra Argument II; 3/28/07 Tr. at 4709-16, D659.)

   (b) This Court reviews a district court's evidentiary rulings for an abuse of discretion, United States v. Speer, 30 F.3d 605, 609 (5th Cir. 1994), but "[s]uch discretion does not extend to the exclusion of crucial relevant evidence necessary to establish a valid defense." United States v. Wasman, 641 F.2d 326, 329 (5th Cir. Unit B 1981).

3. Whether the district court committed reversible error when it failed to dismiss the charges against Mr. Minor under 18 U.S.C. § 666 and improperly instructed the jury on the jurisdictional element of the offense.

(a) Mr. Minor preserved this issue below. (D485-86 & 570.)

(b) This Court's review is de novo. Snyder, 930 F.2d at 1093.

4. Whether the district court committed reversible error when it excluded a prospective juror through religious discrimination, even though the juror could set aside her religious beliefs and fairly apply the law.

(a) Mr. Minor preserved this issue below. (2/16/07 Tr. at 1382-83, D635.)

(b) Because the district court applied the incorrect legal standard, this Court's review is de novo. Adams v. Texas, 448 U.S. 38 (1980).

5. Whether Mr. Minor's 11-year sentence and $4,250,000 in fines and restitution were unreasonable and inconsistent with federal law.

(a) Mr. Minor preserved the various sentencing issues raised in this appeal. (8/3/07 Tr. at 149-60 & 245-46, D606; 9/6/07 Tr. at 365-66, D671; 9/7/07 Tr. at 412-16, D671.)

(b) Because the appellant raises multiple sentencing issues, the standard of review for each is discussed infra at Argument V.

STATEMENT OF THE CASE

On July 25, 2003, a federal grand jury in the Southern District of Mississippi returned an indictment against Paul S. Minor. (D1 at 84.) At the time, Mr. Minor was a successful trial lawyer from the Gulf Coast of Mississippi. (2/27/07 Tr. at 2237, D640.) The indictment alleged Mr. Minor engaged in fraud, bribery, and racketeering when he provided loan guarantees to three Mississippi state court judges who were running for office. (D1 at 84.) The government's theory of the case was simple: Mr. Minor entered into a corrupt bargain with these judges in which he provided them loan guarantees and payments on those loans in exchange for their agreement to favor Mr. Minor's clients in later cases pending before them. (Id. at 94.)

Along with Mr. Minor, the government indicted three Mississippi state court judges: Walter "Wes" Teel, a Chancery Court judge; John H. Whitfield of the Second Circuit Court; and Mississippi Supreme Court Justice Oliver E. Diaz. (Id.) The government also indicted Justice Diaz's former wife, Jennifer Diaz. All defendants, including Mr. Minor, pled not guilty to these charges on August 6, 2003. (D10 at 129.)[2]

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[2] Before the 2005 trial, Jennifer Diaz pled guilty to an unrelated tax charge.

Over the next two years, the parties engaged in extensive pre-trial motions practice, and the government brought two superseding indictments against Mr. Minor and his co-defendants. (D154 at 446; D297 at 984.) Eventually, on May 11, 2005, the case proceeded to trial. (D: 5/11/05 Minute Entry.) More than three months later, on August 12, 2005, after deliberating for one week, the jury announced a partial verdict, acquitting Mr. Minor on six counts (four mail fraud counts, one bribery count, and one extortion count), partly acquitting Judge Whitfield, and fully acquitting Justice Diaz. (D431 at 1453-58.) The district court declared a mistrial as to all other counts, including eight against Mr. Minor. (Id.)

Despite this failure to obtain a single conviction, the government decided to retry the remaining pieces of the case. On December 6, 2005, it filed a Third Superseding Indictment against Mr. Minor and Judges Whitfield and Teel (D454 at 1580), recharging those counts subject to the mistrial—racketeering, fraud, and federal program bribery—and adding three new charges: one against Mr. Minor and Judge Whitfield for conspiracy to commit mail, wire, and honest services fraud and federal program bribery under 18 U.S.C. § 666; a nearly identical conspiracy charge against Mr. Minor and Judge Teel; and a charge against Mr. Minor and Judge Whitfield for mail and honest services fraud. (D454.) These new

counts, much like the eight remaining counts against Mr. Minor, were based on the same loan guarantees that Mr. Minor had made to Judges Whitfield and Teel. In total, Mr. Minor—who faced fourteen charges in the first trial and obtained six acquittals—now faced a total of eleven counts: one racketeering; two conspiracy; two bribery; and six honest services, mail, and/or wire fraud.

A second trial commenced on February 7, 2007, and led to a different result: the jury took only one day to render a guilty verdict against all defendants on all counts. (D572 at 2468; 3/30/07 Tr. at 4996-5001, D661.) At sentencing, the court imposed an 11-year prison sentence against Mr. Minor and ordered that he pay $4,250,000 in fines and restitution. (D618 at 2983, 2986.) The court entered a final judgment of conviction on September 18, 2007.

Mr. Minor timely appealed. (D614 at 2976.) On October 24, 2007, he paid in full the fines and restitution ordered by the court. (SR1: Receipt for Payment of Fine and Restitution.) Because the court revoked his bond on September 18, 2006, Mr. Minor has been detained for nearly two years. (D519 at 2215.) At present, he is housed at the Federal Prison Camp in Pensacola, Florida. (D: 9/7/2007 Minute Entry.)

STATEMENT OF THE FACTS

For decades, state and local judges have run for election in Mississippi. For decades, these campaigns have been funded by those with the most interest—attorneys. For decades, there were no limits on contributions from these attorneys.[3] And, for decades, attorney contributions could come in the form of cash, checks, loans, or loan guarantees. Against this backdrop, during the 1998 Mississippi judicial campaign, the appellant, Paul Minor, made several loan guarantees to two judicial candidates. (3/1/07 Tr. at 2506 & 2526-28, D663; 3/13/07 Tr. at 3792, D649; 2/27/07 Tr. at 2286-87, D640.)

Yet despite this history, in 2003, a grand jury indicted Mr. Minor for making these loan guarantees, claiming he had struck an unholy bargain with the judges in question: loan guarantees in return for favorable treatment toward Mr. Minor's clients in future cases that might be filed before them. (D1 at 94.) At the time, the government styled its case as a classic quid pro quo bribery case (Sealed Document, 3/6/03 Grand Jury Tr. at 17-18; 6/1/05 Tr. at 1860, D687; 3/15/07 Tr. at 4104, D651; 3/27/07 Tr. at 4670, D658), but ultimately presented no evidence of a quid pro quo

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[3] In recent years, Mississippi changed its laws to impose campaign contribution limits during judicial elections. However, no such limits were in place during the 1998 judicial elections.

agreement. Mr. Minor thus prevailed at trial in 2005, receiving an acquittal on six of the fourteen counts against him and a mistrial on the rest.

In 2007, the government retried the case. This new trial stood in stark contrast to the 2005 trial, even though both were held before the same judge. For instance, although the court permitted Mr. Minor to introduce evidence to rebut the government's theory of criminal intent in 2005, the court excluded much of that evidence in the 2007 trial. At the first trial, the court instructed the jury that the government's case required a finding of quid pro quo, yet it refused to provide that same instruction in 2007. Not surprisingly, after the court kept from the jury Mr. Minor's core defense and essentially eliminated the government's burden to prove quid pro quo bribery, the 2007 jury returned a guilty verdict in less than one day.

But at sentencing, the court changed course yet again. Although it allowed Mr. Minor's conviction on something less than quid pro quo bribery, the court acted as though Mr. Minor had been convicted of just that, and sentenced him under the bribery provisions of the Sentencing Guidelines to 11 years in prison, restitution, and an unprecedented fine. It was as if the indictment was the government's accordion, contracting at trial to allow the government to obtain a conviction, and then expanding at sentencing to inflict the greatest punishment on Mr. Minor.

Much had changed from the 2005 trial that resulted in acquittals and a mistrial to the 2007 trial that resulted in a hasty conviction and a significant sentence. This appeal addresses these changes—a series of constitutional, evidentiary, legal, and sentencing errors by the district court that ultimately resulted in an unlawful conviction and sentence that cannot stand.

A. Paul Minor, John Whitfield, and Wes Teel.

Paul Minor was raised in Mississippi and developed his legal practice on the Gulf Coast—a close-knit community where lawyers and judges often are close friends. (3/7/07 Tr. at 3026-27, D645.) With his wife as his office manager, Mr. Minor built a litigation firm called Minor and Associates, which gained national recognition as a leader in personal injury and maritime law. (2/23/07 Tr. at 1930, D638; 2/27/07 Tr. at 2237, D640.)

Colleagues considered Mr. Minor among the best in his field. He was nationally recognized by the American Trial Lawyers Association and earned praise from "60 Minutes" for championing the plaintiffs' cause in the Bridgestone/Firestone litigation. (E.g., 6/3/05 Tr. at 2212, D689; 6/9/05 Tr. at 3131, D693; 3/19/07 Tr. at 4218-27, D652.) Mr. Minor served as the past President of the Mississippi Trial Lawyers Association and, throughout his career, earned several prestigious honors and awards, including from the Inner Circle of Advocates and the International Academy of Trial Lawyers.

(6/9/05 Tr. at 3131, D693; 6/8/05 Tr. at 2798-800 & 2853-54, D692.) He represented hundreds of people (3/7/07 Tr. at 3124, D645) and, from 1998 to 2003, had hundreds of cases (3/19/07 Tr. at 4189, D652). He fought hard for his clients and earned over 15 multi-million dollar verdicts for them in various jurisdictions. (7/26/05 Tr. at 6967, D714.) He routinely taught other lawyers and published articles in his areas of expertise, including bad faith insurance and Jones Act litigation. (6/8/05 Tr. at 2801, D692; 6/8/05 Tr. at 2757, D691.)

Mr. Minor had long-standing friendships with Judge Wes Teel of the Eighth Chancery Court and Judge John Whitfield of the Second Circuit Court of Mississippi. (2/27/07 Tr. at 2253, D640; 3/12/07 Tr. at 3582, D648.) On the Gulf Coast, it was not unusual for judges and lawyers to be friends and maintain close personal and professional relationships. (3/7/07 Tr. at 3026-27, D645.) Mr. Minor knew Whitfield long before Whitfield became a judge in 1994, as they had served together for years on the Board of Directors of the Legal Services Corporation for Southern Mississippi, an organization founded by Mr. Minor, which provided legal assistance to Mississippi's poorest communities. (6/8/05 Tr. at 2812, D692; 3/19/07 Tr. at 4227, D652.) Mr. Minor also was instrumental in recommending that Judge Whitfield leave the bench in December 2000 for a position as a

partner at a large regional law firm, Phelps Dunbar. (6/6/05 Tr. at 2436, D690; 3/19/07 Tr. at 4144, D652.)

Likewise, Mr. Minor had a long-standing relationship with Judge Teel—a relationship that predated Teel's run for Chancery Court Judge in 1998. (6/8/05 Tr. at 2834-35, D692.) Indeed, when Judge Teel was in private practice, the two men often referred cases to one another. (3/19/07 Tr. at 4176, D652.)

B. The 1998 Mississippi Judicial Elections.

In 1998, both Whitfield and Teel sought judicial office in Mississippi. For Whitfield, it was a reelection campaign, having first earned a seat on the Second Circuit Court in 1994. (6/8/05 Tr. at 2812, D692.) For Teel, it was his first run for the Chancery Court. (6/8/05 Tr. at 2834-36, D692.)

In Mississippi, state court judges are elected and, consequently, judicial candidates must raise and spend money to campaign. In the late 1990s, the predominant issue was tort reform, and both those for and against it spent significant sums to reach Mississippi voters. (6/7/05 Tr. at 2555-56 & 2563-64, D691.)

In 1998, Mississippi had no law limiting the amount of contributions to a judicial campaign. (3/1/07 Tr. at 2506 & 2526, D663.) Nor were there laws barring campaigns from receiving loans guaranteed by others wishing

to assist judicial candidates in financing their campaigns. (2/27/07 Tr. at 2287, D640; 3/1/07 Tr. at 2526-28, D663.) And, at the time, the vast majority of contributions to judicial campaigns came from attorneys. (6/7/05 Tr. at 2558-59, D691.) Attorneys like Mr. Minor could contribute significant sums to the candidates of their choice—either directly through loans or indirectly through loan guarantees—without restriction or legal repercussion. (3/1/07 Tr. at 2526-27, D663.)

There was nothing unusual, therefore, when Mr. Minor provided loan guarantees to Whitfield and Teel during their 1998 judicial campaigns. (2/27/07 Tr. at 2159 & 2219, D640.) Mr. Minor guaranteed two related loans to Whitfield: one for $40,000 and a second for $100,000. (2/27/07 Tr. at 2186-88, D640.) Mr. Minor also guaranteed a $25,000 loan for Teel. (2/27/07 Tr. at 2251-52, D640.) As the guarantor, Mr. Minor promised to repay the value of these loans to the bank if either Judges Whitfield or Teel could not repay them. Mr. Minor provided these guarantees during the election cycle and in an effort to assist Whitfield and Teel with their political campaigns. (2/27/07 Tr. at 2159 & 2219, D640.)[4]

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[4] Judge Whitfield used the $100,000 loan to purchase a house with his second wife. At the time, Whitfield was going through a contested divorce from his first wife, which threatened to damage his reelection campaign if publicly aired. (2/27/07 Tr. at 2238, D640.) At the 2007 trial, the

These loan guarantees were neither hidden nor secret. Each was accompanied by extensive paperwork: application forms that delineated the purpose of the loans; that identified Paul Minor's name and bore his signature (2/27/07 Tr. at 2265, D640); and that were approved by a committee of senior banking executives (2/27/07 Tr. at 2242-49, D640). By their terms, each loan guarantee was renewable in six-month intervals. When renewed, the parties had to re-sign the loan and guarantee papers, and the bank had to review and approve the extension. (2/27/07 Tr. at 2176-77, D640.) As the bankers who approved the transaction explained, such loan guarantees often were made for the purpose of funding political campaigns and were wholly lawful.[5] (2/27/07 Tr. at 2287, D640.) Indeed, these 1998 loan guarantees were hardly the only loans Mr. Minor guaranteed during his lifetime. He had a history of providing similar guarantees to numerous people, including political colleagues and friends. (2/27/07 Tr. at 2238-39, D640; 3/19/07 Tr. at 4175, D652.)

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government's bank witness confirmed that both loans to Whitfield were arranged at the same time and were made in the context of the reelection race. (Id. at 2237-38.)

[5] Mr. Minor had third parties pay off these debts when they became due, a practice that was not unusual. (2/27/07 Tr. at 2287, D640.)

C. The 2005 Indictment and Trial.

Despite the lawful nature of the 1998 loan guarantees, on July 25, 2003, a federal grand jury returned a fourteen-count indictment against Mr. Minor stemming from these guarantees. (D1 at 84.) The indictment alleged that Mr. Minor entered into a corrupt bargain with these judges, claiming he provided them with loan guarantees and payments on those loans in exchange for their agreement to favor Mr. Minor's clients in future cases that may come before them. (Id. at 94.) At the 2005 trial, the district court issued several rulings that permitted Mr. Minor to present the heart of his defense: that he lacked any corrupt intent to bribe the judges.

1. The Trial Court Allowed Mr. Minor to Admit Evidence to Rebut Criminal Intent.

First, the court permitted Mr. Minor to admit evidence to rebut the government's theory that he acted with criminal intent when he provided the loan guarantees. In a series of rulings, the court allowed Mr. Minor to introduce evidence highlighting the nature of his long-standing friendship with Judges Whitfield and Teel; his history of providing loan guarantees to others, including candidates for office; and the general practice among attorneys on the Gulf Coast of providing financial support for judicial candidates. (6/6/05 Tr. at 2368-70, D690; 6/8/05 Tr. at 2812-14, D692;

7/21/05 Tr. at 6539-40, D712; 6/6/05 Tr. at 2397, D690; 6/3/05 Tr. at 2241-42 & 2243, D689.)

2. The Trial Court Admitted Evidence on the People's Bank and Marks Cases.

Second, the court permitted Mr. Minor to introduce evidence that the two cases alleged by the government to have been influenced by bribery, instead, were decided properly by Judges Whitfield and Teel.

The first case, The People's Bank v. USF&G (the vehicle alleged as the payback from Judge Teel), was a civil action seeking damages arising out of United States Fidelity and Guaranty Company's ("USF&G") failure to defend The People's Bank in a class action lawsuit brought by its insureds. (6/20/05 Tr. at 3371-72, D694.) Minor and Associates represented The People's Bank and, after nearly four years of litigation, the parties settled the case on December 21, 2001 for $1,500,000. (6/21/05 Tr. at 3653-55, D695.)

People's Bank was filed in Chancery Court on August 25, 1998, and assigned to Judge J.N. Randall months before Judge Teel was elected to the bench. (6/20/05 Tr. at 3364, D694.)[6] Jim Reeves, another lawyer at Minor

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[6] The court clerk assigned the case to Judge J.N. Randall without influence from anyone. (7/20/05 Tr. at 6328-32, D711.) Judge Randall then solicited the involvement of Judge Teel for a discovery dispute completely

and Associates—not Mr. Minor—handled the case and appeared for all court hearings, depositions, and settlement negotiations. (6/20/05 Tr. at 3357-58, D694; 6/21/05 Tr. at 3678, D695.) Although this was a hard-fought and well-litigated case, (6/21/05 Tr. at 3678, D695; 6/22/05 Tr. at 3724, D696), USF&G had reasons to fear taking the case to trial. Most damaging was proposed testimony from several of its own employees, who were prepared to testify that they believed USF&G had a duty to defend The People's Bank. (6/22/05 Tr. at 3726-33, D696.) For this reason, USF&G risked a loss at trial on the issue of bad faith and the entry of a large punitive damage award against it—a very real threat in Mississippi at the time. (6/22/05 Tr. at 3718-19, D696; 6/22/05 Tr. at 3736-37, D696.) Rather than take its chances at trial, USF&G settled the case. (6/22/05 Tr. at 3787-88, D696.) Bribery, it seems, had nothing to do with it.

