

***No. 07-60748. United States of America vs. John H. Whitfield; Paul S. Minor; Walter W. Teel, Appellants.**

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(Note: Approximately the first five minutes of the proceedings are missing from the transcript.)

MR. LOWELL: And we know he did too little on two ways. The latests cases that are being decided in this area, and the last one being the P.K. Cha Sue case in the 9th Circuit, really addressed the issue of whether or not the specific quid pro quo requirement applies in the 1346 context as well. And what the court said, when a prosecutor uses as her or his theory that the underlying state violation was a bribery scheme, which is what this indictment says, things of value in exchange for favorable treatment in cases, then the same logic and philosophy and First Amendment requirements, for example, of McCormack should apply whether the charge is 1346, 666, conspiracy or RICO, as long as the underlying theory is the same. So consequently by simply equating --

JUDGE GARWOOD: You're saying that the --

MR. LOWELL: What Kink and Chauncey says is that's the logic behind applying McCormack's requirement for an explicit quid pro quo in a campaign context applies not just outside of the contact to any other such scheme that might seem like the same kind of quid, this for that, but specifically addressed it in the 1346. You don't have to apply quid pro quo in every 1346 because that would be under inclusive. But when the indictment alleges a bribery scheme, a this for that, 1346, then the logic of the McCormack, the ten key Chauncey circuit says apply in the same courts, because really the First Amendment value is the same and the peer that you will convict as the jury did here for something long occurred let's look at what the judge instructed. When he said in his instruction, start off, well, in a way he said that for the government to prove its case they have to prove beyond reasonable doubt that the defendant entered into a corrupt agreement. He was heading in the right direction, but he immediately slammed into the wall of the precedence of Tomlin and the cases we cite. What he then said, to provide a judge with thing of value with the intent to influence, bad phrase. It should have been when in exchange for, in return for, or in some fashion to make very clear that it is a quid pro quo, this for that. Were that not bad enough, he then slammed into the sentence where he said to constitute the offense of offering a bribe there need not be mutual intent. How could that not have confused that jury who had been told over and over again that that is --

JUDGE HAYNES: You can't offer somebody a bribe and then they don't take it.

MR. LOWELL: Absolutely.

JUDGE HAYNES: But I actually have a little different question. You are about to run out of time. I'm having trouble understanding how guaranteeing a loan for somebody's house has anything to do with the campaign contribution.

MR. LOWELL: You could, perhaps, properly instructed, come to the conclusion whether it does or doesn't, but here is what the record shows. The banker who made both the \$40,000 loan for the campaign and the \$100,000 loan for the judge who was in a controversy with his wife over this particular house said they were made at the same time and indicated that it was addressed to the bank at the same time during the campaign cycle, first. Second, it was Mr. Minor's theory of defense that that was his intent. At the very least, Judge, at the very least have two --

JUDGE HAYNES: I understand the concept of the campaign contribution. You have to be careful calling that a bribe because everybody makes campaign contributions. Whatever their hopes may be that this person will be a favorable official to them doesn't constitute a bribe. But I don't -- I just cannot see, yes, a judge has to live somewhere and if they are living on the street that might hurt their reelection, but that just seems a little bit of a stretch to me.

MR. LOWELL: You may be spot on, but then let's decide what would have happened. Judge Wingate should have said to the jury as follows, there are three loan guarantees involved in this case. Two, the government clearly concedes as they do in their appellate brief apply in the campaign context. I am going to give you a McCormack explicit quid pro quo instruction for that. The third is a contest. Mr. Minor says it's also campaign. The government says it's not. You may find Mr. Minor guilty if the government proves beyond a reasonable doubt this, this, this, this, and maybe not explicit, but you had a number of loans of which many of them are in and then one not. You can't just sweep the ones that are into the one that isn't. And you know how we can know this? The McCormack case. Look at the McCormack case itself. Look at the facts. Cash in an envelope given to the public official, never reported on the books of the campaign, never reported as a campaign contribution, and the Supreme Court said you have to test it in the explicit quid pro quo criteria. So you may be right, but then you have to be even more careful on the jury instruction.

