No. 07-14648

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

US INFRASTRUCTURE, INC., SOHAN P. SINGH, and EDWARD T. KEY, JR.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
(Judge C. Lynwood Smith, Jr.)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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Plaintiff-Appellee,
v.

US INFRASTRUCTURE, INC., ET AL.,
Defendants-Appellants.

Certificate of Interested Persons and Corporate Disclosure Statement

To the Certificate of Interested Persons in appellants' opening brief, appellee adds:

Barnett, Thomas O.

Hammond, Scott D.

Hirsh, Adam D.

Jefferson County (Alabama) Environmental Services Department

Maynard Cooper & Gale PC

McCord & Brunson

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Defendants-Appellants.

Miller Hamilton Snider & Odom, LLC

O'Connell, James J.

Powers, John J., III

Timberlake-Wiley, Deana

United States of America

White Arnold Andrews & Dowd PC

The victim(s) in this case were Jefferson County, Alabama and/or the State of Alabama and/or the United States of America.

Dated: March 21, 2008

Respectfully submitted,

_____

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STATEMENT REGARDING ORAL ARGUMENT

Because of the extent of the record and the number of issues raised, appellee believes that oral argument may be of assistance to the Court.

STATEMENT OF RELATED CASES

This appeal is from the fourth of five trials held in 2006-2007 in which public officials of Jefferson County, Alabama, and various construction and engineering contractors were convicted of bribery, conspiracy to commit bribery, and related offenses stemming from a scheme to profit illegally at the expense of Alabama's taxpayers. On March 13, 2008, this Court entered an order consolidating the appeals from the four remaining cases that are discussed below. The crimes arose from the county's $3 billion repair and rehabilitation of its sewer and wastewater treatment plants. The Jefferson County Environmental Services Department ("JCESD") supervised that repair and rehabilitation effort, and County Commissioner Jewell "Chris" McNair oversaw the operation of the JCESD.

On August 29, 2005, a federal grand jury sitting in Birmingham, Alabama returned a 127-count Second Superseding Indictment charging Roland Pugh Construction, Inc. and two of its principal owners and officers, Grady "Roland" Pugh and Joseph "Eddie" Yessick, with conspiracies to commit bribery and bribing JCESD Director Jack Swann, JCESD Assistant Director Harry Chandler, Chief Engineer Ronald Wilson, JCESD Construction and Maintenance Supervisor Clarence Barber, and JCESD Maintenance Supervisor Larry Creel. The Indictment also charged Rast Construction, Inc. and its principals, Bobby Rast and

Danny Rast, and F.W. Dougherty Engineering Associates, Inc. and its principal Floyd "Pat" Dougherty, with a conspiracy to bribe Swann. It further charged the Pugh Construction defendants, Rast Construction defendants, and Dougherty Engineering defendants with a conspiracy to bribe McNair, and the appellants in this case with conspiracies to commit bribery and bribing McNair.

On December 2, 2005, Senior District Judge Propst ordered the case severed into five separate cases for trial. Chandler, Barber, Creel, Wilson, JCESD engineer Donald Ellis, and Grady Pugh, Jr., son of Roland Pugh, pled guilty to various offenses.

The first trial (2:05-cr-061) focused on the bribery of McNair (Counts 1-31, 125-26). On April 21, 2006, a jury found all of the Pugh Construction defendants, Rast Construction defendants, Dougherty Engineering defendants, and McNair guilty of conspiracy to commit bribery; McNair guilty on ten substantive counts of bribery; the Pugh Construction defendants guilty on four counts of bribery; the Rast Construction defendants guilty on nine counts of bribery; and the Dougherty Engineering defendants guilty on one count of bribery. That case is docketed in this Court as No. 07-11476.

The second trial (2:05-cr-545) focused on the bribery of Wilson (Counts 75-77). On June 13, 2006, a jury found Wilson and Pugh Construction guilty of

conspiracy to commit bribery and Wilson guilty of one count of bribery. That case is docketed in this Court as No. 08-10433.

The third trial (2:05-cr-544) focused on the bribery of Swann (Counts 51-69, 90-100, 124). On October 2, 2006, a jury found the Pugh Construction defendants, Rast Construction, Bobby Rast, and the Dougherty Engineering defendants guilty of bribery and conspiracy. The jury also found Swann guilty of conspiracy, six counts of bribery, and 11 counts of mail fraud. The jury found Danny Rast not guilty on all charges. That case is docketed in this Court as No. 07-11476.