The second case the government alleged was influenced by a bribery scheme was Marks v. Diamond Offshore Drilling Co. (the vehicle alleged as the payback from Judge Whitfield). This case involved an oil rig worker,

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on his own, without Mr. Minor's involvement. (6/21/05 Tr. at 3591, D695.) After that dispute, Judge Randall reassigned the entire case to Judge Teel. This was at Mr. Minor's urging after Mr. Minor expressed frustration at the lack of progress in the case. (7/13/05 Tr. at 5916-17, D708.) Judge Randall testified that he gladly reassigned the case to Judge Teel because he was "sick of it" and was "glad to have someone to give it to"—not "because Paul Minor asked [him] to." (3/5/07 Tr. at 2736 & 2746, D662.)

Archie Marks, who was injured while working on an offshore oil platform in the Gulf of Mexico. (6/24/05 Tr. at 4115-16, D698.) After his injury, Marks could not continue working as a laborer. (6/24/05 Tr. at 4241-45, D698.) He hired Minor and Associates to represent him in his suit against Diamond Offshore, which was filed in February 1999. (6/23/05 Tr. at 3997-98, D697.) Again, this was not Mr. Minor's case. It was led by Jim Reeves, who was retained by the client and handled all day-to-day activities associated with the case, including all contacts with the client, all court hearings, and the eventual trial. (6/24/05 Tr. at 4118 & 4251, D698.) Mr. Reeves was an effective adversary, and even a witness from Diamond Offshore testified that the case was hard-fought and well-litigated. (6/23/05 Tr. at 4021, D697.) After losing a bench trial before Judge Whitfield, Diamond Offshore appealed to the Mississippi Supreme Court, which affirmed on 12 of the 13 points of error raised, but remitted the damages from $3,600,000 to $1,800,000. (6/7/05 Tr. at 4409-10, D691.) Once again, bribery, it seems, was not an issue in the result.[7]

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[7] Before the Mississippi Supreme Court justices read about the federal investigation in this case, they initially voted to affirm all of Judge Whitfield's rulings. (6/29/05 Tr. at 4671-72, D701.)

3. The Trial Court Instructed the Jury on Quid Pro Quo Bribery.

Third, the district court clearly instructed the jury on what conduct could constitute bribery under the indictment. The government's theory, the court instructed the jury, was "that monies were provided and unlawful favors received. So if you were to find that monies were provided but no favors were returned . . . that would not constitute a crime." (5/13/05 Tr. at 747, D682 (emphasis added).) Later, the court reiterated the point: "You have to find that [Mr. Minor] gave . . . the judges . . . money or goods or chattels . . . with an intent to influence the judge. So if he did it for a purpose other than an intent to influence, if he did it for a purpose of kindness, friendship, etcetera, he would not be guilty." (8/3/05 Tr. at 7678, D720 (emphasis added).) Finally, the court explained that "[a] gift or favor bestowed on a judge solely out of friendship . . . or for a motive wholly unrelated to influence over official action does not violate the bribery statute." (8/3/05 Tr. at 7711, D720 (emphasis added).)

In addition, the court instructed the jury on Mr. Minor's theory that the results in Marks and People's Bank were grounded in the facts and law, not bribery. "Although the judges may have ruled in Minor's favor, say defendants, the judges' actions were predicated upon their innocent belief of the merits of the case and unaffected by Minor's acts of guaranteeing the

loan." (8/3/05 Tr. at 7709, D720.) And, when defining the term "unfair advantage," a term used by the government in the indictment, the court explained that the jury should:

> look to the rulings, decisions . . . and determinations in those cases by the judges and whether Paul Minor was entitled to those rulings, decisions and determinations. In addressing this question, you may consider whether the rulings were accompanied by the judge's honest belief in the law and facts of a particular case rather than a corrupt purpose.

(8/03/05 Tr. at 7707-08, D720.)

4. Mr. Minor's Victory at the 2005 Trial.

The case went to trial on May 11, 2005. (D: 5/11/05 Minute Entry.) More than three months later, the jury announced a partial verdict, acquitting Mr. Minor on six of the fourteen counts against him (four mail fraud counts, one bribery count, and one extortion count). The court declared a mistrial as to the remaining eight counts.

D. The Third Superseding Indictment.

Soon after the 2005 trial, the government indicated its intent to re-try Mr. Minor, Judge Whitfield, and Judge Teel on the remaining counts in the indictment. On December 5, 2005, it filed a Third Superseding Indictment ("Indictment") against the three men. The core of the new Indictment was still the government's allegation that Mr. Minor engaged in a bribery conspiracy with Judges Whitfield (Count 1) and Teel (Count 2) to "provide

things of value" to the judges "in return for favorable treatment" and "an unfair advantage" in lawsuits that Mr. Minor had before the two judges. (D454 at 1583 & 1590.) The lawsuits at issue were still specifically described as Marks and People's Bank (D454 at 1583 & 1590)—the same two cases discussed in detail during the 2005 trial.

In addition to these conspiracy counts, the Indictment re-alleged a host of other offenses, all of which had bribery at their core. Count 3 alleged a racketeering offense under 18 U.S.C. § 1962(c) ("RICO")—an offense based on the same loan guarantees described above and that listed as its purpose "to unlawfully obtain an advantage in matters before" the judges. (D454 at 1596-1603.)[8] Counts 4-6 and 8-10 alleged mail, wire, and/or honest services fraud, again with the purpose "to provide things of value" to Judges Whitfield and Teel in exchange for "an unfair advantage in matters" before the judges. (Id. at 1603-08.) Finally, the indictment alleged two counts of federal program bribery against Mr. Minor under 18 U.S.C. § 666.

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[8] The racketeering count also alleged impropriety arising out of a prior judicial disciplinary investigation of Judge Teel. In 2001, three of the four chancery court judges in the Eighth District—J.N. Randall, Tom Teel, and Wes Teel—came under criminal investigation for alleged abuses of the travel reimbursement program. (3/5/07 Tr. at 2688-89, D662.) Mr. Minor agreed to help all three judges under investigation by arranging for a meeting with then-Mississippi Attorney General Michael Moore in Jackson, and transported the judges, their attorneys, and others to this meeting on his private plane. (Id. at 2691-92.)

(Id. at 1610-11.) Like the others, these counts alleged that Mr. Minor knowingly and corruptly gave "something of value" to Judges Whitfield and Teel, "with intent to influence" their decisions in cases before them. (Id.)

E. The 2007 Re-Trial.

Although the 2007 re-trial involved the same parties, the same underlying conduct, nearly the same charges, and the same trial judge, the proceedings were radically different from the 2005 trial.

1. The District Court Excluded Evidence It Admitted in the 2005 Trial.

First, the district court reversed course on a number of its prior evidentiary rulings. Each new ruling limited or circumscribed the evidence Mr. Minor could introduce. In 2007, for instance, the court prevented Mr. Minor from offering evidence and fully cross-examining witnesses on the facts underlying Marks and People's Bank. (3/8/07 Tr. at 3296-98, D646.) The court barred Mr. Minor from challenging government witnesses' and counsel's implication that the Mississippi Supreme Court's remittitur of the verdict had something to do with corruption. (3/8/07 Tr. at 3293-94, D646.) Whenever Mr. Minor's counsel attempted to elicit such testimony, the court interrupted or otherwise undercut such efforts. (3/8/07 Tr. at 3293-94, D640.) The trial court also excluded an expert on the soundness of the Marks verdict and barred the admission of the Marks trial transcript.

(3/21/07 Tr. at 4380, D642.) Ironically, the court later would instruct the jury that it could consider whether Judge Whitfield decided Marks based on his honest belief of the facts and the law (3/28/07 Tr. at 4790-91, D659), even though the court had limited the presentation of Mr. Minor's evidence on that very issue.

The district court also held that Mr. Minor could not offer evidence concerning past loan guarantees he made to others (3/20/07 Tr. at 4337, D641), evidence of the nature of his long-standing friendships with Judges Whitfield and Teel (3/9/07 Tr. at 3451-52, D647), evidence that Gulf Coast attorneys routinely provided financial support to judicial candidates (3/22/07 Tr. at 4583-84, D643), and evidence of Mr. Minor's reputation as a successful trial lawyer who won large settlements and verdicts for clients (3/6/07 Tr. at 2958, D644; 3/9/07 Tr. at 3448-49, D647). Although the jury heard all of this evidence in 2005, the court limited or excluded it in 2007.

2. The District Court Admitted Evidence It Excluded in 2005.

Second, the district court also admitted evidence it previously excluded in 2005. For example, in 2005, the court limited reference to a judicial disciplinary case against Judge Teel, allowing the government to call the state investigation a "serious" matter but not a criminal investigation. (6/20/05 Tr. at 3305-06, D694.) The court also prohibited the government

from going into the details of the underlying allegations. (3/20/07 Tr. at 4336-37, D641.) In 2007, the court allowed the government to pursue not only the details of the alleged "help" Mr. Minor provided, but also to call it a criminal case and discuss details about the allegations against the other judges involved. (3/5/07 Tr. at 2688-92, D662.)

Likewise, in 2007, the court admitted a transcript of testimony given by Judge Whitfield in his 1999 divorce proceedings. (3/13/07 Tr. at 3862-63, D649.) In 2005, the same court was "uncomfortable" with testimony relating to Judge Whitfield's divorce and would not even allow the divorce decree to come in because the prosecution was attempting to infer "an intentional secreting." (7/7/05 Tr. at 5537, D705.) Instead, the 2005 court was comfortable reading to the jury four mutually agreed upon stipulations outlining the basic parameters of Whitfield's divorce. (7/12/05 Tr. at 5638-39 & 5641-42, D707.) The 2005 court was sensitive to Mr. Minor's argument that Judge Whitfield's divorce was not relevant and unfairly prejudicial to him. (7/8/05 Tr. at 5594-95 & 5598, D706.) In 2007, however, the government again argued that the evidence was indicative of an act of concealment that demonstrated the defendants' (plural) criminal intent, and this time, the court, without explanation for its change of heart, admitted the evidence at trial. (3/13/07 Tr. at 3860-75, D649.)

Finally, in 2007, the district court changed its ruling on the admission of state ethics rules. In 2005, the court prevented the government from introducing recusal rules taken from the Judicial Code of Conduct and other judicial canons as evidence to show concealment of the alleged bribery scheme. (6/9/05 Tr. at 3116-20, D693.) According to the court, such evidence only would serve to confuse the jury, which might then convict based on findings of state or ethical law violations instead of proof of the federal offenses charged. (6/9/05 Tr. at 3120, D693.)

In 2007, the court reached the opposite conclusion. Although the court initially struck the Indictment's references to the ethical canons (2/26/07 Tr. at 1968-70, D639), at trial it not only permitted the government to elicit testimony regarding recusal, attorney disclosure rules, and economic interest statement forms, but also failed to provide a limiting instruction to the jury on how such evidence could be considered (3/27/07 Tr. at 4674, D658; 3/28/07 Tr. at 4726-27 & 4791-92, D659). During its charge to the jury, the court suggested that the jury could consider the judges' failure to list the loan guarantees on their economic interest forms—forms that Mr. Minor neither saw nor had any part in preparing—as evidence that the judges never intended to repay the loans. (3/28/07 Tr. at 4791-93, D659.) In its closing statement, the government seized on this, repeatedly arguing

that alleged state ethical lapses by the judges amounted to "acts of concealment" in furtherance of the conspiracy with Mr. Minor. (E.g., 3/29/07 Tr. at 4955-56, D660.)

3. The Court's Instructions to the Jury.

Finally, the court reversed course by refusing to instruct the jury on bribery and Mr. Minor's theory of the case as it had during the 2005 trial. A few examples prove the point. In 2005, the court instructed the jury that bribery required a quid pro quo—a finding that Mr. Minor provided loan guarantees to the judges with a "corrupt intent" and that the judges simultaneously received the loans with the "specific intent to take a bribe." (8/3/05 Tr. at 7678, 7708-09, & 7716, D720.) At the 2007 trial, however, the court specifically refused to require any quid pro quo or mutual intent between Mr. Minor and the judges. (3/28/07 Tr. at 4770-71, D659.)

The court also reversed course on jury instructions concerning Mr. Minor's theory of the case—that he lacked criminal intent. In 2005, the court told the jury that it could acquit if it found that Mr. Minor provided the loan guarantees "out of friendship" or "for a motive wholly unrelated to influence over official action[.]" (8/3/05 Tr. at 7711, D720.) The court further instructed the jury that "[a] person's good faith belief that his actions do not violate any federal law is a complete defense." (Id. at 7721-22.)

Again, the court refused to provide these instructions in 2007. (3/28/07 Tr. at 4712-14, D659.)

Unfortunately for Mr. Minor, with these rulings in place, the jury had little trouble returning a verdict against him. On April 22, 2007, after deliberating for less than one day, the jury found him and his co-defendants guilty on all counts.[9]

F. The Sentencing Hearing.

In August and September 2007, the court held a sentencing hearing. In imposing the sentence, the court applied the bribery Guideline under the Sentencing Guidelines, yielding a base offense level of 10. U.S.S.G. § 2C1.1. After a 2-level enhancement for multiple offenses, U.S.S.G. § 2C1.1(b)(1), a 2-level enhancement for obstruction of justice, U.S.S.G. § 3C1.1, and an 18-level enhancement based on loss, U.S.S.G.

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[9] Although the jury found Mr. Minor guilty on all counts, it did not accept the government's entire theory of the case. The jury convicted Mr. Minor of racketeering under Count 3 based upon a $100,000 loan guarantee to Judge Whitfield (Racketeering Act Two) and alleged wire fraud in the repayment of that loan (Racketeering Act Four). (D572 at 2471.) The jury rejected the government's claim that bribery was involved in the $40,000 loan guarantee Mr. Minor made for Judge Whitfield (Racketeering Act One) and $24,500 loan guarantee Mr. Minor provided Judge Teel (Racketeering Act Three). Similarly, with respect to the alleged conspiracy between Mr. Minor and Judge Teel in Count 2, the jury rejected the mail, wire, and honest services fraud allegations related to the loan guarantee to Judge Teel, but oddly found a violation of Section 666. (D572 at 2470.)

§ 2C1.1(b)(2)(A), the court arrived at an offense level of 32. When combined with a criminal history category of I, the court determined that Mr. Minor had a Guidelines sentencing range of 121-151 months, and a fine range of $17,500 to $175,000 per count. (9/07/07 Tr. at 451, D671.) The court then sentenced Mr. Minor to 132 months in prison, followed by a three-year term of supervised release. (D618 at 2619-20.) The court ordered restitution in the amount of $1,500,000. (Id. at 2986.) Then, announcing the fact that Mr. Minor had "substantial assets and income," the court made a dramatic upward departure and imposed a total fine of $250,000 per count, for a total of $2,750,000. (9/07/07 Tr. at 453, D671; D618 at 2986.)

Mr. Minor raised numerous objections at the time, none of which received serious attention from the court. He objected to the use of the bribery Guideline (instead of the gratuity Guideline), an objection the court rejected with little discussion. (8/2/07 Tr. at 134, D606.) He objected to the court's calculation of loss, particularly because the court prevented him from introducing any evidence on this issue. (8/3/07 Tr. at 210-229, D606.) Again, his objection was ignored. He objected to an enhancement for obstruction of justice, because the court had days before rejected that very enhancement. (9/7/07 Tr. at 437, D671.) Again, the objection was

dismissed. Finally, he objected to the imposition of a fine well beyond the acceptable range of the Guidelines. (8/3/07 Tr. at 234-38, D606.) Again, the objection was ignored. On September 18, 2007, the court entered its final judgment of conviction and sentence. (D618 at 2618.)

G. Public Acknowledgment of Selective Prosecution.

To Mr. Minor, the proceedings in the 2007 case exemplified what he had long viewed as an improper prosecution. Long before he was convicted and sentenced, Mr. Minor claimed he had been selectively targeted by a United States Attorney with conflicts of interest. (D112 at 328.) In pretrial proceedings before both the 2005 and the 2007 trials, Mr. Minor filed a motion to dismiss for selective prosecution and conflicts of interest. (D112 at 328; D495 at 2080.)[10] Both times, he sought an evidentiary hearing to prove this claim. (D112 at 328; D495 at 2080.) Both times, the court took

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[10] Dunn Lampton, the U.S. Attorney who initially prosecuted Mr. Minor, had many conflicts of interest. Mr. Minor opposed Lampton when he ran for Congress; Mr. Minor successfully brought suit against Lampton's family business (7/21/05 Tr. at 6537-38, D712); Mr. Minor advocated against the tort reform proposal advocated by Lampton (6/7/05 Tr. at 2555-57, D691); and Mr. Minor contributed to Justice Oliver Diaz's political campaign against Lampton's friend, Keith Starrett (6/7/05 Tr. at 2735-36, D691; 7/28/05 Tr. at 7420, D716).

the motion "under advisement" without conducting any evidentiary hearing, ultimately denying it without explanation.[11]

Since Mr. Minor's conviction and sentence, various media outlets and Members of Congress have raised similar questions about the reliability of this prosecution. See, e.g., United States House of Representatives Comm. on the Judiciary Majority Staff Report, Allegations of Selective Prosecution in Our Federal Criminal Justice System, at 26-30 (Apr. 17, 2008) (hereafter, "House Judiciary Report"); Scott Horton, Justice in Mississippi, Harper's Magazine (Sept. 18, 2007) (online edition). Some have questioned whether Mr. Minor was prosecuted merely because he was a large contributor to local Democratic Party candidates. Larisa Alexandrovna and Muriel Kane, The US Attorney Who Wasn't Fired: How Bush Pick Helped Prosecute Top Democrat-Backed Judge, The Raw Story, April 1, 2008, at 6. Others have questioned why Republicans who engaged in the same conduct were neither investigated nor charged. House Judiciary Report at 28-29. "But fundamentally, the biggest question raised is whether commonplace and widely-practiced campaign funding behaviors were selectively prosecuted against political opponents of one party, such as Mr. Minor . . . but were not

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[11] In 2006, the court stated it would issue its opinion after the jury was seated. To date, the court has not issued any written opinion on this matter. (6/29/06 Tr. at 33, D743.)

prosecuted against individuals or organizations favored by the other party." Id. at 28 (emphasis added).

While the trial court did not take these allegations seriously, the United States Department of Justice ("DOJ") now has done so. In May 2008, the Office of Professional Responsibility at DOJ announced that it was conducting an internal investigation of Mr. Minor's prosecution. Adam Lynch, Congress Probes "Witch Hunts," Jackson Free Press (May 28, 2008). In a letter to members of the House Judiciary Committee, DOJ officials announced they were moving forward on "allegations of selective prosecution relating to the prosecution[] of . . . Paul Minor." H. Marshall Jarrett, Counsel for Professional Responsibility, United States Department of Justice to Hon. John Conyers, Chairman, House of Representatives Judiciary Committee (May 5, 2008) at 1 (hereafter, "Jarrett Letter").