JUDGE BENAVIDES: Thank you, counsel.

MR. LOWELL: Thank you.

JUDGE BENAVIDES: Mr. Lucas.

JUDGE GARWOOD: I wish you would address at some point the 666. You assume that Mr. Whitfield was an agent of the administrative office of courts of Mississippi. Is the transaction in which he acted one of the administrative office of courts as I read the 666 to apply the -- the statute says that it's a last section of the -- of part of the statute says that the bribe must be in connection with any business transaction or series of transactions of such organization, which is the organization in this case being the administrative office of courts according to the jury finding. It frankly is hard for me to see how a ruling in a civil case between two groups is a transaction of business of the administrative office of the courts.

MR. LUCAS: And that is one that gave us great difficulty at trial as well, Your Honor. As the court is well aware the record is replete with our objections to the use of testimony from the administrative office of the courts in Mississippi which receives federal crime and using that as a jurisdictional Culp to incorporate 666 -- to use the 666 statute when neither Judge Whitfield nor Judge Teel who I represented at trial had any control whatsoever on the crimes that came from the federal government through the administrative office of the courts, ultimately.

JUDGE GARWOOD: Can you even if someone was to call Judge Teel an agent of the office of the courts, the bribe was paid to get a favorable ruling in a civil case that was pending between two parties before him, was pending before him.

MR. LUCAS: That's correct, Your Honor.

JUDGE GARWOOD: And I read the statute to say that it only applies to bribes that are given in connection with any business or transaction of the agency receiving federal funds. And the suit between these two private persons had nothing to do at least as I could tell, with the business of the administrative office of the courts.

MR. LUCAS: And that is exactly right, Your Honor. It had nothing to do with the business of the administrative office of the courts and for that reason we objected and --

JUDGE GARWOOD: Did any of the witnesses -- I think there were some witnesses who testified on

behalf of the administrative office of the courts or who were employed of the administrative office that testified in the case.

MR. LUCAS: That's correct, Your Honor. There was testimony --

JUDGE GARWOOD: Did they give any testimony about whether rulings in cases that were pending before the courts was part of their business or would fit into that part of the statute or not?

MR. LUCAS: The testimony that came from the administrative office of the court was merely that money came from the federal government, was thrown into a big pot of money that contained money from the federal government and the state government and ultimately used to pay expenses of the courts. That was the only jurisdictional hook that had any claim to 666. There was never any allegation that anything that the judges did in the cases that were cited inside this case had anything to do with that fund of money. In fact, I think one of the sources of money for Judge Whitfield?

JUDGE GARWOOD: I'm not talking about the money. I understand that this offense does not require that the defendant have taken any money from the federal government or even get into the particular -- the federal funds. But it does require that the bribe relate to something which is a part of the business of the organization that received the federal money.

MR. LUCAS: And that is correct. Once again, that is what we objected to and moved for dismissal under rule 29 that the rulings made by these district court judges had nothing to do with the money that came from the federal government.

JUDGE GARWOOD: Did it have anything to do with the business of the administrative office of courts in Mississippi.

MR. LUCAS: Only insofar as the administrative office of the court is a court that pays secretaries, pays for office supplies, the courts of Mississippi.

JUDGE GARWOOD: I notice, for example, that I think it was perhaps Judge Teel, but one of these judges had been investigated by the Mississippi authorities for taking money that was supposed to be used to buy equipment for his office and pocketing it, not using it, something like that.

MR. LUCAS: That is correct, Your Honor.

JUDGE GARWOOD: Or the purpose that it was given to. Now, that would be clearly within the statute.

MR. LUCAS: That's right. I think so. But he was acquitted on all those charges when they ultimately went to trial. Judge Haynes, you asked a question that how Whitfield making a house down payment constitutes campaign contributions, and I would like to point out that as to Judge Teel there was never any evidence, allegation, that any of the \$24,500 that he received with the loan from the Peoples Bank was used for anything but campaign purposes. Therefore, under the McCormack case, we submit that an explicit quid pro quo was required, and the court instructions did not require that. The court allowed a generalized gratuity theory which is all that's necessary under Mississippi law to go to the jury and for the jury to find Justice Teel guilty based on that.