After appellants' trial in the instant case (2:05-cr-543), the fifth trial (2:05-cr-542) focused on the bribery of Barber (Counts 78-86). On January 17, 2007, a jury found Pugh Construction guilty of one count of conspiracy and four counts of bribery. The jury found Roland Pugh not guilty on all charges. That case is docketed in this Court as No. 08-10428.

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STATEMENT OF JURISDICTION

The district court's jurisdiction was based on 18 U.S.C. § 3231. This Court's jurisdiction is based on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the jury's guilty verdicts.

2. Whether the court abused its discretion in deciding to admit or exclude certain evidence.

3. Whether the court's jury instructions accurately reflected the law and the facts, and adequately stated appellants' theory of the defense.

4. Whether the prosecutor's use of the grand jury to investigate whether appellants bribed McNair, after appellants had been indicted for bribing Chandler and Ellis, was an abuse of the grand jury process.

5. Whether the FBI's questioning of appellant Key concerning possible bribes to McNair, after Key had been indicted for bribing Chandler and Ellis, violated Key's Sixth Amendment right to counsel.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

In 1996, after a lawsuit by residents of Jefferson County, Alabama and the U.S. Environmental Protection Agency ("EPA") alleging that untreated waste

illegally had entered into the area's rivers and streams in violation of the Clean Water Act, Jefferson County entered into a consent decree requiring the County to repair and rehabilitate its sewers and wastewater treatment plants.[1] R26-226:249; R27-227:634-35, 640-41. The Jefferson County Environmental Services Department ("JCESD") supervised the process of rehabilitating the sewer and treatment plants.[2] County commissioner Jewell "Chris" McNair oversaw the operation of the JCESD, which included JCESD Director Jack Swann, Assistant Director Harry Chandler, and Chairman, Product Review Committee Donald Ellis. R28-228:663

On August 29, 2005, a federal grand jury sitting in Birmingham, Alabama returned a 127-count Second Superceding Indictment (R1-1) that, *inter alia*, charged US Infrastructure, Inc. ("USI"), USI's President and principal owner Sohan Singh, and USI's Vice President Edward Key, Jr., with conspiring to commit bribery by paying McNair approximately $140,000 for work not actually done by McNair (18 U.S.C. § 371) (Count 32); bribing McNair by giving him

[1] Record citations are to the record volume number and document number (and pages if applicable) shown on the District Court's Certificate of Readiness.

[2] The cost ultimately amounted to nearly $3 billion. R27-227:641; R28-228:774.

checks for that bogus work (18 U.S.C. § 666) (Counts 38-49);[3] conspiring to commit bribery by giving McNair approximately $335,000 cash drawn from USI funds (Count 50); bribing Chandler with a $2,000 gift card to Parisian's Department Store (Count 73) and an envelope containing $1,500 cash (Count 74); and obstructing justice by intentionally withholding documents from the grand jury and providing a false letter of compliance with the grand jury's subpoena (18 U.S.C. § 1503) (Count 127). Key and USI were charged with bribing Ellis with an envelope containing $500 cash (Count 88).

After Senior District Judge Propst severed the Indictment into five separate cases, appellants' trial began on November 27, 2006, in Huntsville, Alabama.[4] On December 8, 2006, the jury found appellants guilty on all counts. R34-234:1753-57. On September 19, 2007, the district court denied their post-trial motions. R3-179.

On September 19, 2007, the court sentenced Singh to 78 months

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[3] Count 46 was dismissed before trial.

[4] McNair was charged with the USI defendants in the two conspiracy counts (Counts 32 and 50), and separately with five counts of accepting bribes from appellants (Counts 33-37), but was severed from the USI defendants. Prior to his trial, he pled guilty to Count 32 on February 14, 2007, and the government subsequently dismissed him as a defendant to the other counts involving USI. R3-157. McNair also was convicted of numerous offenses in the first of the five trials (2:05-cr-061).

imprisonment, to be followed by three years supervised release, a $6,721,373.94 fine, a $1,600 special assessment, and $426,254.63 in restitution to Jefferson County. The court sentenced Key to 60 months imprisonment, to be followed by three years supervised release, a $25,000 fine, a $1,700 special assessment, and $426,254.63 in restitution to Jefferson County. The district court stayed Singh and Key's report dates, so they currently are not incarcerated. The court sentenced USI to five years probation, a $6,750,000 fine, a $6,800 special assessment, and $426,254.63 in restitution to Jefferson County.