* * *

In 1998, Paul Minor provided political contributions, in the form of loan guarantees, to two individuals running for seats on the Mississippi State courts. A significant question in this appeal is whether the district court's legal rulings, evidentiary rulings, and jury instructions were sufficient to ensure that the jury did not convict Mr. Minor merely for taking part in

"commonplace and widely practiced campaign funding behavior[.]" House Judiciary Report at 28.

SUMMARY OF THE ARGUMENT

There are many reasons that this Court should have concerns about the reliability, integrity, and lawfulness of the conviction and sentence of Paul Minor. In recent months, news outlets, Members of Congress, and even the Department of Justice's internal watchdog have questioned whether the case was the product of selective prosecution and bias.

But these public concerns merely symbolize the more fundamental problems with this case. Mr. Minor's indictment was questionable from the start, his prosecution fraught with errors, and his verdict and sentence wholly unreliable. When Mr. Minor was given a fair opportunity to defend himself in 2005, the jury refused to convict. But two years later, all the rules had changed: the prosecutor filed a new Indictment; the district court altered a host of evidentiary rulings, depriving Mr. Minor of evidence essential to his defense; and the jury instructions were so unclear that they allowed a new jury to convict Mr. Minor for something other than the crimes with which he was charged. This Court should vacate Mr. Minor's conviction and sentence for the following reasons:

First, in a case involving constitutionally protected political campaign contributions, the district court erred when it failed to properly instruct the jury on bribery. Under Supreme Court precedent, bribery requires an

explicit "quid pro quo," United States v. McCormick, 500 U.S. 257, 273 (1991)—the "specific intent to give or receive something of value in exchange for an official act." United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05 (1999). Yet, when the district court instructed the jury on the meaning of bribery, it did not require the jury to find a quid pro quo. By failing to specifically define and limit the meaning of bribery, the court left the jury unmoored, free to reach conclusions without regard to either the prevailing law or the charges in the indictment. Established precedent from this Court requires reversal. United States v. Tomblin, 46 F.3d 1369, 1379 (5th Cir. 1995).

Second, the court's evidentiary rulings deprived Mr. Minor of the ability to defend himself. In a series of rulings, the district court excluded relevant, reliable, and exculpatory evidence aimed at rebutting criminal intent. As this Court has held, a criminal defendant is entitled to present evidence that is material to his defense. United States v. Lowery, 135 F.3d 957 (5th Cir. 1998). Exclusion of such evidence is grounds for reversal. United States v. Wasman, 641 F.2d 326 (5th Cir. Unit B 1981).

Third, the court erred when it failed to dismiss the charges against Mr. Minor under 18 U.S.C. § 666. Under this statute, the government must prove that Mr. Minor bribed "an agent" of a State agency. But, under this

Court's jurisprudence, Judges Whitfield and Teel were not "agents" of a State agency. This Court's decision in United States v. Phillips, 219 F.3d 404 (5th Cir. 2000), says as much and thus requires reversal.

Fourth, the court engaged in unlawful religious discrimination by improperly excluding a potential juror based on her religious belief, even though the juror said that she could be fair and impartial. As the Supreme Court has explained, such an error requires automatic reversal. Snyder v. Louisiana, 128 S. Ct. 1203, 1208 (2008).

Finally, the court committed various errors at Mr. Minor's sentencing hearing—applying incorrect Guidelines; imposing an enhancement for obstruction of justice that the court acknowledged on the record did not apply; and imposing an excessive sentence that was not justified by the facts found by the jury.

For these reasons, and those set forth below, this Court should reverse Mr. Minor's conviction and sentence and remand for a new trial. To remove the taint that has permeated these proceedings, this Court also should assign a new judge to this matter on remand.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY ON BRIBERY, THEREBY PERMITTING THE JURY TO CONVICT MR. MINOR FOR CONDUCT THAT WAS NEITHER CHARGED IN THE INDICTMENT NOR CONSIDERED BRIBERY UNDER FEDERAL LAW.

The indictment, prosecution, and conviction of Paul Minor should concern every public servant who runs for office and every person who exercises their constitutional right to support such a candidate. During the 1998 Mississippi judicial elections, Mr. Minor provided loan guarantees to Judges Whitfield and Teel to help with their political campaigns. There is no debate that the loan guarantees themselves were entirely legal. At that time in Mississippi, there was no limit on contributions, no barrier to loaning money, and no restriction on loan guarantees to judicial candidates. In fact, these loan guarantees were, in the words of a recent House Judiciary Committee Report, "commonplace and widely-practiced campaign funding behaviors[.]" House Judiciary Report at 28.

As the Supreme Court explained, "contributing money to, and spending money on behalf of, political candidates implicates core First Amendment protections[.]" FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2676 (2007) (Scalia, J., concurring). When the government seeks to outlaw contributions or expenditures regarding political activities, it

"operate[s] in an area of the most fundamental First Amendment activities." Id. (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)). But even in this core constitutional area, the government can prevent "quid pro quo" corruption, "whereby an individual or entity makes a contribution or expenditure in exchange for some action by an official." Wisconsin Right to Life, 127 S. Ct. at 2676 (citing Buckley, 424 U.S. at 26, 27, 45, 47).

In this case, the government originally sought to avoid the serious First Amendment implications of its indictment by alleging that Mr. Minor engaged in just such quid pro quo corruption. From the original indictment in July 2003 through the Third Superseding Indictment ("Indictment") filed in December 2005, the government alleged a classic quid pro quo bribery case. Counts 1 and 2 of the Indictment charged that Mr. Minor engaged in a scheme to bribe Mississippi state court judges with loan guarantees and other things of value "in return for favorable treatment" in his cases before the judges. (D454 at 1583 & 1590 (emphasis added).) Every other count echoed and relied upon this quid pro quo bribery scheme. Count 3 alleged a RICO offense based on the same loan guarantees that had as its purpose "to unlawfully obtain an advantage in matters before" Judges Whitfield and Teel. (Id. at 1595-603.) Counts 4-6 and 8-10 alleged mail, wire, and/or honest services fraud, again based on the loan guarantees and with the

purpose "to provide things of value" to Judges Whitfield and Teel in exchange for "an unfair advantage in matters" before the Judges. (Id. at 1601-08.) And Counts 12 and 14 alleged that Mr. Minor knowingly and corruptly gave "something of value," namely loan guarantees, to Judges Whitfield and Teel, "with intent to influence" the decisions of those judges in cases before them, a crime under 18 U.S.C. § 666. (Id. at 1609-11.)

In a case like this, the court plays a critical role. To comply with the Constitution's commands, the court must tell the jury what is and what is not a crime. Yet somewhere between the grand jury room and the petit jury's deliberation room, the district court eliminated the quid pro quo requirement from the case. In doing so, the court committed two serious errors. First, it ran afoul of controlling law on the proper definition of bribery, and thus failed to distinguish between constitutionally protected political activity and illegal bribery. Second, it allowed the jury to convict Mr. Minor for crimes with which he was never charged. These were reversible errors, and thus, for the reasons set forth below, this Court must vacate Mr. Minor's conviction on all counts.

A. The District Court Did Not Properly Charge the Jury on the Elements Needed to Prove Bribery in a Political Campaign Contribution Case.

In 2007, the district court erred when it instructed the jury on the meaning of bribery under federal law. In United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999), the Supreme Court held that bribery requires a "quid pro quo," defining the crime as "a specific intent to give or receive something of value in exchange for an official act." Id. at 404-05 (emphasis in original). While the definition appears simple enough, the concept often gets muddied in its application. Thus, both the Supreme Court and this Court have gone to great lengths to define both what is bribery and what is not.

First, bribery is not the act of giving campaign contributions otherwise protected under the First Amendment to the Constitution. Wisconsin Right to Life, 127 S. Ct. at 2676; United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993) ("[A]ccepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act."). In United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995), this Court made the point perfectly clear:

> [A] jury instruction must adequately distinguish between the lawful intent associated with making a campaign contribution and the unlawful intent associated with bribery. . . . In order to convict a briber, the government must prove that the accused

> intended to bribe the official. Intending to make a campaign contribution does not constitute bribery, even though many contributors hope that the official will act favorably because of their contributions. Accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not to perform an official act.

Id. at 1379 & n.15 (emphasis added). 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); Wisconsin Right to Life, 127 S. Ct. at 2676.

The Supreme Court's decision in McCormick is a fitting example of how a trial court must instruct a jury in a case involving political contributions, even when the crime alleged is something less than bribery. In that case, a state legislator was indicted for extortion based on the solicitation and receipt of money during and after a political campaign. McCormick, 500 U.S. at 261. Although the government alleged that McCormick had performed official favors for the contributors, the trial court did not require an explicit quid pro quo between McCormick and his contributors. For this reason, the Supreme Court reversed. Such payments, the Court explained, are only unlawful if "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." Id. at 273 (emphasis added). To permit otherwise "would open

to prosecution not only conduct that has long been 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 and expenditures[.]" Id. at 272. Without proof of an explicit quid pro quo, money given in the heat of a political campaign is not a bribe.[12]

Second, an unlawful bribe is not a mere gratuity. Sun-Diamond, 526 U.S. at 404-05; 18 U.S.C. § 201(c)(1)(A)-(B). The difference between a bribe and a gratuity is subtle, but extremely important. As the Sun-Diamond Court explained, "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). Bribery cannot rest upon vague, amorphous, or unknown promises to do something in the future. To be a bribe, the official act in question must be intended by the parties, be specific, and be known at the time of the unlawful exchange. Tomblin, 46 F.3d at

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[12] All other activity upon which the government supported the indictment is similarly protected by the First Amendment. For example, the government made various allegations regarding assistance Mr. Minor provided to Judge Teel and others during a 2001 judicial misconduct investigation. See note 8, supra. Like the campaign contributions, these efforts to petition the Attorney General not to prosecute are protected by the First Amendment. See, e.g., Professional Real Estate Investors v. Columbia Pictures Indus., 506 U.S. 48, 56 (1993) (holding that the Petition Clause of the First Amendment protects efforts to persuade the Executive and Judicial Branch to take political action).

1379. "Vague expectations of some future benefit should not be sufficient to make a payment a bribe." Id.; see Allen, 10 F.3d at 411.

A gratuity, in contrast, "may constitute merely a reward for some future act that the public official will take . . . or for a past act that he has already taken." Id. at 405. When one party provides something of value to another with the hope or expectation of some future benefit not yet defined by the parties, that can be a gratuity, but not a bribe. Sun-Diamond, 526 U.S. at 404-05; Tomblin, 46 F.3d at 1379. This Court's jurisprudence further supports this distinction between a bribe and a gratuity. See, e.g., United States v. Washington, 688 F.2d 953, 958 & n.4 (5th Cir. 1982) ("Bribery 'imports the notion of some more or less specific quid pro quo for which the gift or contribution is offered or accepted.'") (emphasis in original).

In this case, the court failed to understand these important distinctions, despite Mr. Minor's repeated efforts to assist. (3/27/07 Tr. at 4662-76, D658.) Mr. Minor submitted three proposed jury instructions that would have clarified the meaning of bribery:

> **Proposed Instruction No. 12—Mail/Wire Fraud, Honest Services:** In order to prove the scheme to defraud another of honest services through bribery, the government must prove . . . that the thing of value was given by Mr. Minor, and received by the particular judge, in order to influence or induce a specific official act. . . .

> **Proposed Instruction No. 13—Proof of Bribery:** Even if a financial transaction by Paul Minor benefitted [sic] a judge, it is not a bribe unless at the time of the transaction Mr. Minor intended it to cause or accomplish some specific official action by the judge which, at the time of the transaction, was identified by Paul Minor. Providing financial assistance for use by a campaign of a candidate for judge is not, in itself, bribery. It is also not bribery to provide financial assistance to a judge with a purpose of building a general basis of goodwill or loyalty that might ultimately affect one or more of a multitude of unspecified acts in the future. . . .
>
> **Proposed Instruction No. 18—Bribery, Explanatory Instruction:** . . . A corrupt intent exists only if there is a specific quid pro quo for the official to engage in a specific official act in exchange for the thing of value. A payment is made corruptly only if [it] is in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit are not sufficient to make a payment a bribe. A gift bestowed on a judge solely out of friendship, to promote good will, or for motives wholly unrelated to influence over official action does not violate the bribery statutes. . . .

(SR2: Appellant's Proposed Jury Instructions Nos. 12, 13, 18 (emphasis added).) These instructions would have ensured that Mr. Minor was not convicted merely for giving campaign contributions (id. at Proposed Instruction No. 13), was not convicted without a specific finding of a quid pro quo (id. at Proposed Instruction Nos. 12, 13, 18), and was not convicted based on a vague agreement that the judges would perform some future, unknown act (id. at Proposed Instruction No. 18). Yet with little discussion,

the court refused to provide these instructions to the jury. (3/27/07 Tr. at 4671, D658.)

Instead, amidst a series of obtuse instructions that spanned almost an entire day, the court provided only one significant instruction on the meaning of bribery:

> THE COURT: [instructing the jury on honest services fraud through bribery charge] In 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 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 on any question, matter, cause or proceeding which may be then or thereafter pending subject to the judge's action or judgment. 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 accepter of the bribe.

(3/28/07 Tr. at 4770-71, D659 (emphasis added).)[13] This instruction suffered from serious defects.

Initially, the court's instruction failed to distinguish between the crime alleged at the core of the Third Superseding Indictment, quid pro quo bribery, and a crime that the government had not charged—gratuity. As

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[13] The confusion created by this instruction was exacerbated by the district court's practice of repeatedly interspersing recitation from the indictment (charges written by the prosecution) into its presentation of the jury instructions (directions intended to be neutral). (E.g., 3/28/07 Tr. at 4724-42 & 4767-69 & 4773-75 & 4778-84, D659.)

detailed above, the distinguishing characteristic between a bribe and a gratuity is that a bribe requires an explicit quid pro quo, while gratuity may rest upon vaguer expectations of future undefined benefits. Sun-Diamond, 526 U.S. at 404-05. Yet at no time did the court ever instruct on bribery's quid pro quo requirement. (Proposed Instruction Nos. 12, 13, 18.) This alone is reversible error. McCormick, 500 U.S. at 273; United States v. Taylor, 993 F.2d 382, 385 (4th Cir. 1993) (reversing conviction when court instructed jury it could convict if it found payment made with "intent to influence" public official; "All payments to elected officials are intended to influence their official conduct.").

The reason for this absence is quite simple: the court did not believe that the crime of bribery required a quid pro quo at the time of the exchange. (3/27/07 Tr. at 4700-06 & 4710, D658 ("[T]here need not be a meeting of the mind. And that then I feel completely undermines your argument on quid pro quo.").) At one point during an exchange with counsel, Mr. Minor's counsel noted that bribery required that "the briber has to intend the specific [benefit sought] at the time of the bribe[.]" (3/15/07 Tr. at 4081, D651.) The court replied "I'm not really impressed by that argument." (Id.) "[W]hat you are telling me," the court continued, is that "[y]ou can't exactly early on put an official in your back pocket and use the influence later.

Under your scenario, you can't do that. And I just don't see how that statute [Miss. Code. Ann. § 97-11-11] can be read that narrowly." (Id. at 482.)

Despite the district court's unwillingness to accept the argument, bribery law is read that "narrowly," especially when the government seeks to transform a political contribution into a bribe. McCormick, 500 U.S. at 273; Tomblin, 46 F.3d at 1379. 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, regardless of when (or if) this "intended benefit" is to occur. Tomblin, 46 F.3d at 1379; Allen, 10 F.3d at 411. Where the thing of value is provided without a concrete benefit being identified in advance, it is a gratuity, not a bribe. Sun-Diamond, 526 U.S. at 404-05. The district court simply did not understand the distinction, and thus instructed the jury as if acts of gratuity could support a bribery conviction.

Likewise, the court did not instruct that bribery required the formation of criminal intent at the time of the exchange. This Court requires a defendant to form a corrupt intent at the time the thing of value is provided to the public official—meaning that the briber must intend to bestow "money or favor bestowed on or promised to a person in a position of trust to pervert his judgment or influence his conduct," Washington, 688 F.2d at

957, and must intend that at the time the money passes hands. United States v. L'Hoste, 609 F.2d 796, 804 (5th Cir. 1980) ("The requisite criminal intent, then, is formed when the gift or favor is intended to influence official action."). "A gift or favor bestowed on a judge solely out of friendship, to promote good will, or for motive wholly unrelated to influence over official action does not violate the bribery statutes." United States v. Frega, 179 F.3d 793, 807 (9th Cir. 1999); see also Taylor, 993 F.2d at 385.

Even though Mr. Minor provided the district court with the tools it needed to properly instruct the jury on criminal intent, (SR2: Appellant's Proposed Jury Instructions Nos. 12, 13, 18), the court failed to do so. Nor did it distinguish acts of goodwill from criminally corrupt intent. (Id.) Providing no guidance on criminal intent at all, the court left the jury free to convict even if the loan guarantees were given out of friendship, to promote goodwill or loyalty, or with some vague expectation of future benefit or other lawful motive—none of which constitute the bribery charged. See, e.g., Sun-Diamond, 526 U.S. at 404-05; Tomblin, 46 F.3d at 1379; Frega, 793 F.3d at 807.

The court's bribery instruction stands in stark contrast to the instructions that the same court gave in 2005. At the earlier trial, the court

properly cautioned prospective jurors that the failure to find a quid pro quo would preclude a bribery conviction:

> THE COURT [addressing the venire in 2005]: The charge here deals with the contention that monies were provided and favors were received. Now, the question is that unlawful favors were received. That's the contention, that monies were provided and unlawful favors were received. So if you were to find that monies were provided but no unlawful favors were returned in response, then . . . that would not constitute a crime, that's here in front of us at this point.

(5/13/05 Tr. at 747-48, D682.) It continued:

> Even though giving a judge or a judge receiving something of value may be inappropriate or a violation of the campaign finance limits or campaign finance laws or the ethical rules, such an act is not done corruptly so as to constitute a bribery offense . . . unless it is intended at the time it is given or in the case of a judge received to effect a specific action the judge officially will take in a case before him or may take in a case that may be brought before him. A gift or favor bestowed on a judge solely out of friendship to promote good will or for wholly—or for a motive wholly unrelated to influence over official action does not violate the bribery statutes.