JUDGE GARWOOD: Were they different instructions that he gave to Teel and Whitfield or were they the same?

MR. LUCAS: Same instructions, Your Honor.

JUDGE GARWOOD: Your contention is that those instructions didn't show a bribery in the context of what McCormack or --

MR. LUCAS: That is correct, Your Honor. Our contention is that the instructions as given allowed

the jury to find the parties guilty under a simple gratuity -- simple gratuity rather than a bribe.

JUDGE GARWOOD: In your view doesn't the 666 require that it be a specific act that the bribery is for? In other words, the Supreme Court held in the agriculture department case that the --

MR. LUCAS: The sundown --

JUDGE GARWOOD: The federal bribery statute as I read their decision is bribery under federal law that we're talking about requires that the agreement be -- to take a particular act before it's bribery.

MR. LUCAS: That's correct, Your Honor. It's our contention that the instruction did not require that in this case.

JUDGE BENAVIDES: Thank you.

MR. LUCAS: Thank you.

JUDGE BENAVIDES: Valerie, would you add three minutes to government's arguing?

MS. COLLERY: Good morning, may it please the court. Eliza Collery on behalf of the United States. Let me start by addressing the issue of the instructions on the mail fraud count. I think it's important to consider first whether or not these instructions included what the defendants describe as quid pro quo requirement. That is, if these instructions require the jury to find that Minor gave something and intended to receive something in return, that is the incidence of a quid pro quo. If you look at the instruction you will see that it required the jury to find that Minor provided things of value, specifically with the intent to influence the action of the judges. Now, Mr. Lowell says there is something wrong with that intent influence language, but that is the language that the defendants proposed. If you look at their proposed jury instruction No. 12 that intent to influence language that comes out of Mississippi statutes and it's in both federal bribery statutes it's also the language the defendants propose. So the instructions of intent to influence the action. Judge and I'm paraphrasing in a pending or future case. Now, that's not all it said. It went on to describe specifically what he had to intend for those judges to do, what the quid pro quo was. And the instructions said unless Minor acted corruptly to influence a particular judge on any question matter cause or proceeding, based on things of value provided by Mr. Minor, rather than the judge's honest view of the law and the facts, then Mr. Minor's actions were not a deprivation of honest services.

JUDGE GARWOOD: Doesn't it say though in any action, in any case now or which might thereafter be pending?

MS. COLLERY: That's right. The instruction allows the jury to convict if they believe that when Minor gave the bribes he didn't have a specific case in mind, a pending case. The bribes could be in connection with some future proceeding. And that's consistent with how bribery law has always been understood.

JUDGE GARWOOD: Is that not consistent with what the Supreme Court said in the agriculture department case.

MS. COLLERY: That's a gratuity case.

JUDGE GARWOOD: No. That's section 2 one -- what is it? 210?

MS. COLLERY: 201.

JUDGE GARWOOD: Which covers both gratuity and bribery and is exactly the same language in the gratuity and in the bribery statutes part of that statute. As far as what is designed to be influenced. It says an action. The words exactly the same and the Supreme Court said an action.

Means a particular action, not just any action that might arise.

MS. COLLERY: That's not the way the Mississippi statute least reads. The Mississippi statute talks --

JUDGE GARWOOD: Is that what we should be talking about?

MS. COLLERY: That's what the defendants argue we should be talking about that there is no question the defendants argued vigorously that Mississippi law govern here. They now claim the Mississippi law --

JUDGE GARWOOD: The 666 counts as well as the 1346 counts?

MS. COLLERY: Well, whether they argue that Mississippi law governed the 666 counts or not I don't really remember. There was a lot of talk in the instruction conference just about what bribery is without parceling it out. But the defendants argued vehemently that under the Brumley decision Mississippi lawsuit got so now Mr. Lowell says oh the judge erred egregiously in relying on Mississippi law but that is what the defendants asked for the instructions to read and so the jury was instructed on the elements of Mississippi law.