(8/3/05 Tr. at 7711, D720 (emphasis added).) A side by side comparison of the 2005 and 2007 bribery instructions highlights the difference between the two. (2005 v. 2007 Summary Chart, attached as Addendum A.) In 2005, the district court clearly explained unlawful intent and imposed a specific and contemporaneous quid pro quo requirement. (Id.) In 2007, it did nothing of the kind, instead providing a short instruction that was incorrect as a matter of law, confusing in light of the facts, and simply incomplete.

When viewed as a whole, the bribery instruction in the 2007 case is not "a correct statement of the law . . . [that] clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." United States v. August, 835 F.2d 76, 77 (5th Cir. 1987); see also United States v. Hill, 417 F.2d 279, 281 (5th Cir. 1969). This Court should therefore reverse.

B. The District Court's Instructions Were Erroneous Because They Allowed the Jury to Convict Mr. Minor for Crimes Not Charged in the Indictment.

The Third Superseding Indictment charged Mr. Minor with engaging in a scheme to bribe Mississippi state court judges with loan guarantees and other things of value "in return for favorable treatment" in his cases before the judges. (D454 at 1583 & 1590 (emphasis added).) But by not clearly defining bribery for the jury, the court allowed for the possibility that the jury could convict on a theory not charged in the indictment. Such a constructive amendment of the indictment is wholly improper and requires reversal. United States v. Griffin, 324 F.3d 330, 356 (5th Cir. 2003); United States v. Sawyer, 85 F.3d 713, 729 (1st Cir. 1996). In this case, the court's incorrect instruction regarding bribery introduced a number of possible grounds under which the jury could have wrongly convicted Mr. Minor.

First, under the theory articulated by the court's instructions, the jury could have wrongfully convicted Mr. Minor merely for paying a gratuity,

not a bribe. This Court's decision in Griffin dealt with this kind of situation. Griffin involved a scheme in which certain real estate developers were charged and convicted of conspiring to bribe a state agency administrator to obtain tax credits used to help finance proposed affordable housing projects in the State of Texas. Griffin, 324 F.3d at 337. This Court held that the mail fraud counts alleged in the indictment had no reference to the intangible right to honest services, so when the district court included language charging honest services in its jury instructions, it constructively amended the indictment. Id. at 356. Under the Fifth Amendment, a criminal defendant can only face trial on charges alleged in the indictment and handed down by the grand jury. Id. at 355. "A constructive amendment occurs when the trial court through its instructions and facts it permits in evidence, allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment." Id. at 355. Once a constructive amendment has occurred, "the conviction cannot stand; there is no prejudice requirement." United States v. Mikolajczyk, 137 F.3d 237, 243 (5th Cir. 1998).

By failing to define bribery adequately, the court provided the jury no way to distinguish between a valid legal theory of bribery (one that requires a quid pro quo with a specifically identified future act) and an impermissible

gratuity theory not alleged in the indictment (seeking illegal unspecified future favors). The law requires such a distinction. Sun-Diamond, 526 U.S. at 404-05.[14]

Next, the jury could have wrongfully convicted Mr. Minor if it concluded that his conduct violated a host of Mississippi state laws, even though such state laws were not the federal crimes charged in the indictment. In this case, the honest services fraud and RICO charges were premised on a violation of state laws—here, the Mississippi bribery statutes. (D454 at 1581-82.) For this reason, it was important that the jury know how to interpret state law in conjunction with the federal offense charged so that it would not mistakenly convict Mr. Minor based on a violation of the state law alone. United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997); United States v. Edwards, 458 F.2d 875, 880 (5th Cir. 1972) ("[T]he fact that a scheme [to defraud] may or may not violate State law does not determine whether it is within the proscriptions of the federal statute."). As this Court made clear in Brumley, "a violation of state law that prohibits

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[14] Though payment of an unlawful gratuity is considered a lesser-included offense of bribery under federal law, United States v. Alfisi, 308 F.3d 144, 152 (2d Cir. 2002), had the government intended to seek a conviction for payment of a gratuity it should have included such a charge in the indictment, Griffin, 324 F.3d at 355, or sought a specific, clear instruction on this alternate theory. It did neither.

only appearances of corruption will not alone support a violation of §§ 1343 and 1346." Brumley, 116 F.3d at 734.

In Washington, this Court overturned a conviction because the lower court instructed the jury in a way that allowed the jury to convict merely based on a state law crime. There, a public official denied receiving bribes and testified that he received only unsolicited gifts, which he honestly believed he could legally accept. 688 F.2d at 956. In response, the government sought to show that the unsolicited gifts violated Mississippi law. Id. at 957. When instructing the jury, the district court refused to instruct on the difference between a bribe and an unsolicited gift and to further instruct that the receipt of unsolicited gifts was not an offense charged in the indictment. Id. at 958. This Court reversed:

> [T]he court should not have given [an instruction on honest services] without further explaining how Mississippi law relates to the federal offense charged. Standing alone, the instruction might be interpreted to mean that, if [the defendant] had violated state law by failing to turn the gifts over to the county, he was guilty of a federal offense. Patently the violation of Mississippi law does not ipso facto constitute a violation of the federal statute.

Washington, 688 F.2d at 957; see also United States v. Brown, 459 F.3d 509, 519 (5th Cir. 2006); United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008) (discussing how honest services fraud statute must be cabined

"lest it embrace every kind of legal or ethical abuse remotely connected to the holding of a governmental position").

Although the jury in Mr. Minor's case could not, by law, convict him for violating state law, the district court provided the jury with the mistaken impression that it could do just that. Rather than make the distinction between state and federal law perfectly clear, the court simply read the language of the Mississippi bribery statutes and repeatedly equated honest services fraud to a mere violation of the state's bribery law:

> [W]hen you hear me discuss honest services later, you're going to hear me referring to the bribery laws of the State of Mississippi. That is, by honest services, it refers to violation of the bribery laws of the State of Mississippi. Now, I'm going to emphasize that throughout as I talk to you about honest services. So you will hear me say that [sic] more than one occasion. So then you can fix it in your mind that when you see honest services, that you know we are talking about an alleged violation of the bribery laws of the State of Mississippi.

(3/28/07 Tr. at 4749-50, D659.) Even more so than in Washington, these instructions permitted the jury to convict Mr. Minor for a violation of state law, an error that requires automatic reversal. Washington, 688 F.2d at 957; see also Griffin, 324 F.3d at 355-56.

Finally, the jury also could have wrongfully convicted Mr. Minor merely if it believed that his co-defendants, Judges Whitfield and Teel, violated state judicial ethics rules. In 2007, the district court allowed the

government to elicit testimony regarding recusal, attorney disclosure rules, and economic interest statement forms. In fact, during its charge to the jury, the court suggested that the jury could consider the judges' failure to list the loan guarantees by Mr. Minor on their economic interest forms—forms that Mr. Minor never saw—as evidence that the judges never intended to repay the loans. (3/28/07 Tr. at 4792-93, D659.) In its closing statement, the government relied upon this evidence to argue that the alleged state ethical lapses by Judges Whitfield and Teel amounted to "acts of concealment" in furtherance of the conspiracy with Mr. Minor. (3/29/07 Tr. at 4955-56, D660.) Yet even ethical misconduct cannot constitute bribery unless it is part of an explicit quid pro quo arrangement. Frega, 179 F.3d at 807. Once again, by failing to clearly define what was and was not bribery, the court permitted the jury to convict Mr. Minor for something that was simply not a crime.[15]

Indeed, on its face, the verdict form returned in the 2007 trial shows that the jury operated under the mistaken belief that it could convict based on something other than the bribery charged. Even under the court's faulty

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[15] Like its change from 2005 in allowing evidence from Judge Whitfield's divorce in the 2007 trial (3/13/07 Tr. at 3860-75, D649), the district court's admission of judicial codes also improperly tainted Mr. Minor's trial and is grounds for reversal.

instruction, the jury found that Mr. Minor's $24,500 loan guarantee to Judge Teel did not constitute bribery. (D572 at 4.) Yet the jury convicted Mr. Minor for a number of related charges that were wholly dependant upon a finding that Mr. Minor had bribed Judge Teel. (See, e.g., D572 at 6 (finding Mr. Minor and Judge Teel guilty of mail fraud, honest services fraud, and federal program bribery).) The only explanation for this incongruity is that the jury must have believed that it could convict based on something other than bribery—but only bribery was charged in the indictment, and so only bribery could properly serve as the basis of a conviction.

* * *

This Court has long held that jury instructions that "confuse or leave an erroneous impression in the minds of the jurors" are subject to reversal. Perez v. United States, 297 F.2d 12, 16 (5th Cir. 1961). In this case, the jury instructions were both erroneous and confusing—but they were more than that as well. In the end, the court's instructions failed to provide the jury with the proper definition of bribery, and thus permitted the jury to convict Mr. Minor for campaign conduct protected under the First Amendment, for the lesser federal crime of illegal gratuity, or even for violations of State laws or ethical rules. For these reasons, this Court must vacate all counts of Mr. Minor's conviction.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ALLOW MR. MINOR TO REBUT CRIMINAL INTENT AND BY FAILING TO CHARGE THE JURY ON MR. MINOR'S THEORY OF THE CASE.

The district court's erroneous jury instructions swept so much conduct into the realm of what was criminal that a jury was made to believe it could convict Mr. Minor based on conduct that never was charged. The court's evidentiary rulings went even further and made it nearly impossible for Mr. Minor to present his theory of defense—that he lacked any criminal intent. The court's evidentiary rulings thus violate the well-established rule that a defendant is entitled to present evidence that is material to his theory of defense. See, e.g., United States v. Lowery, 135 F.3d 957 (5th Cir. 1998) (reversing obstruction conviction where defendant's intent evidence was improperly excluded); United States v. Wasman, 641 F.2d 326 (5th Cir. Unit B 1981) (reversing false statement conviction because defendant not allowed to present evidence rebutting allegation that he "willfully" used a false name). In a case such as this, where specific criminal intent is a pivotal element at issue, the defendant must be able to present evidence to rebut the government's theory of intent. United States v. Riley, 550 F.2d 233 (5th Cir. 1977) (reversing bank fraud conviction because defendant's evidence regarding his lack of intent to defraud the bank was improperly excluded); United States v. Safavian, No. 06-3139, slip op. at 21 (D.C. Cir. June 17,

2008) (reversing conviction because exclusion of expert testimony deprived jury of ability to understand the context of defendant's actions in evaluating his intent). Although this Court generally reviews a district court's evidentiary rulings for an abuse of discretion, United States v. Speer, 30 F.3d 605, 609 (5th Cir. 1994), "[s]uch discretion does not extend to the exclusion of crucial relevant evidence necessary to establish a valid defense." Wasman, 641 F.2d at 329. Here, the district court abused its discretion by reversing its holdings on a series of critical evidentiary issues without reason or explanation, and thus committed reversible error.

A. The District Court's Evidentiary Errors Prevented Mr. Minor From Presenting Crucial, Relevant Evidence of Alternative Non-Criminal Motives to Rebut Criminal Intent.

At trial, Mr. Minor sought to defend himself against the charged offenses, which were rooted in a bribery theory, by showing that he had no corrupt intent or criminal purpose when he provided the loan guarantees and other things of value to the judges. These arguments were the heart of Mr. Minor's defense. There is no dispute that Mr. Minor provided the loan guarantees in question, or that Judges Whitfield and Teel later presided over Marks and People's Bank. The case thus centered on two remaining questions: (1) did Mr. Minor engage in an unlawful quid pro quo; and (2) did

he, at the time of the loan guarantees, have the specific intent to commit a crime.

Mr. Minor prepared a vigorous defense on both issues. To support this defense, he attempted to introduce evidence to show that: (1) he had long standing personal relationships with Judges Whitfield and Teel (3/19/07 Tr. at 4173, D652); (2) he had a practice of guaranteeing loans to others without expecting or receiving anything in return (3/20/07 Tr. at 4269-73 & 4338, D641); (3) the Marks and People's Bank cases had merit and were correctly decided, and thus were not the result of bribery (3/21/07 Tr. at 4380, D642); (4) he had a good faith belief that his actions were lawful (3/22/07 Tr. at 4582-83, D643); (5) he did not file some of his most important cases in Whitfield's court when he could have (3/19/07 Tr. at 3446-48, D652); and (6) he had a reputation for being a nationally recognized leader in the field and repeatedly garnered high jury verdicts, further demonstrating the merits of the Marks and People's Bank cases. (3/19/07 Tr. at 4171, D652.)

Yet rather than allow Mr. Minor to present his case in 2007, the lower court excluded much of this evidence and strictly limited Mr. Minor's ability to fully cross examine the government's witnesses on these very points. (3/5/07 Tr. at 2799 & 2820, D662; 3/9/07 Tr. at 3451-52, D647; 3/6/07 Tr.

at 2958, D644; 3/19/07 Tr. at 4133 & 4171-72, D652; 2/28/07 Tr. at 2339-40, D664; 3/13/07 Tr. at 3786 & 3820, D649; 3/20/07 Tr. at 4337, D641; 3/22/07 Tr. at 4512-13, D643.) When Mr. Minor attempted to introduce evidence of non-criminal intent during cross-examination, the court consistently rejected that evidence as either "irrelevant" or "outside the scope of direct examination." (E.g., 3/9/07 Tr. at 3448-49, D647.) Indeed, the court even took the extraordinary step of conducting voir dire for several proposed defense witnesses outside the presence of the jury before they were allowed to testify, and then instructed them on what they could or could not testify to in advance. (E.g., 3/22/07 Tr. at 4512-13, D643; 3/13/07 Tr. at 3786, D649.) The court did not restrict the government in this fashion, allowing it to introduce, for example, evidence regarding alleged ethical errors committed by Judges Whitfield and Teel and regarding Judge Whitfield's divorce, even though the court had properly excluded such evidence in 2005. (2/27/07 Tr. at 1968-70, D640.)

This entire course of conduct ran afoul of the Rules of Evidence and violated Mr. Minor's constitutional right to present his defense. For the reasons more fully set forth below, this Court should vacate Mr. Minor's convictions.

1. Evidence of Motive Based on Friendship, Loyalty, and Shared Political Values Was Improperly Excluded.

At the 2007 trial, the district court improperly restricted evidence of the nature of Mr. Minor's long-standing friendships with Judges Teel and Whitfield. The men had known each other for decades, referred cases to one another while in private practice, and served on civic boards together. (3/19/07 Tr. at 4176-77 & 4227, D652.) The fact that these judges also held similar political views to Mr. Minor further suggested that Mr. Minor provided loan guarantees to them not for criminal reasons, but rather to support individuals with whom he shared friendship and common beliefs.

Nevertheless, the court excluded relevant evidence of these facts during trial. The court first prevented Mr. Minor's counsel from inquiring into these long-standing friendships on cross-examination, stating that the matters were best left to direct examination. (3/9/07 Tr. at 3449-50 & 3462, D647.) But when Mr. Minor called his secretary and business manager, Janet Miller, to testify about these matters on direct, the court again excluded the testimony:

> Q: Okay. I need to ask you a few questions about Mr. Minor's relationship with John Whitfield at different points in time. Before Mr. Whitfield became a judge, do you know of your own experience and knowledge as to whether or not Mr. Whitfield and Mr. Minor served together on any professional or community groups?

MS. TIDWELL: Objection, Your Honor.

THE COURT: I sustain the objection.

(3/19/07 Tr. at 4173, D652.) As far as reason or explanation, the court provided none.

Without knowing that Mr. Minor and Judges Whitfield and Teel shared a long-standing friendship and common interests, the jury was unable to determine whether those factors influenced Mr. Minor's decision to provide the judges with loan guarantees. As the Ninth Circuit has explained, "a favor bestowed on a judge solely out of friendship . . . does not violate the bribery statutes." Frega, 179 F.3d at 807. Exclusion of this evidence thus interfered with Mr. Minor's ability to establish that the loan guarantees were supported by motives unrelated to the government's theory of bribery. Mr. Minor's long-standing friendship with Judges Whitfield and Teel was highly relevant, and its exclusion was therefore erroneous. Fed. R. Evid. 401 & 402.

2. Evidence of Motive Based on Charitable History Was Improperly Restricted.

Another critical type of intent evidence that the court wrongly restricted was Mr. Minor's practice of guaranteeing loans to others, just as he did for Judges Whitfield and Teel. In its opening statement, the government argued that Mr. Minor created a "clever deception[]" to use the

loan guarantees as a method of "disguising and concealing" the funneling of bribes to Judges Whitfield and Teel so that he could corruptly influence their decisions in later cases. (2/26/07 Tr. at 2026-30, D639.) But these loan guarantees were no "clever scheme" devised for these two judges. Rather, Mr. Minor consistently assisted friends and colleagues in need by guaranteeing loans, without asking for anything in return. (2/27/07 Tr. at 2238-39, D640; 3/19/07 Tr. at 4175, D652.) With this evidence, Mr. Minor could show that he lacked criminal intent when he guaranteed the loans at issue. See Frega, 179 F.3d at 807.

Once again, the lower court rejected Mr. Minor's effort to rebut the government's case. (3/19/07 Tr. at 4243-44, D652; 3/20/07 Tr. at 4337-38, D641.) Several times, it prevented Mr. Minor's counsel from inquiring into Mr. Minor's pattern of loaning money to friends without asking for payment in return. (See, e.g., 3/9/07 Tr. at 3482, D647; 2/27/07 Tr. at 2240, D640.) Then, it completely excluded the testimony of John Walker, a Mississippi attorney and community leader to whom Mr. Minor had made a similar substantial loan guarantee:

> THE COURT: Well, that's what I'm asking. What does it tend to show here?
>
> MR. SWEET: It tends to show that it wasn't [Mr. Minor's] purpose in using—he did not come up with a scheme or way and creation of loan guarantees to bribe judges. That he had

had (sic) a past history of using loan guarantees to help friends. That has been our position in opening. That's the position we have in defense. I submit that it is relevant to show that in other situations, he did the same thing. He asked for nothing for it. He didn't require any favors or any type [of] payoffs or anything. He simply helped his friends. And that's why—that's our position. This is consistent with our position. And it goes toward rebutting the government's position that the purpose in loan guarantees and the purpose in his use in loan guarantees was to bribe people.

* * *

THE COURT: Everybody dances—everybody seems to dance around the issue—not the issue, but the observation anyone in the courtroom would see is that the jury is majority black and Mr. Walker is also black.

MR. SWEET: Yes, Your Honor.

THE COURT: Okay. So does that have anything to do with it?

MR. SWEET: Your Honor—

THE COURT: It wouldn't hurt, huh?

(3/20/07 Tr. at 4269-73, D641.) Although the Court later allowed Mr. Walker to testify, it excluded any reference to his loan guarantee. (3/20/07 Tr. at 4348, D641.)

The court's ruling regarding Mr. Walker's testimony is troubling for several reasons. The loan Mr. Minor guaranteed for Mr. Walker was very similar to the ones in this case: a guarantee for a friend, with multiple six-month renewals, and a lack of any expected favors or benefits in return. Perhaps this is why the court permitted Mr. Walker to fully testify in 2005

about this same loan guarantee. (7/21/05 Tr. at 6530-41, D712.) Yet in 2007, the court reversed course with little explanation, succinctly ruling: "I'm not persuaded the [Walker] loan guarantee has relevance here. I'm excluding it." (3/20/07 Tr. at 4337, D641.) The only explanation the court did offer had to do with the court's unfortunate fixation on Mr. Walker's race, obviously a factor that should have no weight in the decision of any judge.

At trial, the government argued in a motion in limine that this was merely "good act" evidence that should be excluded. (2/23/07 Tr. at 1923-34, D638.) In support, it relied principally on two cases. The first, United States v. Hill, 40 F.3d 164 (7th Cir. 1994), involved a postal employee convicted of stealing a United States treasury check from the mail in violation of 18 U.S.C. §§ 510(a) and 1709. When the defendant appealed the exclusion of evidence by the trial court concerning her failure to steal three "test letters" from the mail, the Seventh Circuit found the district court's exclusion of evidence proper because it "recognized that the 'test letters' incident occurred five months after the charged offenses and one month after officials from the bank confronted Hill about the check in September 1991." Id. at 168 (emphasis added). But in addition to lacking precedential value in this Court, Hill is readily distinguishable. In Mr.

Minor's case, the loan guarantees to others either preceded the guarantees to the judges or occurred during the same time-period. Such evidence is therefore highly relevant because it shows Mr. Minor's practice of providing loan guarantees to friends and colleagues, particularly those in the legal profession, and undercuts the government's theory of criminal intent.

The government's second case, United States v. Lambert, 580 F.2d 740 (5th Cir. 1978), also is distinguishable. That case involved a conspiracy to transport stolen cars across state lines. There, the court excluded documentary evidence that the defendant purchased used cars from sellers other than his co-defendants, which he argued was relevant to show his routine practice of being an auto dealer. Id. at 746. This Court affirmed the exclusion, on the grounds that the defendant's prior practice of purchasing used cars would not suggest that he did not also steal others. But unlike the defendant in Lambert, Mr. Minor was charged with a pattern or practice of engaging in criminal conduct that spanned years. Mr. Minor's practice of providing loan guarantees was therefore relevant to rebut the government's claim that the guarantees were a newly created and unique scheme, designed to camouflage Mr. Minor's alleged bribery.

Mr. Minor's case is far more analogous to United States v. Riley, 550 F.2d 233 (5th Cir. 1977). There, a national bank examiner was accused of

defrauding his bank by cashing checks for his remittance before paying for them. As part of his defense, he sought to introduce evidence of the bank's past practice of cashing 80 other checks during the same period without contemporaneous payment. Id. at 237. This Court held that such evidence was crucial to his defense and was relevant to determining whether the defendant intended to defraud the bank. Id. Similarly here, evidence of Mr. Minor's pattern of loaning money to friends and colleagues was admissible because it directly rebutted the government's theory of criminal intent.

3. Evidence Regarding the Correctness of the Challenged Cases Based on Their Facts and Applicable Law Was Improperly Excluded.

In addition to preventing Mr. Minor from placing the loan guarantees in their proper context, the district court further erred by preventing Mr. Minor from introducing evidence that the rulings in Marks and People's Bank were honestly decided based on the facts and law. Given that the central accusation made by the government was that Mr. Minor "fixed" these two cases through bribery, evidence regarding the merits of the cases and the decisions reached therein was critical for the jury to consider.

This improper exclusion was a two-step process. First, the court excluded testimony from Mr. Minor's two expert witnesses who would have testified about the reasonableness of Judge Whitfield's and Judge Teel's

rulings in Marks and People's Bank. (3/21/07 Tr. at 4380, D642.) Second, it limited cross-examination of government witnesses to rebut their testimony that the results in those cases were "inconsistent," "unusual," and "exorbitant." (E.g., 3/21/07 Tr. at 4389-90, D642.) Once again, because the court excluded evidence at the heart of Mr. Minor's defense, the jury was left with only the government's side of the story.

As Mr. Minor attempted to present his defense, the court excluded two of his experts, Alben Hopkins and James George. They would have testified that the outcomes in Marks and People's Bank were reasonable and justified under the facts and law. (3/21/07 Tr. at 4380 & 4458, D642.) These experts also would have testified about the extensive work done by Minor and Associates—testimony that would dispel any notion that the cases were the product of corruption or a theft of honest services. (3/21/07 Tr. at 4436-37 & 4408-10 & 4466-67, D642.) Yet, in 2007, the court excluded this relevant testimony.

The court's rulings with regard to Mr. George demonstrate the nature and magnitude of its errors regarding both witnesses. Mr. George was a renowned expert with thirty-five years of experience regarding the Jones Act, the statute at issue in the Marks case. (3/21/07 Tr. at 4489, D642.) The district court feared, however, that Mr. George would cast doubt on the

Mississippi Supreme Court's decision in Marks, and therefore excluded his testimony. (3/21/07 Tr. at 4380, D642.) The reason it did so was unusual and incorrect. It concluded that Mr. George was not qualified, again based on its perception that Mr. George would testify about the legal correctness of the Mississippi Supreme Court's decision in Marks. (3/21/07 Tr. at 4380, D642.) As Mr. Minor's counsel explained, Mr. George was not going to question the Mississippi Supreme Court's decision. Rather, he would have analyzed the decisions made by Judge Whitfield at the trial court to show that those decisions were sound and not the product of bribery. (3/21/07 Tr. at 4371-73, D642.) Regardless, the district court excluded Mr. George from testifying, casting its concern that Mr. George's testimony might criticize the Mississippi Supreme Court's decision as a reason why he was not qualified to serve as an expert.

As this Court knows, a district court should admit testimony from a qualified expert when the testimony is relevant and would aid the jury in understanding an issue in the case. Fed. R. Evid. 702. Here, Mr. George would have helped the jury understand the claims involved, the decisions made by Judge Whitfield, and whether those decisions were grounded in law rather than compelled through corruption. Contrary to what the district court believed, Mr. George was not being called to contradict the Mississippi

Supreme Court decision. In particular, Mr. George was prepared to discuss the damage award Judge Whitfield had rendered and how that award was justified given the intangible concepts of pain, suffering, and permanent disability. (3/21/07 Tr. at 4498, D642.) He was also prepared to testify about his review of the Minor and Associates files that showed substantial work went into the case, the support in the record regarding the severity of Mr. Marks' injuries, and the extensive litigation between the parties—all of which supported Mr. Minor's theory that his victory resulted from merit and hard work, not bribery. (3/21/07 Tr. at 4498-500, D642.) Mr. George was highly qualified on these grounds, and his testimony was relevant. In these circumstances, the district court abused its discretion when it failed to permit him to take the stand and present the jury with evidence that Marks was correctly decided.

In addition to refusing Mr. Minor's direct evidence of the soundness of Marks and People's Bank, the court also prevented cross-examination of government witnesses on the issue. (3/5/07 Tr. at 2799, D662; id. at 2820-22.) To make matters worse, the district court stood by this ruling even after government witnesses offered conclusory, unsupported testimony intended to undermine the results in Marks and People's Bank. From the government, the jury was told that the Marks judgment was "exorbitant" and

that the Mississippi Supreme Court remitted the verdict by $2,000,000, due, in part, to "irregularities," implying that corruption was to blame. (3/7/07 Tr. at 3085-90, D645.)[16] A government witness further implied that Judge Teel acted inappropriately during the settlement conference that led to the parties reaching a $1,500,000 settlement of the People's Bank claim, which USF&G's counsel testified he thought was "unusual." (3/5/07 Tr. at 2862-64, D662.) Without being permitted to defend the merits of those outcomes, Mr. Minor was forced to fight with both hands tied behind his back.

What is most unusual about the court's refusal to allow Mr. Minor's evidence on the merits of Marks or People's Bank is that the district court took the opposite view both in the 2005 trial (7/25/05 Tr. at 6716-28, D713; 8/3/05 Tr. at 7708, D720) and during a motions hearing in the 2007 case. In April 2006, the district court explained its view as follows:

> "[I]n an instance or circumstance where a defendant has authored an opinion totally devoid of any legal underpinnings, then the government, it seems to me, would certainly want to introduce that as a factor to show that one basis for that determination was the fact of a bribe. Well then, if a defendant is testifying to the contrary, that, "I did not accept any bribe," and that, "I at all times behaved properly," why wouldn't that bring in to some limited degree whether the actions taken were

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[16] The district court did not then allow the jury to know that the Mississippi Supreme Court had initially voted to sustain the entire Marks verdict, before it learned of the federal investigation. (6/29/05 Tr. at 4671-72, D701.)

> proper. . . . What I'm just simply addressing is the broad statement [the government] earlier made that—that the correctness of a legal ruling never has any validity in a bribery case. And that's what you had started off by saying. And I'm questioning exactly how far that principle should be taken, because it would appear to me that a defendant who testifies that, "I took the proper course," has now brought into issue whether the ruling suffered impropriety as a basis of fact on the basis of fact and law, but it would certainly seem to me to be proper testimony from a defendant in the action and, therefore, this broad prohibition [the prosecutor] mentioned earlier that the correctness of a legal ruling is never appropriate would seem to have exception there.

(10/4/06 Tr. at 28 & 30, D679 (emphasis added).) But by 2007, the district court had taken a new, opposite view on whether the correctness of People's Bank and Marks was relevant.

Taken together, these rulings left Mr. Minor unable to challenge the government's case. He could not, for instance, demonstrate that he did not receive an "unfair advantage" in People's Bank or Marks (D454 at 1580), because he could not discuss the merits of the two cases. Nor could he show that he and his conspirators lacked criminal intent because the cases were supported by the law and facts, rather than inferences of bribery. If admitted, this evidence could have altered the jury's verdict. See, e.g., Lowery, 135 F.3d at 959; Wasman, 641 F.2d at 329; Riley, 550 F.2d at 237. After all, when the court admitted similar evidence in 2005, the jury refused to convict.

4. Evidence of Motive Based on Mr. Minor's Belief that His Actions Were Lawful Was Improperly Excluded.

The district court also refused to let Mr. Minor demonstrate that he had a good faith belief that the loan guarantees were lawful. To show this, Mr. Minor's counsel prepared exhibits to show that overwhelming financial support for judicial election campaigns came from attorneys. (3/22/07 Tr. at 4582-83, D643.) This evidence would have put the Mississippi judicial electoral system into perspective and removed inferences that somehow an attorney's contribution to a judicial campaign was in any way peculiar or nefarious. Due to the court's erroneous evidentiary rulings prohibiting this evidence, Mr. Minor again was helpless to defend against the government's allegation.

An exchange from the 2007 trial proves the point:

> "MR. PIGOTT: There was also the matter of the exhibits and testimony that I proffered with respect to the majority of contributors to 1998 chancery and circuit judge candidates being attorneys and his compilation of that.
>
> THE COURT: And how is that relevant?
>
> MR. PIGOTT: We submit it is . . . relevant information to the jury given the implication in the government's charge that an attorney's support for a judicial candidate is a basis for an inference of an intent to corrupt when, in fact, under the whole of the legal system in the state, attorneys are not only permitted, but most of the contributions—hundreds and hundreds of contributions in 1998 to candidates for those two offices were from attorneys. We submit that the fact, the phenomenon of

> financial campaign support to judicial candidates should be put in perspective and that that perspective is relevant.
>
> THE COURT: Well, I don't see the relevance there."

(3/22/07 Tr. at 4583, D643.) That was the extent of the court's rationale.

In contrast, the district court admitted such evidence in 2005 (6/7/05 Tr. at 2558-59, D691) and further instructed the jury on the issue of Mr. Minor's good-faith defense:

> The defendants contest the government's accusations and contend that they acted in good faith. A person's good faith belief that his actions do not violate any federal law is a complete defense. A good faith belief that his actions do not violate any federal law. This is so because, remember, we are dealing here with specific criminal intent. That conduct intentionally pursued, aimed at violating the law.

(8/3/05 Tr. at 7721-22, D720.) Clearly, Mr. Minor had many reasons to believe he acted lawfully in this case. He provided loan guarantees to political candidates, a wholly legal and even constitutionally protected activity. He had engaged in this kind of activity previously, as had other lawyers on the Gulf Coast. But despite its recognition of the importance of this evidence in 2005, the district reversed course in 2007, preventing Mr. Minor from introducing evidence on the conduct of other lawyers and refusing to provide a good faith instruction. Once again, this deprived Mr. Minor of the ability to contest the government's charges.

5. Evidence that Mr. Minor Did Not File Some of His More Significant Cases in Judge Whitfield's Court Was Improperly Excluded.

Next, Mr. Minor sought to introduce evidence that he had many significant cases that he could have, but did not, bring before Judge Whitfield during the time period alleged in the indictment:

> MR. PIGOTT: I believe that Ms. Miller is personally aware and remembers that the largest piece of litigation that the Minor law firm had during the alleged conspiracy and RICO period was a set of cases against Ford Motor Company and Firestone/Bridgestone.
>
> THE COURT: I don't see how that's relevant.
>
> * * *
>
> MR. PIGOTT: . . . . It is that it rebuts the motive, the state of mind attributed in the indictment to Mr. Minor during the same period of time with respect to that same court. The allegation is that he continually engaged during those four or five years including 2000, a conspiracy to get and exploit an unfair advantage with respect to the Circuit Court of Harrison County. Contrary to such a motive, acting inconsistently with a motive, he filed the most important litigation of that period of time in his career in a different court. The law gave him a green light to file it—
>
> THE COURT: I'm going to let you make a record on that later, but I'm going to exclude it. I don't see the relevance in that. I think the analogy that the government provided earlier is directly on point. That a robber on the way to the bank that he robs and he passes other banks on the way, that he doesn't rob those, speaks directly to that type of defense here. And while I'm not equating this to any type of bank robbery, it was the argument the government made earlier. I don't see why the defense should be allowed to show that a defendant could have ruled on a number of matters differently or could have filed a number of other matters in the same venue as showing a state of

> mind with regard to this matter. So you will have to pursue that at a later stage with another court if it comes to that, but I'm not going to let it in.

(3/9/07 Tr. at 3446-48, D647.)[17]

In so ruling, the court missed the point of this evidence. According to the government, from 1998 to 2003, Mr. Minor was part of a conspiracy to get corrupt rulings from Judge Whitfield. (D454.) It only makes sense that Mr. Minor be allowed to show the gaping hole in the government's theory by demonstrating that during the exact same period of time that he allegedly operated a racketeering enterprise to get corrupt rulings from Judge Whitfield, he did not file his most important case in Whitfield's court. This rebuts the claim that Mr. Minor offered the loan guarantees with specific criminal intent—if Mr. Minor had already "bought" a judge through his campaign contributions, why would he not invoke that unfair advantage in his most important cases?

Once again, the court's ruling was at odds with its conduct during the 2005 trial. At that time, Mr. Minor's counsel called a witness who, based on his review of law firm records, lawsuits filed, and venue rules concluded that Mr. Minor's law firm could have filed far more cases with Judges Whitfield

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[17] Mr. Minor sought to introduce this evidence through a third expert, James Henley. (3/9/07 Tr. at 3447-48, D647; 3/22/07 Tr. at 4510-13, D643.)

and Teel than it did during the time period alleged in the indictment. (7/26/05 Tr. at 6887-91, D714.) This testimony negated the government's theory that Mr. Minor was seeking illegal favors in exchange for so-called bribes. The court admitted that evidence in 2005. (7/26/05 Tr. at 6887-91, D714.) Yet when Mr. Minor's counsel made the same arguments in 2007, they were rejected by the same court. (3/19/07 Tr. at 4156-60, D652.)

As this Court has explained, facts critical to the defense theory that are of "substantial probative value" and "closely connected in time and circumstances" should be admitted. Holt v. United States, 342 F.2d 163, 166 (5th Cir. 1965). By excluding such relevant and highly probative evidence in Mr. Minor's case, the district court committed reversible error.[18]

6. Evidence that Mr. Minor Was a National Leader in Jones Act and Bad Faith Insurance Litigation Was Improperly Excluded.

Finally, the district court excluded evidence about Mr. Minor's expertise and recognition as a trial lawyer who achieved multi-million dollar verdicts and settlements in the very areas at issue in Marks (Jones Act

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[18] Compounding its error in excluding Mr. Minor's evidence was the trial court's admission of the government's irrelevant and prejudicial evidence against him, including the possible breach of judicial ethics rules by the judges, Judge Teel's prior travel expense cases, and Judge Whitfield's failure to disclose his loan guaranty during his divorce proceeding. (See Statement of Facts § E.2.)

litigation) and People's Bank (bad faith insurance). (3/19/07 Tr. at 4171-72, D652; 3/6/07 Tr. at 2958, D644.) Mr. Minor's expertise and receipt of national awards in these areas was relevant, because it rebuts the government's theory that his successes stemmed from something other than merit, that he had any need to bribe judges, or that he otherwise had a corrupt motive. Once again, the district court's exclusion of evidence severely harmed Mr. Minor's defense.

* * *

Taken as a whole, these myriad evidentiary errors combine to establish that the district court deprived Mr. Minor of his right to present a complete defense against the charges he faced. He could not explain why the loan guarantees were provided. He could not rebut the government's claim that the loan guarantees were unusual, surreptitious, or suspicious. He could not show that he lacked criminal intent. And he could not show that he neither sought nor received favorable treatment from Judges Whitfield and Teel. As this Court has repeatedly stated, when a district court's evidentiary rulings cut so deeply into the defendant's ability to present his theory of the case, there is reversible error. Wasman, 641 F.2d at 329; Riley, 550 F.2d at 237.

This Court needs no further proof of the harmful nature of these errors than to look to the result in the 2005 trial. In 2005, the district court introduced much of the evidence that it excluded in 2007. The result in that case was an acquittal on many counts and a hung jury on the rest. For this reason, the errors are not harmless, and this Court must reverse.