JUDGE HAYNES: But you agree that there has to be some kind of agreement okay I'm going to give you money and you're going to rule in my favor on X in some way.

MS. COLLERY: On a case.

JUDGE HAYNES: Okay. And how much -- well, let me ask you this. What is your context of what that agreement was? Because in neither of these two cases that we have been presented were pending in front of those judges at that time as I understand it. And one of them wasn't even a judge yet he was a candidate. So he might never have a case. But all right. The idea is you will win and you will rule for me on this case but it's not yet pending. So what was the agreement as you present.

MS. COLLERY: The agreement was you will take this money and in some future case you will rule dishonesty for me. If you look at the jury instructions the instructions said if the judges behaved honestly and decided the case based on their honest view of the law and the facts then they are not guilty.

JUDGE HAYNES: I understand this is an enforceable contract it's illegal. But what is the deal? In other words, if you could enforce this contract or they are paid the money now the judge rules honestly against you. How did that judge know it was that case that they were supposed to rule dishonestly. That's what I'm trying to say. What is the deal as the government presented it?

MS. COLLERY: The deal is --

JUDGE HAYNES: Just any case? Because these lawyers Mrs. Minor had 700 cases and he is this Jones act guy and he is all over the country. So in this case in their court with Mr. Minor or what about Mr. Minor's firm Mr. Minor's friend Mr. Minor's friend?

MS. COLLERY: The deal I will make sure you get a case and in both of these cases there was Mr. Minor engaged in actions that channeled a particular case to these judges. It was part of our case to show that there was forum shopping here in regard to both of the cases.

JUDGE HAYNES: I understand that and the clerk come in and assign the cases. My question is was every case the deal I will give you this money and every case I have as lawyer or my firm has a lawyer in your court you are going to rule for us whether that is the right result or not? Don't you have to be able to articulate the deal?

MS. COLLERY: The deal was I will give you this money and you are going to rule for me and if you

look at what happened --

JUDGE GARWOOD: You are going to rule for me where?

MS. COLLERY: Look at what happened in the March case. After the \$3.6 million verdict up to that point he made a few small payments on a \$40,000 loan after he entered that \$3.6 million judgment no more payments on loans. So I think you can infer from that that they understood that he had given the quo and the deal had been fulfilled. So --

JUDGE HAYNES: Why wouldn't he pay the loan if the deal is fulfilled doesn't he have to pay his side of the deal?

MS. COLLERY: The Minor side of the deal is I will pay for the loan and that's what he did. Minor came through after Whitfield --

JUDGE HAYNES: I thought you said he stopped paying it. I misunderstood.

MS. COLLERY: Whitfield stopped making.

JUDGE HAYNES: Minor paid off the loan after he got the good verdict.

MS. COLLERY: So up to the time I guess the the verdict he gets that verdict and then after that no more payments. So I think it's safe to conclude and the jury was entitled to infer that the deal was once I get my big verdict you are off the hook.

JUDGE GARWOOD: That seems to make sense to me frankly, but the problem was was the jury told that that's what they had to find?

MS. COLLERY: Yes.

JUDGE BENAVIDES: Was that the action that the jury necessarily found?

MS. COLLERY: Yes.

JUDGE BENAVIDES: The actual transaction which provided the quid pro quo as opposed to some generalized feeling that the jury might still be able to convict if they thought that the money might be used on some generalized transaction in the future?

MS. COLLERY: No, the only evidence of what the quo was was those two lawsuits, and the instructions required --

JUDGE GARWOOD: Maybe Mr. Minor knew about what he was going to do with those lawsuits. I can't remember that before they were filed. Obviously he did know. But when he made these -- when he made the loans did Mr. Minor have in mind we are going to get them in this USF&G case?

MS. COLLERY: I don't think the government proved that he did, no. But I don't think that matters. It's never been an element of bribery that you have to know exactly what you are going to get when you give the bribe.