B. The District Court Erred by Refusing to Charge the Jury on Mr. Minor's Defense Theory of the Case.

After first excluding much of the evidence Mr. Minor required to fairly present his defense, the court further erred by refusing even to provide the jury with instructions explaining Mr. Minor's theory of the case. (See Proposed Instructions 12, 13, 18.) Mr. Minor's proposed instructions:

> (1) [were] correct, (2) [were] not substantially covered by other instructions which were delivered, and (3) deal[t] with some point in the trial so "vital" that the failure to give the requested instruction seriously impaired the defendant's ability to defend.

United States v. Opdahl, 930 F.2d 1530, 1533 (5th Cir. 1991) (holding district court's failure to give defendant's theory of defense in bribery case constituted reversible error) (internal citations and quotations omitted); United States v. Grissom, 645 F.2d 461, 464 (5th Cir. 1981); Washington, 688 F.2d at 958. The district court provided instructions in 2005 on various defense themes—gifts given out of friendship or loyalty are not bribes, Mr. Minor's long-standing relationships with the judges, his past pattern of

guaranteeing money to friends, and large attorney support for judicial campaigns. (2005 v. 2007 Summary Chart, attached as Addendum A.) In 2007, however, the court refused to do the same.

The district court's failure to completely instruct the jury on Mr. Minor's theory of the case constitutes reversible error. See United States v. Perez, 297 F.2d 12, 15-16 (5th Cir. 1961) ("It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. The charge to which he is entitled, upon proper request, in such circumstance is one which precisely and specifically, rather than merely generally or abstractly, points to his theory of the case"); Opdahl, 930 F.2d at 1535 ("The law is clear that the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." (emphasis in original)). Left without instructions to guide the jury and evidence to make his case, Mr. Minor was unequipped to rebut the charges against him.

For this additional reason, this Court must reverse.

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO DISMISS THE CHARGES AGAINST MR. MINOR UNDER 18 U.S.C. § 666 AND IMPROPERLY INSTRUCTED THE JURY ON THE JURISDICTIONAL ELEMENT OF THE OFFENSE.

The district court further erred when it permitted the Section 666 counts against Mr. Minor to go to the jury, and again when instructing the jury on the relevant law. Section 666(a)(2) makes it a crime to bribe any "agent" of a State agency (that receives over $10,000 in federal funds) in connection with any business or transaction of the agency in excess of $5,000. 18 U.S.C. § 666(a)(2). Section 666 does not give the federal government free rein to claim jurisdiction over conduct best left to state and local prosecutors. Rather, when interpreting the scope of that statute, this Court should respect the federal/state balance and ensure that federal prosecutors do not overreach and charge conduct best left to the state. Fischer v. United States, 529 U.S. 667, 681 (2000).

The government alleged that Section 666 applied because Judges Whitfield and Teel were "agents" of the Mississippi Administrative Office of Courts ("AOC"). Mr. Minor objected to this characterization throughout the proceedings below,[19] claiming that the government could not, as a matter

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[19] Mr. Minor sought to dismiss the Section 666 counts through a pretrial motion filed June 1, 2006 (D485 at 2007), and again asked the district court

of law, satisfy this jurisdictional prerequisite to Section 666. (D486 at 2011 & D570 at 2442.) With no discussion, the court denied these requests. (D: 6/29/06 Minute Entry & 3/22/07 Tr. at 4638, D643.) For the following reasons, that court's decision was in error, and this Court should reverse.

A. The District Court Erred by Denying Mr. Minor's Rule 29 Motion and Allowing the Section 666 Charges to Go to the Jury.

First, the district court erred when it found that Judges Whitfield and Teel were "agents" of the AOC, within the meaning of Section 666. Under the statute, "agent" is defined 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 also United States v. Phillips, 219 F.3d 404, 411 & n.7 (5th Cir. 2000) (explaining that Section 666 applies standard agency principles).

Here, the facts show that Judges Whitfield and Teel were not "agents" of the AOC. The AOC is an agency created in 1993 to handle the non-judicial business of the state courts in Mississippi. See Miss. Code. Ann. § 9-21-11. It is empowered to "disburse" any "aid, assistance, funds, monies, grants or subgrants" from any "federal government agency or

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to dismiss those counts through a Rule 29 motion filed March 16, 2007. (D570 at 2442.)

entity" for the purpose of judicial administration in Mississippi. Miss. Code. Ann. §§ 9-21-11, 9-21-13. It is the AOC that directs expenditures for the operation of the state courts, and it alone controls these disbursements. Id. Circuit and Chancery judges have no control over the AOC or its spending decisions. Even the "separate office allowance fund for the purpose of providing support staff to (local) judges" must by statute be "managed by the [AOC]," not the judges themselves. Miss. Code. Ann. §9-1-36(2).[20] Because Circuit and Chancery courts in Mississippi are created directly by the Mississippi Constitution, Miss. Const. §§ 156, 159-60 (1890), judges like Whitfield and Teel have no power over the AOC, and the AOC has no authority over them (3/1/07 Tr. at 2604 & 2607, D663).

At the 2007 trial, the government's sole witness concerning the AOC, Carolyn Briscoe, Finance Director of the AOC, confirmed this distinction between the Mississippi Judges and the AOC. (3/1/07 Tr. at 2586-88, D663.) As Ms. Briscoe explained, the AOC handles "the nonjudicial business for all the courts in the state" (3/1/07 Tr. at 2586-87, D663), and is entirely separate from the judicial aspects of the Mississippi courts (3/1/07 Tr. at 2586-87 & 2605, D663). Neither Judge Whitfield nor Judge Teel was

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[20] Although the AOC processes the payroll for the Mississippi Circuit and Chancery courts, the judges are not employees of the AOC, but are employees of the courts upon which they sit. Miss. Const. §§ 156, 159-60.

employed by the AOC or had any authority to act on the AOC's behalf. The judicial and nonjudical aspects of the Mississippi courts were separated both by law and in practice, such that neither judge could be considered an agent of the AOC.

This Court's decision in Phillips confirms the soundness of this conclusion. In that case, this Court overturned a Section 666 conviction because of a lack of agency. There, the defendant was a tax assessor for St. Helena Parish, Louisiana, who was charged with financial misconduct. The government argued that the Parish was a federally-funded state entity and that the defendant was an agent of the Parish under Section 666. This Court framed the issue as turning "on whether Phillips, as tax assessor, was authorized to act on behalf of the parish with respect to its funds." 219 F.3d at 411. Looking carefully at Louisiana law, the Court found that Louisiana's Constitution and statutes separated the tax assessment districts from parish governments such that, "although Phillips was the tax assessor for property in the parish, the parish has no power, authority, or control over the assessor's duties of job." Id. at 412. The Court overturned the conviction, explaining that "[a] reasonable application of the statute precludes the senseless conclusion that an individual can be an agent of one who exercises no control, direct or indirect, over that individual." Id. at 412 n.12.

That same result applies here. It borders on the nonsensical to suggest that State court judges elected by the people and fulfilling the traditional judicial functions set forth by the Mississippi Constitution are subject to the control of a bureaucratic agency. Nothing in Mississippi law or in the evidence adduced at trial suggests that any such agency relationship exists. Thus, for the same reasons this Court set forth in Phillips, Section 666 does not apply in this case.

B. The District Court Erred When It Instructed the Jury on the Agency Requirement Under Section 666.

After failing to dismiss the Section 666 counts from the case, the district court also erred when it instructed the jury contrary to this Court's precedent. As this Court repeatedly has held:

> [T]he statutory term "agent" should not be given the broadest possible meaning, as urged by the government, but instead should be construed in the context of § 666 to tie the agency relationship to the authority that a defendant has with respect to control and expenditure of the funds of an entity that receives federal monies.

Phillips, 219 F.3d at 415; see also United States v. Moeller, 987 F.2d 1134, 1137 (5th Cir. 1993) ("[T]here must be some nexus between the criminal conduct and the agency receiving federal assistance."); United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988) (the "statute limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions").

In this case, however, the court told the jury that it could convict under Section 666 even though the judges had no control over the expenditure of funds by the AOC. "Under 18 U.S.C. Section 666," the court stated, "it is not necessary for the particular judge defendant to have had any control over the use or spending of federal funds." (3/28/07 Tr. at 4786-87, D659.) As the court told counsel: "[Mr. Minor has] made an argument that under 666, the agency to which the judge belonged must have had control over the use or spending of federal funds. And by this instruction, I specifically advise the jury that this is not so." (3/27/07 Tr. at 4681, D658; see also id. at 4672-73, 4677, & 4682-84.) Although it is true that the alleged corruption does not have to involve the federal funds, see Moeller, 987 F.2d at 1137, the defendants still must have control over those funds, Phillips, 219 F.3d at 415. The trial court's instruction facially conflicts with Phillips' mandate that agents must have the ability to "control" the expenditure of funds to sustain a conviction.

Section 666 was designed to prevent federal funds from falling into the hands of corrupt persons who may misspend those dollars. Sabri v. United States, 541 U.S. at 600, 605-06 (2004); United States v. Rooney, 37 F.3d 847, 851 (2d Cir. 1994). That purpose is not served by expanding federal criminal jurisdiction to cover state officials with no control over the

expenditure of federal dollars. Indeed, the Supreme Court has specifically cautioned against turning every act of "bribery into a federal offense, upsetting the proper federal balance." Fischer, 529 U.S. at 681. Given the conflict between the lower court's actions and this Court's interpretation of Section 666, this Court must reverse Mr. Minor's conviction.

IV. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY EXCUSING A PROSPECTIVE JUROR THROUGH RELIGIOUS DISCRIMINATION.

In addition to the significant errors committed by the district court at trial, the court also committed reversible error before the trial even started by excluding Juror 81 based solely on her religious belief. (2/16/07 Tr. at 1385, D635.) "A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve." Gray v. Mississippi, 481 U.S. 648, 652 n.3 (1987); Swain v. Alabama, 380 U.S. 202, 220 (1965), overruled in part on other grounds, Batson v. Kentucky, 476 U.S. 79 (1986). The appropriate "standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 44 (1980)). The Supreme Court has held that a trial court cannot excuse for cause a juror who expresses "conscientious or religious scruples" when the juror can set aside her personal beliefs and fairly apply the law. See, e.g., Adams, 448 U.S. at 44-45; Witherspoon v. Illinois, 391 U.S. 510, 515 n.8 (1968).

As many jurors often do, Juror 81 first told the district court that she held a religious belief that she should not sit in judgment of others. But after

further questioning, the juror then clarified three times that she could sit in this case and would follow and apply the law to the facts as instructed by the court. (2/16/07 Tr. at 1382-83, D635.) Defense counsel objected to Juror 81 being dismissed for cause, explaining that "[i]f you instruct her on the law, she would follow the law, she said." (2/16/07 Tr. at 1384, D635.) To this, the district court replied: "She is excused. That's not the test. She says she has a religious belief. And this court is going to respect her religious belief and not force her to violate her religious belief." (2/16/07 Tr. at 1385, D635.)

It is the district court that had the test wrong. Under Witt, the question is whether the juror can set aside any personal bias and be impartial, 469 U.S. at 424, not whether she holds a religious belief. Where a juror credibly testifies that she can set aside her personal beliefs and follow the law, as in this case (2/16/07 Tr. at 1383-84, D635), the Supreme Court has held that such a juror cannot be struck for cause. See, e.g., Adams, 448 U.S. at 44-45. The district court did not question whether Juror 81 could follow the law, but struck her simply because of her religious belief. That sort of religious discrimination, unmoored by any concern for the juror's impartiality, cannot serve as a basis for a strike for cause under the Witt standard.

Moreover, such purposeful discrimination constitutes a structural error that always necessitates reversal. See, e.g., Snyder v. Louisiana, 128 S. Ct. 1203, 1208 (2008); J.E.B. v. Alabama ex rel T.B., 511 U.S. 127, 132 (1994); United States v. Broussard, 987 F.2d 215, 221 (5th Cir. 1993). While an erroneous strike for cause may be harmless in many settings, that is never the case when a court's strike constitutes purposeful discrimination on account of race, gender, or religion. Whether the district court's conduct is viewed as "prohibiting" Juror 81 from serving as a juror or "rewarding" her by excusing her from service based on her "religious beliefs," the court's action plainly violates the First Amendment's Free Exercise and Establishment Clauses: "a law targeting religious beliefs as such is never permissible." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 533-34 (1993); see also McDaniel v. Paty, 435 U.S. 618, 626 (1978) (The Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."). Since Strauder v. West Virginia, 100 U.S. 303 (1880), the Supreme Court has consistently held that discrimination by courts on the basis of such a protected class violates the Constitution, and thus requires reversal. See, e.g., Snyder, 128 S. Ct. at 1208 ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."); J.E.B, 511 U.S. at

132 ("The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.").

For these reasons, the court's decision to strike Juror 81 for cause was an error that warrants reversal.

V. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT IMPOSED A SENTENCE THAT WAS UNREASONABLE AND IN VIOLATION OF FEDERAL LAW.

On September 18, 2007, the district court sentenced Mr. Minor to 11 years in prison and ordered him to pay $1,500,000 in restitution and a fine of $2,750,000. (D618 at 2982.) If the 2007 trial showed a district court that repeatedly reversed course, without explanation, on legal rulings that it made in 2005, then the sentencing hearing revealed a court that was willing to contradict itself even within the very same proceeding. At their root, the court's sentencing decisions were deeply flawed, often inconsistent, and at times wholly irrational. While there are a host of reasons that this Court should remand for re-sentencing, five merit this Court's attention.

- First, the district court made no effort to harmonize this sentence with the Supreme Court's post-Booker case law governing reasonable sentences and a defendant's Sixth Amendment right to a trial by jury.

- Second, having instructed the jury in a way that allowed a conviction on something other than quid pro quo bribery, the trial court switched course and applied the bribery Guideline to significantly increase the penalty against Mr. Minor.

- Third, the court deprived Mr. Minor of the opportunity to present evidence on the issue of loss, which it erroneously calculated based on a gross, rather than net, value.

- Fourth, it enhanced the sentence for obstruction of justice after stating on the record that this enhancement did not apply.

- Finally, after conceding that it could not calculate "net loss" attributable to Mr. Minor, the court nonetheless changed course again and ordered a restitution award and imposed a fine in a way that far exceeded anything allowed under the law.

For these reasons, and the ones set forth below, this Court should vacate Mr. Minor's sentence and remand for re-sentencing.

A. The District Court's Sentence Violates Mr. Minor's Right to Trial by Jury and to Have the Evidence Against Him Proven Beyond a Reasonable Doubt.

Mr. Minor's sentence is unconstitutional as it was enhanced based on facts not found by a jury beyond a reasonable doubt or admitted to by the defendant. Instead, the district court relied upon judge-made factual findings, found by a mere preponderance of the evidence, to enhance Mr. Minor's sentence. This violates the dictates of recent Supreme Court precedent in Cunningham v. California, 127 S. Ct. 856, 863-64 (2007), and United States v. Booker, 543 U.S. 220 (2005), which hold that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." Cunningham, 127 S. Ct. at 863-64.

In Booker, the Supreme Court invalidated the mandatory Federal Sentencing Guidelines because the factual prerequisites necessary to elevate a sentence from one sentencing range to a higher range were improperly

determined by judges under the preponderance of the evidence standard. While Booker's remedy does much to protect a defendant's Fifth and Sixth Amendment rights, even in the post-Booker regime a sentence that rests heavily upon judicial fact-finding remains unconstitutional. See, e.g., Gall v. United States, 128 S. Ct 586, 602-03 (2007) (Scalia, J., concurring) ("The 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."); Rita v. United States, 127 S. Ct. 2456, 2479 (2007) (Scalia, J., concurring) (explaining that the Court's opinion "does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea"). The remedy in Booker substantially broadens the factors that a sentencing court can consider when imposing a sentence, but the sentencing court's discretion is not boundless. It is limited to those sentences that are both procedurally and substantively reasonable. See Gall, 128 S. Ct. at 597. Any sentence outside the "reasonable" range must be reversed. Id. A Sixth Amendment problem arises, and a sentence becomes unreasonable, when the appropriate sentence depends on the judicial finding of significant aggravating facts. United States v. Kandirakis, 441 F. Supp.

2d 282, 299 (D. Mass. 2006); United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019, 1024-25 (D. Neb. 2005).

In this case, the court's sentence for Mr. Minor could not possibly be considered "reasonable" unless aggravating facts found by the judge under a preponderance of the evidence standard are considered. Had the court crafted Mr. Minor's sentence based on what the jury found (even using the erroneous bribery Guideline), the sentence would be as follows:

Bribery Guideline (§ 2C1.1)	10	
Multiple Offenses (§ 2C1.1(b)(1))	2	
Loss (§ 2C1.1(b)(2)(A))[21]	8	
Total Offense Level	20	(33-41 months, with a fine range of $7,500 to $75,000)

Because there was no jury finding at trial that anyone suffered any loss attributable to Mr. Minor, no restitution or enhancement of the loss amount can be used following the tenets of Gall, Rita, Cunningham, and Booker.

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[21] As the jury did not make any finding as to the amount of loss caused by the alleged bribery, the bribery Guideline requires the sentence be based on the amount of the alleged bribe itself. U.S.S.G. § 2C1.1, cmt. background. Here, the jury found that Mr. Minor's $100,000 loan guarantee to Judge Whitfield and its repayment was improper, but the jury rejected the government's allegation that the other loan guarantees were improper. (D572 at 4.) Although the jury found that Mr. Minor gave Judge Teel "something of value" to sustain the Section 666 and conspiracy counts against them (i.e., the attorney's fees and/or cost of the flight to meet the Mississippi Attorney General), there is no basis in the record for determining the value of that "something." Thus, the $100,000 loan is the measure of loss, which equates to an 8-level enhancement.

By usurping the role of the jury as fact-finder and finding aggravating facts by a preponderance of the evidence, the court imposed a 132-month term of incarceration and a $2,750,000 fine, which is a prison sentence roughly 3 times longer and a fine more than 36 times higher than could be justified by the jury-found facts. The court also imposed a $1,500,000 restitution award, even though the jury never concluded that anyone had suffered any financial loss whatsoever (D572 at 2468), and the court acknowledged that a loss calculation under these facts was impossible (8/3/07 Tr. at 238-39, D606). Thus, the total financial obligation imposed on Mr. Minor ($4,250,000) was more than 56 times what the district court could have imposed under the Guidelines based solely on jury-found facts. Basing such a tremendous increase upon such judge-found facts makes a mockery of Booker's constitutional holding, and can be upheld only by rendering Booker's remedy of reasonableness review completely toothless.