JUDGE GARWOOD: Not exactly maybe but I mean you got to be in the universe somewhere. He I mean, it could have been any case. Just saying when Minor made that deal with Whitfield, there is no way to know that -- for the jury to know or told that he had in mind the USF&G case.

MS. COLLERY: No. Not at the time he gave the bribe.

JUDGE GARWOOD: Whitfield accepted it.

MS. COLLERY: Imagine what the world would look like if you can engage in that kind of bribery if

you can say here is \$700,000 we have an understanding I come before you all the time we have an understanding that sometime in the future I'm going to come to you and you are going to have to corruptly decide a case for me and that's not bribery?

JUDGE GARWOOD: Well, what does the Supreme Court say in the agriculture department case, the statute says you can't ask -- pay a man to take some -- to take an action, and the Supreme Court said that means a specific action.

MS. COLLERY: But the reason why they said that is because it wasn't a bribery case. If you read what they said --

JUDGE GARWOOD: But it's in the statute and it's the same words.

MS. COLLERY: But they said you have to interpret it this way because there is no intent it influence. It's just a gratuity influence and there is no intent to influence if there is an intent it influence then we don't interpret it the same and the Second Circuit just decided this issue they just rejected the argument that you have to interpret them the same in the Ganeem case. They said when you are talking about a bribery offense and there is an intent to influence, then it doesn't have to be a specific action.

JUDGE BENAVIDES: But you are saying the specific action it sounds like to me is a favorable outcome.

MS. COLLERY: Favorable decision.

JUDGE BENAVIDES: Regardless of which particular case it might be is a specific action that you are complaining about is a favorable. And that -- so your argument boils down to that you think that this is enough to satisfy an action requirement in the statute?

MS. COLLERY: Look what the Mississippi statute said.

JUDGE BENAVIDES: I'm thinking the Mississippi statute is going to -- I think Brumley stands for the idea that you have to have some substantive violation of state law with respect to honest services. But on top of that you have the overlay of the actual federal violation and you don't meet that -- that requirement simply because you have a violation of a state substantive statute.

MS. COLLERY: But the federal part of it is the mail fraud part. That's the scheme to defraud. Mr. Lowell suggested that these instructions somehow left off the scheme to defraud. That's just not true jury instructed that they needed to find not only this bribery but that it was part of an overall scheme to defraud that involved numerous false representations. It wasn't just a question of taking money. It was a question about repeatedly lying about it, lying about it under oath, filing false -- filing false --

JUDGE HAYNES: Judge Garwood makes a fair point. I don't go and consult with everybody that appears in my court before I file financial disclosures as a judge and I'm sure that Judge Whitfield and Teel didn't either so how is Mr. Minor responsible for the falsehoods in these financial statements?

MS. COLLERY: Minor orchestrated the false pay off. Minor had his secretary type up a totally false promissory note that was backdated.

JUDGE HAYNES: So you are saying he did things that lent himself to the false filing. He helped pay for the false filing?

MS. COLLERY: His action were part of this series of fraudulent actions.

JUDGE HAYNES: What I want to understand is the deal for one case so he will give him the one

for one case or is it every time I'm in your court you better rule for me whether I'm right or wrong?

MS. COLLERY: The deal appears to have been for one case.

JUDGE HAYNES: So a draft is that it?

JUDGE GARWOOD: It isn't filed?

MS. COLLERY: You can say to a public official I'm going to give you this money and there will come a day when I come to you and ask for your help on something. It doesn't have to be then pending. That's not a requirement of bribery.

JUDGE HAYNES: So I will designate a case in the future that you are going to have to rule for me and that's the deal.

MS. COLLERY: The understanding. And when they filed those fee audits, when they filed those motions which brought the cases before these particular judges rather than having them randomly assigned that was the sign that this is the case.

JUDGE BENAVIDES: Counsel under your theory of the case, then if that's the offense, then that offense would be replete notwithstanding that the offeree never delivers the favorable outcome.

MS. COLLERY: That's correct. That's true. Although in this case they did. In this case actually the defendants got an instruction the judicial defendants got an instruction that was more than they were entitled to because they should be guilty of bribery if they accept this money knowing that they are not entitled to it and knowing that it's being made in return for this corrupt deal. But these instructions actually required the jury to find that they followed through. And so while they got more than they were entitled to in that regard.