Nor can the constitutionality of Mr. Minor's sentence be saved by the fact that reasonableness review is deferential to the district court. In Cunningham, California sought to defend its guideline regime under the mistaken premise that the regime afforded the sentencing court broad discretion. The Supreme Court brought such analysis to an end:

> We cautioned in Blakely, however, that broad discretion to decide what facts may support an enhanced sentence, or to

> determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

Cunningham, 127 S. Ct. at 869. In this case, the district court used facts not found by the jury to impose a sentence, restitution award, and fine that far exceeded anything permitted by law. For this first reason, this Court should reverse the sentence of the district court.

B. The District Court Misapplied the Bribery Guideline.

Second, the court erred when it applied the bribery Guideline, instead of the more factually applicable gratuity Guideline. The Supreme Court has emphasized that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Gall, 128 S. Ct. at 596. Meanwhile, courts of appeals

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. . . .

Id. at 597. Here, the district court's misapplication of the bribery Guideline constitutes reversible error. Id.

Mr. Minor was convicted of, among other things, honest services fraud, and the applicable Guideline for that offense, U.S.S.G. § 2C1.7 (2001), directs that the court should apply whichever Guideline more specifically addresses the facts of the case: the Guideline for bribery, Section 2C1.1.; gratuity, Section 2C1.2; or conflict of interest, Section 2C1.1. See U.S.S.G. § 2C1.7(c)(4); United States v. Moeller, 80 F.3d 1053, 1062 (5th Cir. 1996) (determining which of the more specific Guidelines is applicable is "fact intensive," and there is no per se rule to use the bribery Guideline in calculating a Guideline sentence for a Section 666(a)(2) conviction); United States v. Anderson, 517 F.3d 953, 961 (7th Cir. 2008) ("Convictions under § 666 . . . call for the application of either § 2C1.1 or § 2C1.2, whichever is most appropriate or most specifically covers the offense conduct.").[22] There should be no dispute that this case is subject to the gratuity Guideline, but the district court concluded—without explanation—that the bribery Guideline applied. (8/2/07 Tr. at 134-35, D606.) Where, as here, there was no proof at trial of any explicit quid pro quo agreement—the only appropriate Guideline was the gratuity Guideline.

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[22] Mr. Minor also was convicted of violating RICO, mail/wire fraud, and 18 U.S.C. § 666(a)(2), but under the grouping rules in the Guidelines Manual his other offenses of conviction were properly grouped together with the honest services fraud conviction.

Not only did the court err in not applying the gratuity Guideline, the court also failed to provide a reasoned explanation for its decision to apply the bribery Guideline. As the Supreme Court has emphasized, the district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." Gall, 128 S. Ct. at 597; see also 18 U.S.C. § 3553(c)(2). Here, the district court merely stated that it heard Mr. Minor's argument on the applicability of the gratuity Guideline but succinctly ruled, "I'm not persuaded." (8/2/07 Tr. at 134, D606.) Merely stating a conclusion without affording any explanation of the basis for the decision cannot allow "meaningful appellate review" or lend itself to fostering a perception of fairness.

The court's mistaken reliance upon the bribery Guideline resulted in a sentence substantially longer than if the court had applied the gratuity Guideline. The base offense under the gratuity Guideline is 7 (rather than a base of 10 under the bribery Guideline), and there would be a 2-level enhancement for multiple offenses (same under bribery Guideline). In addition to the 3-level difference in the base offense levels, there is a substantial difference in the most significant enhancement—the value of the payment. While the bribery Guideline uses the greater of either the amount of the bribe, amount received from the bribe, or loss to the government, the

gratuity Guideline more simply bases this enhancement solely upon the amount of the gratuity. Compare U.S.S.G.§ 2C1.1(b)(2)(A) (bribery) with id. § 2C1.2(b)(2)(A) (gratuity). Because the value of the "gratuities" in this case were less than $120,000, the gratuity Guideline applies an 8-level enhancement, which is in stark contrast with the 18-level enhancement the district court made by applying the bribery Guideline. U.S.S.G. § 2B1.1.[23] Taken together, the total offense level under the gratuity Guideline was 17, which equates to an advisory Guideline range of 24 to 30 months—far less than the 121 to 151 range deemed applicable by the district court. (9/7/07 Tr. at 451.) Adding years to Mr. Minor's sentence through this misapplication of the Guidelines is a serious error, which warrants reversal.

C. The District Court Erred by Enhancing Mr. Minor's Sentence Based on an Improperly Calculated Loss Amount.

Third, the district court erred when it calculated the amount of "loss" for purposes of determining Mr. Minor's sentence. Regardless of which Guideline applied (bribery or gratuity), "loss" for sentencing purposes

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[23] As explained above, supra note 21, Mr. Minor contends that this should be an 8-level enhancement under either the bribery or gratuity Guideline because there is no jury finding as to any loss, and the value of the $100,000 loan guarantee would be the same under either Guideline. Apart from whether the district court's guess at a loss calculation was accurate, despite not allowing any hearing upon the issue of loss, such loss analysis has no place in the gratuity Guideline context.

should have been measured by the value of the payments that Mr. Minor gave the judges. But the district court instead first declared that it was unable to calculate the loss attributable to Mr. Minor, and then erroneously concluded that it would use the entire amount of the People's Bank settlement and the original Marks judgment—over $5,000,000—as the loss figure for sentencing purposes. (8/3/07 Tr. at 239, D606.)[24]

This result violates Guideline commentary. See, e.g., U.S.S.G. § 2C1.1(b)(2)(A), cmt. 2. Under the Guidelines, the court in a bribery case must either conduct a "net value" analysis to arrive at the "expected benefit to be received" (i.e., subtracting from the $5,000,000 figure any amounts payable by defendants in those cases based on the merits of the case) or, when (as the district court concluded here) such net value cannot be calculated, use the value of the payments provided by the defendant as the loss figure. The district's failure to take either approach amounts to serious, reversible error.

To begin, the court erred when it refused to perform any "net loss" analysis at all. (8/3/07 Tr. at 238-39, D606.) To perform such an analysis, the court realized that it would need to "look at expert testimony and all

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[24] The People's Bank amount was the result of a settlement that USF&G decided to make. There never was any payment of the judgment in Marks. (3/08/07 Tr. at 3294-95, D646.)

kinds of other indices or indicia to determine what the, quote, unquote, value was." (8/3/07 Tr. 238-39, D606.) But then, recognizing that this required some effort, the court rejected this approach.

> I don't know how the court could do 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.) Instead of engaging in this required task, the court took a very different approach. The Court first prevented Mr. Minor from introducing critical evidence regarding loss. Then, it concluded that it would base loss solely on the amount paid by the defendant in People's Bank and the amount awarded but not paid in Marks—not the amount that Mr. Minor allegedly had paid in bribes. Finally, without a jury finding or any evidence to guide its determination, the court assumed that both cases were not merely inflated through bribery but in fact were entirely worthless—attributing every penny of the Marks judgment and the People's Bank settlement to "loss." The court then used this loss amount to increase Mr. Minor's sentence and fine. Such a result is plainly inconsistent with any notion of due process under the Fifth Amendment and constitutes an unreasonable sentence under Booker. See Gall, 128 S. Ct. at 597.

This Court already has held that a sentence calculation without a "net value" analysis is reversible error. United States v. Olis, 429 F.3d 540, 547-48 (5th Cir. 2005) (reversing sentence of defendant convicted of securities fraud because of overestimated calculation of loss that included losses not directly caused by the offense conduct); United States v. Griffin, 324 F.3d 330, 365-67 (5th Cir. 2003) (reversing sentence in bribery case based on inflated loss calculation); see also United States v. Frega, 179 F.3d 793, 812 (9th Cir. 1999) (upholding district court's calculation of loss in judicial bribery case that used the value of the payments provided by defendant-attorney to judges because there was no proof that the value of the civil judgments was solely attributed to defendant's payments). As this Court has explained, loss does not include the total gross value received, but must deduct any amounts that had value independent of Mr. Minor's loan guarantees. See, e.g., United States v. Harms, 442 F.3d 367, 380 (5th Cir. 2006), cert. denied, 127 S. Ct. 2875 (2007) (finding reversible error in a fraud case to base amount of loss on the gross value of inflated payments without netting out the money actually due, explaining that the proper calculation of loss for Guideline purposes is to only consider the "excess benefits received as a result of the fraud."). Even the Probation Office noted in an addendum to the presentence report that a "net loss" calculation was

required in this case (D620), but the trial court selectively relied upon the report only when it increased Mr. Minor's sentence.

Next, the district court also erred when it failed to deduct from the loss amount any actual services provided by (or money due to) Mr. Minor. See U.S.S.G. § 2B1.1, App. Note 2(E)(i) ("Loss shall be reduced by . . . the services rendered[] by the defendant. . . ."); see also Griffin, 324 F.3d at 366 (explaining that the Guideline "examples make clear that 'direct costs should be deducted from the gross value of the contract'") (internal citation omitted). A significant amount of work went into litigating the claims in Marks and People's Bank. (See, e.g., 6/23/05 Tr. at 4020-21, D697 (testimony of Marks opposing counsel, Richard Salloum; "I thought it was a well tried case [sic] a hard fought case. . . ."); 3/5/07 Tr. at 2819, D662.) As the court never held a hearing on this matter or considered the amount of services performed by Mr. Minor's firm (or allowed the expert testimony offered), it never meaningfully considered the amount of loss as required by the Guidelines.

Finally, in a case where "net loss" is difficult, or even impossible, to assess, the bribery Guideline makes clear that the court should use the value of the bribery payments made as measure of loss. See U.S.S.G. § 2C1.1, cmt. background ("[W]here the value of the bribe exceeds the value of the

benefit or the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe."). Such a result is compelled by the fact that the government bears the burden of proving loss. United States v. Dawkins, 202 F.3d 711, 714 (4th Cir. 2000); United States v. Renick, 273 F.3d 1009, 1025 (11th Cir. 2001). It cannot meet that burden when, as here, it offers no evidence on the issue, and the district court prevents a meaningful hearing on the amount of loss. Thus, the court readily admitted it could not conduct a real loss analysis but ignored the result such a ruling dictated.

What makes the court's decision even more difficult to understand was its steadfast refusal to allow a hearing on the very issues it admitted it could not grasp without more evidence. Due process requires "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004); see Simmons v. South Carolina, 512 U.S. 154, 161 (1994) (due process prevents the imposition of a sentence "on the basis of information which [appellant] had no opportunity to deny or explain"); United States v. Jackson, 453 F.3d 302, 306 n.5 (5th Cir.), cert. denied, 127 S. Ct. 462 (2006) ("[D]ue process requires that appellant be afforded the opportunity to refute the information

brought against him at sentencing.") (quoting United States v. Giltner, 889 F.2d 1004, 1008 (11th Cir. 1989)). Thus, "when a defendant objects to particular findings in the presentence report"—as Mr. Minor did here—"the sentencing court must resolve the specifically disputed issues of fact if it intends to use those facts as a basis for its sentence." United States v. Smith, 13 F.3d 860, 867 (5th Cir. 1994).

"When a hearing is necessary to protect a convicted defendant's due process rights, then a failure to hold a hearing would be an abuse of discretion." United States v. Henderson, 19 F.3d 917, 927 (5th Cir. 1994) (addressing amount of loss enhancement). Indeed, in Smith, where the district court simply accepted the drug quantity stated in the presentence report without giving the defendant an opportunity to contest the drug quantity—much as the district court did here with respect to the loss calculation—this Court had no difficulty reversing the sentence. Smith, 13 F.3d at 867. Similarly, when there is no evidence in the record to support a loss calculation, this Court has not hesitated to reverse a sentence. See United States v. Griffin, 324 F.3d 330, 366-67 (5th Cir. 2003) (reversing a net loss calculation because there was "nothing in the record to support" the district court's determination of expected gain from the illegal scheme). For

this additional reason, this Court should reverse the sentence of the district court.

D. The District Court's Unexplained Application of an Enhancement It Previously Held Inapplicable Violates Supreme Court Precedent in Gall.

The district court next erred by applying a 2-level enhancement for obstruction after it repeatedly held on the record that the enhancement was inapplicable. (8/2/07 Tr. at 170-71, D606.) Here, the court actually heard argument on the government's proposed enhancements for sophisticated means and obstruction of justice. After a full briefing and extensive argument, it explained the "problems" with the government's motion, ruling as follows: "I'm not going to apply either one of the enhancements sought by the government." (8/3/07 Tr. at 170, D606.) When the sentencing hearing resumed on September 6, 2007, the government mentioned obstruction again, which led Mr. Minor's attorney to begin addressing it again. The district court interjected by saying, "I thought I denied the [enhancement]." (9/6/07 Tr. at 366, D671.) A co-defendant's counsel then said, "I thought so too," and the court responded by saying, "[a]ll right." (Id.) The very next day, Mr. Minor's counsel again summarized the hearings and noted that the government had mentioned "obstruction of justice, which I asked [you about] yesterday and you told me the

enhancements the government was seeking you had already ruled against." (9/7/07 Tr. at 437, D671.) At the time, neither the court nor the government objected to that characterization.

Despite having twice confirmed its rejection of the obstruction enhancement, and being reminded of that ruling a third time, the district court nonetheless calculated Mr. Minor's Guideline range by including the obstruction enhancement. (Id. at 451.) In sentencing a co-defendant the district court stated: "So in the presentence investigation report, the writer suggested two additional points for obstruction of justice, and I accepted that against both you [Mr. Whitfield] and Mr. Minor. . . ." (Id. at 468.)

Once again, this turn of events amounted to a "significant procedural error." Gall, 128 S. Ct. at 597 (listing "failing to adequately explain the chosen sentence" as a "significant procedural error"); see 18 U.S.C. § 3553(c)(2) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence. . . ."). As the Supreme Court has emphasized, the district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." Gall, 128 S. Ct. at 597. Because there is nothing in the record identifying what conduct the district court believed Mr. Minor engaged in that amounted to obstruction of justice, after the court

rejected that enhancement twice, there is no way for Mr. Minor to test that conclusion or for this Court to review it. Accordingly, the decision is procedurally unreasonable, and this Court must reverse. Gall, 128 S. Ct. at 597.

E. The District Court's Restitution Award and Fine Violate Federal Law.

1. The District Court Based the Restitution Award Upon Speculation, Not Actual Loss.

The court's restitution award was based on its erroneous assumption that USF&G (the defendant in People's Bank) was a victim, reached without benefit of a hearing on whether Mr. Minor harmed USF&G. USF&G decided to settle its dispute with The People's Bank for $1,500,000 based on the law that existed in Mississippi at the time, and in light of damaging factual concessions made by USF&G's own employees. Mr. Minor's firm had done a great deal of work on the matter before that settlement. (See, e.g., 6/23/05 Tr. at 4020-21, D697; 3/5/07 Tr. at 2819, D662.) Without 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 Mr. Minor to pay restitution, let alone assume that the entire settlement amount was the correct amount for restitution.

Restitution is statutorily restricted to victims who were "directly and proximately harmed as a result of the commission of [the] offense." 18 U.S.C. § 3663(a)(2). It is black-letter law that the "[Mandatory Victims Restitution Act] does not permit restitution awards to exceed a victim's loss." United States v. Beydoun, 469 F.3d 102, 107 (5th Cir. 2006) (vacating restitution award that did not reflect actual losses caused by the defendant). Courts cannot speculate as to the existence or amount of "actual loss" in setting a restitution award. See, e.g., United States v. Quarrell, 310 F.3d 664, 680 (10th Cir. 2002) ("A restitution order must be based on actual loss.") (emphasis in original) (reversing a speculative restitution award). This Court squarely has held: "An order of restitution must be limited to losses caused by the specific conduct underlying the offense of conviction." United States v. Butler, 137 F.3d 1371 (5th Cir. 1998) (quoting United States v. Tencer, 107 F.3d 1120, 1135-36 & n.7 (5th Cir.), corrected, 1997 U.S. App. LEXIS 12778 (5th Cir. 1997)); see Beydoun, 469 F.3d at 107. Speculation as to the amount owed in restitution is flatly precluded. See, e.g., United States v. Cienfuegos, 462 F.3d 1160, 1161 (9th Cir. 2006) (restitution cannot be "based upon speculation"); United States v. Mahone, 453 F.3d 68, 74 (1st Cir. 2006) ("an award cannot be woven solely from the gossamer strands of speculation and surmise") (quoting United States v.

Vaknin, 112 F.3d 579, 587 (1st Cir. 1997)); United States v. Young, 272 F.3d 1052, 1056 (8th Cir. 2001) (reversing a restitution order that was "based entirely upon speculation").

It would be difficult to characterize the district court's restitution order as resting upon anything other than speculation. The court declared a determination of loss causation impossible, and prevented any hearing whatsoever on loss causation. (8/3/07 Tr. at 238-39, D606.) Then, without explanation, the court adopted the entire USF&G settlement amount as the total restitution amount (as it had done for loss). This was a guess and, without even affording the parties a hearing on the issue, it was not even an educated one.

By its own terms, the Mandatory Victims Restitution Act is inapplicable in these circumstances:

> This section shall not apply . . . if the court finds, from the facts in the record, that . . . determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3)(B) (emphasis added); see United States v. Dupre, 117 F.3d 810, 824 (5th Cir. 1997) (encouraging courts to invoke this exception when it is overly burdensome to calculate actual loss). This is the precise factual conclusion the district court reached regarding the inability to

calculate real and actual loss, but the district court ignored the legal consequences of that finding.[25] This Court should not do so. It should reverse the district court's restitution order.

2. The District Court Imposed an Excessive Fine Based Upon Impermissible Factors.

This Court should reverse the district court's imposition of a $2,750,000 fine as well. Without prodding by the government, the district court upwardly departed in imposing a fine of $2,750,000 and did so on the basis of a factor that both this Court and the Sentencing Commission have declared improper: Mr. Minor's wealth. (9/7/07 Tr. at 453, D671.) To keep the magnitude of a $2,750,000 fine in perspective, it is 55 times higher than the gratuity Guideline would allow based on the facts found by the jury (see Argument V.B, supra (explaining that the jury finding placed Mr. Minor at Guideline level 17, which has a $5,000 to $50,000 fine range)), more than 15 times what even the district court's erroneous bribery Guideline calculation would require and Probation recommended (see D620 at ¶ 130 (between $17,500 and $175,000)), and more than 11 times what the Guidelines

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[25] USF&G—the third party that received the restitution award—is pursuing an even better remedy through a civil action against Mr. Minor where all the evidence can and will be heard, which is plainly more reasonable than holding a mini-trial on this tangential issue in the middle of a criminal sentencing hearing.

provide for even the worst offenders, U.S.S.G. § 5E1.2(c)(3) (ceiling on fines at $250,000). Imposing such a tremendous fine through an unnoticed upward departure based on a factor deemed impermissible by this Court and the Sentencing Commission constitutes a fine that is substantively unreasonable.