JUDGE BENAVIDES: So to kind of reiterate just to get in my mind, the action that the satisfied an action required under the federal statute is a favorable outcome in a case and you're not saying that it was a favorable outcome in any particular case, just the idea it was a promise of this favorable outcome.

MS. COLLERY: That's right. If you look at the indictment that's exactly what we allege in the indictment and that's exactly the theory that we argued.

JUDGE GARWOOD: Could you sometimes think about this problem that I have with the 666 that whether the bribery has to be -- it does in the statute in relation to a transaction of the government agency receiving money. As I understand, the jury in this case found that the government agency receiving money was the administrative -- the Mississippi administrative office of the courts. How is a ruling in a civil case which the administrative law Mississippi is not a party directly or indirectly a transaction or of the Mississippi department of the courts or administrative office of the courts.

MS. COLLERY: Let me first say I state I'm going to answer that question, but that argument has not been raised on appeal. The question hasn't been briefed.

JUDGE GARWOOD: It was. It was raised in Mr. Minor's I mean Mr. Whitfield's brief.

JUDGE HAYNES: You mean a 158 pages.

MS. COLLERY: That -- the claim that was raised was that the judicial defendants were not agents of the administrative office of the courts.

JUDGE GARWOOD: They got to be agents. I know they said they were not. But the statute very clearly also says that the transaction -- it says in connection with any business or transaction or

series of transactions of in this case, the Mississippi department of the courts.

MS. COLLERY: The administrative office of courts.

JUDGE GARWOOD: And I'm just wondering, how is the ruling of the judge in these civil cases a part of the business of the administrative office of courts or whatever it is.

MS. COLLERY: If you look at the Mississippi statutes that you find the role of the administrative office of courts as assist and improving the administration of justice in the state of Mississippi.

JUDGE GARWOOD: They buy them supplies and they allocate them a certain amount of money for law clerks and secretaries. They don't have anything to do as I would understand it just as I hope our administrative office doesn't with how we decide the cases.

MS. COLLERY: They don't have anything to do with how you decide the cases.

JUDGE GARWOOD: Or what decisions we make.

MS. COLLERY: But the case deciding business of the individual courts is the business of the administrative office of the courts. They among other things, Your Honor, they keep statistics on -- they don't just provide money. They keep statistics on cases in Mississippi courts.

JUDGE HAYNES: But you are saying the judge couldn't do a job without a secretary and a stapler and these kind of things and by providing that they are facilitating the decision making.

JUDGE BENAVIDES: Is that the business of this administrative office? Are they assist the business of the individual judge and does that mean that this is -- that this transaction involves the business of the administrative office of the courts?

MS. COLLERY: Yes, I think it does for a number of different reasons. The employees of the judge -- I'm sorry.

JUDGE GARWOOD: They don't promulgate ethical rules, do they, or jurisdictional rules or anything like that.

MS. COLLERY: I don't believe that they promulgate ethical rules, but they do collect statistics on cases in the courts. They provide the employees --

JUDGE HAYNES: Do they provide additional education? In other words, CLEs for judges?

MS. COLLERY: I don't think so.

JUDGE HAYNES: Go ahead.

MS. COLLERY: They gather statistics on what happens in courts. They provide employees who work in the courts and --

JUDGE GARWOOD: They don't hire them. They give the money for it. The truth -- the judges hire the clerks and the secretaries and administrative office the money flows through it is what it amounts to but I mean, it's --

MS. COLLERY: Let me make one more point. They also apply on behalf of the courts for grants to various institutions. And bribery existing in the court system of Mississippi directly impacts the ability of the administrative office of courts to apply for and receive various grants and funding for the courts. If the integrity --

JUDGE HAYNES: If the U.S. Government knows all their money are going to people that are being bribed and they are not going to give the grant that seems to make a statute very, very broad.

JUDGE GARWOOD: It doesn't because the government is paying for it not just specific programs to notify the INS of criminal convictions and there are about five or six specific programs the people who do those aren't decision maker of judicial cases.

MS. COLLERY: I understand that. I'm not arguing at administrative office of the courts decide the cases but it is the business of the administrative office of courts to improve the administration of justice in Mississippi. It says that in the Mississippi statutes. And they do that in a number of ways that could be impacted by corruption in the Mississippi courts.

JUDGE GARWOOD: Corruption has got to be bad for the courts period, but I -- I will say that's -- they don't police the courts for that matter.

MS. COLLERY: They don't police the courts, but the business of the court is to decide cases. And without -- without that business there would be no administrative office of courts. And the deciding a case in a corrupt manner doesn't affect how the administrative office of courts does its job.

JUDGE HAYNES: Could you speak just very briefly? We haven't heard from the defendants on this, but this issue of the severance and whether the two conspiracies if you will should have been tried together, with the only similarity being Minor's involvement.

MS. COLLERY: Yes. The indictment charges Minor conspired with Teel and Minor conspired with Whitfield but it has --

JUDGE HAYNES: But Teel and Whitfield didn't even know each other. There is no theory in the case where they are also winking at each other.

MS. COLLERY: That's right. There were payments made on both loans almost simultaneously, but they don't have that theory they knew each other or had a connection with each other but both conspiracies are link to the substantive RICO count. When you have a substantive RICO count that has as predicate agents the various bribes at issue in this case, that that is sufficient to permit venue. I'm sorry, to permit the joinder. Now, the defendants are now say, well, Teel and Whitfield were not themselves charged in the RICO count but that doesn't matter. We say the firms circuit case that deals correctly with that issue and that cites Fifth Circuit law that deals with a case where not all defendants are charged in the RICO count. So it's just -- it's well established. It's not open to any doubt that you can join these two -- it's well established in the case law, Your Honor. It's not an open question in the case law. I have one minute left. I just want to address the question of whether or not these were campaign contributions. As Judge Haynes has pointed out at least half of the case involved money that could not under any stretch of the imagination be considered a campaign contribution, and with respect to the \$100,000 loan, I think it's significant to note that that loan was not issued until after Whitfield got reelected, specifically at Minor's request. Minor told the bank oh, this one is not going forward until after -- he doesn't need the money until a day after the election. So there is no -- there is no possible arguments that that was in connection with the campaign. I also heard Mr. Lowell say with the judge should have asked jury to distinguish between these various loans but of course there was no instruction ever proposed that the jury should distinguish between these loans because it was not part of the defense that these were campaign contributions. In fact, Minor not only the defendants deny that Minor intended to give them this money, they said well, these were just -- these were just a guarantee on loans. We all thought the judges were going to pay them back themselves but Minor in both his opening statement and closing argument took issue with the question of whether he actually even given them the money. If you look at the opening statement, he denies that he is paid off and if you look at the closing statement he says the government failed to prove that he made the cash contribution to the bank, that he went to the bank and made those cash contributions. Thank you very much.

JUDGE BENAVIDES: Thank you, counsel. We will have a brief recess. Oh, I'm sorry.

MR. LOWELL: I have just a few remarks back.

JUDGE BENAVIDES: I was taking back 39 minutes we had given you earlier. Go ahead.

MR. LOWELL: I will try to use them well. As to that last point that was made by counsel, the bottom line is that we are not retrying the case here. What we are trying to say is that the theory presented through out the case was that enough evidence had come in as to the campaign context that it required the proper instruction under McCormack. And the government's idea that we can argue as Judge Haynes wanted to and could that maybe one of them doesn't fit in still has to get to the jury through the right place to make that decision. I think Judge Haynes said do the jury know what they were supposed to do, well, you know the jury didn't know what it was supposed to do by looking at tab 4 in the appendix which is the jury form in which they find not proved on various of the parts of RICO and conspiracy but then take the exact same substantive count and then find the defendants guilty. Something was going on and what we tell you is going on without the specific quid pro quo they thought they could convict for something less. The problem is, is that the intent to influence language allows in the state of Mississippi where you have elected judges, lawyers giving money and allowed to, no maximum campaign contributions, and at a time even the ability to do it in cash, that is what the bottom line of these cases say every lawyer gives money to a judge with the intent to influence. But the question is, is it the general intent to influence, pro defense, pro plaintiff. Is it for a specific official act which should be the requirement under the law for it to become corrupt. It was Jennings that said without including in the phrase corrupt intent the specific requirement of a quid pro quo you have violated a jury instruction when you have this kind of context. And that was well said. Lastly, I want to make sure that --