The only justification for this upward departure was that the district court boldly stated that Mr. Minor should be punished more severely than others because he was wealthy. The district court actually stated that it would "step aside from the guidelines," departing upward from the maximum $175,000 Guideline fine for Mr. Minor's offense level, as calculated by the court, and impose a $2,750,000 fine so that this fine would be "punitive to this defendant who has substantial assets and income." (9/7/07 Tr. at 453, D671.)

The district court's reliance upon Mr. Minor's wealth as a justification for this substantial fine is patently improper. Although a court is free to consider a defendant's ability to pay as a factor in preventing a fine from being excessive or in setting a payment schedule, this Court has held that reliance upon a defendant's wealth as a basis for increasing a fine is "an impermissible use of the defendant's socioeconomic status." United States v. Painter, 375 F.3d 336, 339 (5th Cir. 2004) (reversing fine enhanced based

on defendant's extraordinary assets); see United States v. Mancilla-Mendez, 191 Fed. Appx. 273, 274 (5th Cir. 2006) ("A defendant's socioeconomic status is an impermissible factor on which to base an upward departure."); United States v. Andrews, 390 F.3d 840, 848 n.15 (5th Cir. 2004) (same); United States v. Graham, 946 F.2d 19, 22 n.2 (4th Cir. 1991) (holding that "affluence alone cannot justify an upward fine departure"). The Sentencing Commission reached the same conclusion in the Guidelines. See U.S.S.G. § 5H1.10 (explaining that socio-economic status is "not relevant in determination of a sentence").[26] As the Supreme Court has said, such "a major departure should be supported by a more significant justification[.]" Gall, 128 S. Ct. at 597. This Court should reverse.

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[26] Mr. Minor promptly called the inappropriateness of the fine to the court's attention by filing a motion to correct the sentence, but the court implicitly denied that motion by entering the sentence without modification. It later denied the motion as moot. (Sealed, 9/14/07 Defendant Paul S. Minor's Motion and Memorandum of Law to Correct and Reduce Sentence, D611; D: 10/24/07 Minute Entry.)

VI. THIS COURT SHOULD ASSIGN A NEW JUDGE ON REMAND.

While the trial court did not want to consider the serious conflict of interest, selective prosecution, or charging defect issues Mr. Minor raised in pretrial motions in either 2005 or 2007, at the actual 2005 trial, it did make more even evidentiary rulings and provide more appropriate jury instructions. As a result, a jury refused to convict Mr. Minor. In 2007, however, the court changed course abruptly and often without explanation. It refused to instruct the jury on bribery as it had in 2005, eliminating any requirement that the jury find a quid pro quo. It excluded evidence that it had admitted in 2005—evidence that went to the core of Mr. Minor's defense. It admitted irrelevant and highly prejudicial evidence that it had excluded in 2005—evidence that allowed the jury to convict Mr. Minor for so-called ethical lapses that were neither charged in the indictment nor violative of federal law. And it presided over a sentencing hearing that was designed more to reach a predetermined result than to determine a fair sentence. Due to the unfair, unlawful, and unacceptable nature of these proceedings, this Court should assign this matter to another judge on remand.

In recent months, the public has come to question the reliability of the indictment, conviction, and sentence of Mr. Minor. See Adam Cohen, The

United States Attorneys Scandal Comes To Mississippi, N.Y. Times, Oct. 11, 2007, at A30; Scott Horton, A Minor Injustice, Harper's Magazine (Oct. 3, 2007) (online edition). Some of this criticism has been leveled at the role DOJ has played in this matter by selectively and politically prosecuting Mr. Minor, issues that Mr. Minor repeatedly asked the trial court to consider. For instance, Congress has found that identical conduct was engaged in by a prominent Republican donor, who also was the brother-in-law of then-Majority Leader of the U.S. Senate Trent Lott and a friend of the U.S. Attorney, but that Republican donor was not charged. House Judiciary Report at 2. Given that DOJ announced Mr. Minor's indictment within 90 days of the Mississippi gubernatorial election and the "dubiousness of the allegations," the indictment "was widely seen as an attempt to paint the Democratic Party as corrupt." Id.; see Stephanie Mencimer, Blocking The Courthouse Door 106-10 (2006); Scott Horton, A Minor Injustice, supra, at 3-9. The conduct of DOJ in this matter was so suspect that even the Department itself has now opened an investigation into the prosecution of Mr. Minor to determine whether it was, in fact, motivated by an improper purpose. Jarrett Letter, supra, at 1.

But in the end, much of the criticism about the reliability of Mr. Minor's conviction and sentence falls equally at the feet of the district

court judge who presided over this matter. Scott Horton, Justice in Mississippi: The Judge's Dilemma, Harper's Magazine (Dec. 28, 2007) (online edition); Henry Wingate: Portrait of a Corrupt Judge, http://legalschnauzer.blogspot.com/2008/01/henry-wingate-portrait-of-a-corrupt-judge.html (Jan. 28, 2008). From the start, Mr. Minor objected to the selective, politically motivated nature of this prosecution. He identified the apparent conflicts of interest of the United States Attorney,[27] the selective nature of the prosecution, and the improper and legally flawed charges against him. But at every stage of these proceedings the district court generally ignored these allegations, refusing to give Mr. Minor even the courtesy of a formal hearing or an explanation of the court's actions.

There are reasons why the district court might not have wished to delve into the political nature of this prosecution. For one, to do so would have required investigating the conduct of the district judge's social or political friends, at a time when the judge was being considered for appointment to this Court by the same political players whose conduct was being questioned at the time of the pre-trial motions and 2007 trial. See, e.g., Scott Horton, Justice in Mississippi, Harper's Magazine (Sept. 18, 2007) (online version). A hearing on selective prosecution also would have

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[27] See note 10, supra.

required an inquiry into Senator Lott—what role did he play in the case, and in avoiding the prosecution of his brother-in-law, a friend of the U.S. Attorney? Such an inquiry would be potentially embarrassing to this United States Senator whose support would be especially important in any nomination for the Fifth Circuit. Furthermore, recent developments regarding the efforts to investigate political prosecutions by U.S. Attorneys show that such a hearing would have also ended with an evidentiary confrontation against the White House itself—something any district court judge generally would want to avoid, let alone one being vetted for higher appointment.

Questions have now been raised in the media as to whether the judge's potential Circuit nomination also might have influenced the changed evidentiary rulings that caused so much difficulty for Mr. Minor at the 2007 trial:

> When time came for the second trial, Minor found that the judge had decided to change the rules. In the first trial, Minor had offered a great deal of exculpatory evidence. . . . But as the second trial got under way, the presiding judge announced that he had changed his mind about the evidence, and he was going to exclude it. This was a clear and conscious changing of the goal-posts in mid-game designed to help the prosecution get a conviction.

Scott Horton, A Minor Injustice: Why Paul Minor?, Harper's Magazine (Oct. 6, 2007) (online edition).

Whether by refusing evidentiary hearings that were warranted, failing to rule on pre-trial motions, changing key rulings from the 2005 trial to seemingly steer a different result in 2007, or violating the rules to impose a Draconian sentence, the trial court has left itself with at least the appearance of bias and impropriety. This Court can remedy this problem merely by reassigning this case to a new judge upon remand. See, e.g., In re DaimlerChrysler Corp., 294 F.3d 697, 701 (5th Cir. 2002) (explaining that reassignment is appropriate to preserve the appearance of justice); Mata v. Johnson, 210 F.3d 324, 333 (5th Cir. 2000) ("[W]e direct that this case be reassigned to a different judge, to avoid the appearance of bias. . . ."); United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989) ("Reassignment is appropriate where the trial judge has engaged in conduct that gives rise to the appearance of impropriety or a lack of impartiality in the mind of a reasonable member of the public.").

Without question, reassignment is prudent to address the perception problems with this case. But it is also warranted because the district court issued a number of improper and illegal rulings. From the beginning of the case (when the court improperly excluded a juror) to the end (when it imposed an extraordinary fine based solely on Mr. Minor's wealth), the district court committed serious, lasting, and prejudicial errors. This Court

has found reassignment a particularly appropriate remedy where, as here, the district court inappropriately enhanced a defendant's sentence based upon an improper factor, creating the appearance that the judge was "motivated in part by a desire to hammer [the defendant] with a long sentence one way or the other, without paying attention to the dictates of the law." Andrews, 390 F.3d at 853; see also Simon v. City of Clute, 825 F.2d 940, 943 (5th Cir. 1987); United States v. Tobias, 662 F.2d 381, 389 (Former 5th Cir. 1981).

Given the political nature of this case, the district court's drastic reversal of so many of its rulings between the first and second trials, and the illegal sentence imposed on Mr. Minor without a fair hearing, this Court should reassign this case to another judge upon remand.

CONCLUSION

For the reasons set forth above, this Court should vacate the conviction and sentence of the district court and remand with instructions to either dismiss this case or to retry it before a new judge.

Respectfully submitted,

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Abbe David Lowell

MCDERMOTT WILL & EMERY LLP

ABBE DAVID LOWELL
CHRISTOPHER D. MAN
PAUL M. THOMPSON
600 Thirteenth Street, N.W.
Washington, DC 20005-3096
Tel: (202) 756-8000
Fax: (202) 756-8087

OBIAMAKA P. OKWUMABUA
340 Madison Avenue
New York, NY 10173-1922
Tel: (212) 547-5400
Fax: (212) 547-5444

COUNSEL FOR DEFENDANT-APPELLANT PAUL S. MINOR

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25(a)(2)(B) and Fifth Circuit Rule 31.1, 7 paper copies and 1 electronic copy of the attached Brief of Appellant Paul S. Minor were dispatched to the Clerk of this Court through Federal Express Overnight Delivery on June 18, 2008. On the same day, 2 paper copies and 1 electronic copy of the brief were served through Federal Express Overnight Delivery on counsel listed below:

Ruth Morgan
Office of the United States Attorney
1575 20th Avenue
Gulfport, MS 39501

David Fulcher
Office of the United States Attorney
188 East Capitol Street, Suite 500
Jackson, MS 39201

Natashia Tidwell
Peter Ainsworth
U.S. Department of Justice
Criminal Division, Public Integrity Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Elizabeth Collery
U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Michael W. Crosby, Esq.
2111 25th Avenue
Gulfport, MS 39501

George Lucas, Esq.
Federal Public Defender Officer
200 South Lamar Street
Suite 100-S
Jackson, MS 39201

_____
Abbe David Lowell

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations prescribed by Federal Rule of Appellate Procedure 32(a)(7)(B), as modified by this Court through its order granting Appellant's Motion to File Brief in Excess of the Word Count Limitation. This brief contains 28,816 words, including footnotes and the chart attached as Addendum A, and excluding all parts of the brief exempted under Rule 32(a)(7)(B)(iii). Counsel relies on the word count provided by the word processing program used to prepare the brief, Microsoft Word 2003, in order to make this representation.

This brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), as the brief (including footnotes) has been prepared in 14-point Times New Roman font.

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Abbe David Lowell

ADDENDUM A

2005 v. 2007 CHANGED RULINGS SUMMARY CHART

JURY INSTRUCTIONS

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULINGS
1.	**Bribery Instruction**	"That's the contention, that monies were provided and unlawful favors [were] received. So if you were to find that monies were provided but no unlawful favors were returned . . . that would not constitute a crime. . . ." (5/13/05 Tr. at 747, D682.) [Charging jury on elements of MS bribery statute, Miss. Code. Ann. § 97-11-11] "You have to find that [Minor] gave, offered or promised to an officer—public officer, the judges . . . money or goods or chattels. And significantly . . . you have to find that if he did all of that, he did it with an intent to influence the judge.	"In 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 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 on any question, matter, cause or proceeding which may be then or thereafter pending subject to the judge's action or judgment. 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 accepter of the	District court failed to give Minor proposed instruction no. 12 at 2007 trial: "[T]he government must prove . . . that the thing of value was . . . to influence or induce a specific official act." Instead, the court argued for including irrelevant instructions that it felt justified not having to give a <u>quid pro quo</u> instruction: "I think . . . there need not be a meeting of the mind. And that then I feel completely undermines your argument on <u>quid pro quo</u>. . . ." (3/28/07 Tr. at 4710, D659.)

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULINGS
		So if he did it for a purpose other than an intent to influence, if he did it for a purpose of kindness, friendship, etcetera, he would not be guilty." (8/3/05 Tr. at 7678, D720.)	bribe." (3/28/07 Tr. at 4770-71, D659.)	

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULINGS
2.	**Definition of Corrupt Intent**	"The government charges of mail fraud, wire fraud, racketeering and extortion must be proved, each one, by a showing of specific criminal intent. That is, that a defendant intentionally embarked upon the actions charged in the indictment with a specific intent to violate the law. . . . During the trial, the parties have discussed a number of cases, both mentioned and unmentioned in the indictment, and how a particular judge ruled on that case. You have heard the facts of these cases and the opinions of various witnesses whether these cases were rightfully decided. This evidence all bears on whether the defendant judges had any specific intent to violate the law. That is, a specific intent	[Describing elements of Section 666 charge] "And then in so doing, that the defendants acted corruptly. You heard me emphasize that word throughout these instructions and while I read the indictment itself. Corruptly. An act is done corruptly if it is done intentionally with an unlawful purpose." (3/28/07 Tr. at 4786, D659.)	District court failed to give Minor proposed instruction no. 18 at 2007 trial: "A corrupt intent exists only if there is a specific quid pro quo for the official to engage in a specific official act in exchange for the thing of value. A payment is made corruptly only if [it] is exchange for an explicit promise to perform or not perform an official act." (3/27/07 Tr. at 4671, D658.)

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULINGS
		to take a bribe." (8/3/05 Tr. at 7708-09, D720.) "[T]he government is charging that Paul Minor purposely indulged in conduct that was corrupt. That he acted intentionally with—that he acted willfully and intentionally to violate the law. So if you were to find that he gave loan guarantees but did not have the corrupt intent that the government alleges, then you will have to find him not guilty." (8/3/05 Tr. at 7716, D720.)		

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULINGS
3.	**Defense Theory of the Case Instruction**	"The defendants challenge the government's theory of specific criminal intent. Rather, say the defendants, the government has not shown a criminal nexus between the actions of the judges and Minor's acts of guaranteeing loans and providing money and other things of value. Although the judges may have ruled in Minor's favor, say defendants, the judges' actions were predicated upon their innocent belief of the merits of the case and unaffected by Minor's act of guaranteeing the loan. These events, say defendants, were unconnected, coincidental and not tied together by any showing of specific criminal intent—that is, a showing that they intended to provide Minor an unfair	No instruction given.	District court failed to give Minor proposed instruction no. 13 at 2007 trial: "It is [] not bribery to provide financial assistance to a judge with a purpose for building a general basis of goodwill or loyalty . . . [I]f Paul Minor assisted Judge Whitfield or Judge Teel with a purpose of friendship or loyalty or any other lawful motive other than intending to influence some official judicial act, Paul Minor would not be guilty of bribery." (3/27/07 Tr. at 4671, D658.) District court failed to give Minor proposed

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULINGS
		advantage in cases before the judge in exchange for things of value provided by Minor." (8/3/05 Tr. at 7708-09, D720.) "A gift or favor bestowed on a judge solely out of friendship to promote good will or for wholly—or for a motive wholly unrelated to influence over official action does not violate the bribery statutes." (8/3/05 Tr. at 7711, D720.) "On the matter of a defendant's good general reputation, you should consider such evidence along with all of the evidence in the case. Evidence of a defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt since you		instruction no. 25 at 2007 trial: "A person's good faith belief that his actions do not violate any federal law is a complete defense." (3/27/07 Tr. at 4672-75, D658.)

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULINGS
		may think it improbable that a person of good character in respect of those traits will commit such a crime." (8/3/05 Tr. at 7722, D720.) "A person's good faith belief that his actions do not violate any federal law is a complete defense. . . . [R]emember, we are dealing here with specific criminal intent. That [is] conduct intentionally pursued, aimed at violating the law." (8/3/05 Tr. at 7722, D720.)		

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULINGS
4.	**Impact of Alleged Ethical/State Law Violations Instruction**	"A judge's decision not to recuse in a particular case . . . standing alone is not sufficient proof for you to convict a defendant of the federal charges here. . . ." (8/3/05 Tr. at 7708, D720.) "Even though giving a judge or a judge receiving something of value may be inappropriate or a violation of the campaign finance limits or campaign finance laws or the ethical rules, such an act is not done corruptly so as to constitute a bribery offense unless it is intended at the time it is given . . . to effect a specific action the judge officially will take in a case before him or may take in a case that may be brought before him." (8/3/05 Tr. at 7711, D720.)	"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." (3/28/07 Tr. at 4793, D659.)	District court failed to give Mr. Minor proposed instruction no. 24 at 2007 trial: "The Court instructs you that even if you believe that one or more of the Defendants failed to disclose such information to one or more of those attorneys, such a failure would not be a federal crime. It is not a violation of federal law for a state court judge to participate on a case in circumstances [where] the judge should recuse or remove himself or herself from the case." (3/27/07 Tr. at 4674, D658.)

	SUBJECT	2005 INSTRUCTION	2007 INSTRUCTION	RELEVANT RULING
5.	**Definition of "Unfair Advantage" Instruction**	"The term, unfair advantage, is used here in its common and everyday sense, whether one enjoys an undeserved favorable treatment. To apply that term here . . . [w]e look to the rulings, decisions to determine and determinations in those cases by the judges and whether Paul Minor was entitled to those rulings, decisions and determinations. In addressing this question, you may consider whether the rulings were accompanied by the judge's honest belief in the law and facts of a particular case rather than a corrupt purpose." (8/3/05 Tr. at 7707-08, D720.)	No instruction given.	District court failed to give Minor proposed instruction no. 26 at 2007 trial: "The Court instructs you that gaining an 'unfair advantage' in legal cases is not conduct which violates any law which applies to this case." (3/27/07 Tr. at 4674, D658.)