JUDGE BENAVIDES: The argument has some basic -- people -- judges campaign on the idea that they are going to be tough on law and order and people contribute DA's offices, people that are concerned about crime, and they want a judge that is going to be -- that in their view will be receptive and will be tough on crime and -- but isn't this case more than just kind of a generalized view of cases it seems to be in the government's theory is that it's not just getting someone that's inclined or -- or that you give campaign money that's going to be more or less favorable to your view of the law, but that it's going to return favorable decisions in the cases in which you are involved.

MR. LOWELL: That is what the government said its case was about and I understand that that is the dichotomy, but judge, to get the jury to get it right you have to give them an instruction to get it right. And when you say just intent to influence, influence what? A general philosophy or a specific quid pro quo. That is it. You have nailed it. The issue is if you tell the judge that it's not enough to give the contribution with the general intent for some future vague benefit all the language of all the cases, but it has to be for some specific official act. It could be specific official act, specific ruling in a specific case. You have to use the words specific and official and act, not your general philosophy. And by not doing it, not only did the judge violate the general bribery law of quid pro quo but most specifically in a context in which the First Amendment value was at stake and in the campaign context it is. And I see my time is up so I will finish with ten seconds which is one, the Goss issue I know this court has ruled after Judge Wingate in the Goss case and I think we briefed that I'm not sure. And recently on all of our evidence questions I notice Judge Haynes, your decision in the Rothenberg cases as to how to view that and it was instructive for me and I thought I would raise it and finally because our client is incarcerated in the way that has occurred we ask that as you consider that this should be reversed and also the sentence that he also be released pending your decision.

MR. LUCAS: I understand --

JUDGE BENAVIDES: If you could just kind of clear up, counsel, for the government as indicated that it was not a briefing. The issue wasn't briefed with respect to the positions or the questions that were asked by Judge Garwood with respect to an -- a business of an organization.

MR. LUCAS: Your Honor, Mr. Minor's brief on pages 81 to 84 included that material as well as I

believe Judge Whitfield's brief include that material. We incorporated that in our reference our brief, although we have not had a separate section on that. Your Honor, the government cited a great deal in their argument most of which had to do with the case against Paul Minor and John Whitfield. Teel was brought into this case and filed a motion to severance both before -- motion to sever both before the 2005 trial and 2007 trial. Court might have been forgiven for not granting the motion to sever in 2005 trial but in 2007 after they had the opportunity to hear all the evidence the court knew that there were two entirely separate conspiracies. That the only thing that united that conspiracy was Mr. Minor and that under United States versus Welch, Fifth Circuit case, it is, of course, the judge has to determine whether or not joinder is proper. There is always a conflict between judicial efficiency and the rights of the defendant. But in this case clearly the rights of the defendant were trampled on by refusing to grant Judge Teel a severance. In Judge Teel's case the \$24,500 loan was entirely for campaign contributions. This colleague says there is no evidence that it was for campaign contributions but it was -- the record is replete with evidence that Judge Teel's the entire amount of money that he drew off that \$25,000 line of credit was for campaign contributions -- was used for campaign purposes. Judge Teel did not have any matter pending before him at the time that loan was taken out and there was only one matter that had to do with Paul Minor pending in chancery court that we are aware of. It was pending before another judge who testified, J.N. Randall, that he was a good friend of Paul Minor. There was no way that Judge Teel or Judge Minor -- Judge Teel or Mr. Minor could have foreseen that at some point this case was going to go before me.

JUDGE BENAVIDES: Thank you, counsel.