The district court entered final judgment on September 26, 2007. R3-182, 185, 188. Appellants filed notices of appeal on September 28, 2007. R3-193, 194, 195.

STATEMENT OF FACTS

I. BACKGROUND

Jefferson County is a political subdivision of Alabama governed by five elected commissioners. The commissioners divided the various staff departments for purposes of supervision. McNair supervised the JCESD from 1988 until he retired on March 29, 2001. R27-227:632-33. For each of the fiscal years 1999-2004, Jefferson County received more than $10,000 in federal funds. R28-

228:828-30; GX39.[5]

The consent decree process required Jefferson County to hire engineering firms to design the rehabilitation projects, and those firms were hired through no-bid contracts. R28-228:634-35, 664. Because McNair supervised the JCESD, he decided which engineering firms would be hired. R27-227:638. McNair selected USI as the primary design firm (R28-228:665), and USI was awarded numerous contracts during the sewer rehabilitation project – totaling over $50 million. R27-227:639.

USI was founded by Sohan Singh in 1994 and had offices in Birmingham and several other cities. R26-226:386-87; R28-228:869. Singh had an adjusted gross income of more than $1 million in 1999; more than $5 million in 2000; and more than $7 million in 2001, all from salary and other payments from USI. R30-230:1185-86; R31-231:1455; GX61C, 61D. At their Sun Trust Bank in Nashville, the Singhs made transactions of hundreds of thousands of dollars and cashed individual checks for more than $100,000. R31-231:1502-09.

Singh received substantial expense reimbursements from USI. R26-226:386-87. USI routinely paid Singh $5,000-6,000 per month in per diem (*i.e.*,

[5] "GX" refers to government's trial exhibits; "DX" to defense exhibits; and "Br." to appellants' brief.

based on a flat daily rate not on actual expenses incurred), even when he stayed in USI-owned condominiums. R31-231:1423-27, 1457. Singh had Key cash his per diem checks at Key's bank in Birmingham. R31-231:1424-25; R29-229:1105. When asked whether Singh had a normal business need for roughly $100,000 per year in per diem, in cash, former USI controller William Thomas testified "I don't know . . . I don't know how he spends it." R29-229:1105. USI did not have any business reason to use large sums of cash. R29-229:1043.

USI treated JCESD officials, and McNair in particular, differently than other clients. Singh told USI's Mary Duffy that "[t]he department heads at Jefferson County were considered friends of the company, and we were to treat them with the utmost respect and generally be friends with them." R26-226:401. A USI document said "when Sohan is here, he will only take calls from clients, county officials, and other VIP's." The document then listed people to be "put through to Sohan, without question," with McNair at the top, followed by other JCESD officials. R29-229:921-22; GX48.

In addition to being a County Commissioner, McNair owned and operated the Chris McNair Studio and Art Gallery ("McNair Studio"), which, as explained by his daughter Kim McNair Brock, was "a family business where we do photography, custom framing. And after a period of time, we had an art gallery

and banquet facility." R27-227:430. Ms. Brock worked at the studio from 1993-2001, first handling the checking account with her father, and then in the late 1990s with her sister, and also handling the studio's cash receipts. R27-227:431-32.

In 1999-2000, McNair built an addition that more than doubled the studio's size. R27-227:492. *See* R27-227:433-34; GX21A, K. Ms. Brock was "sure that he [McNair] couldn't afford it, or, you know, how was he going to do something on a large scale like that," and told her father so. R27-227:491-92.

II. BRIBERY OF CHRIS MCNAIR

A. Payments of Invoices for Work that McNair Studio Never Performed

The documents demonstrating that the materials McNair Studio supposedly created for USI but which the Indictment alleged, in Counts 32 (conspiracy) and 38-49 (bribery), was work that McNair Studio never performed are summarized in GX59. R29-229:1010, 1015. USI paid McNair Studio for these materials in 1999-2002, during and after the time when McNair constructed the studio addition.

GX59 is based on the following exhibits: The "50" series, GX50A-50Z, are the checks by which USI paid McNair Studio, each one signed by Singh, R26-226:353-57; the "51" series, GX51K-51Z, are the McNair Studio invoices to USI

that correspond to the checks in the 50 series; the "52" series, GX52A-52Z, are USI's copies of the McNair Studio invoices; and the "53" series, GX53A-53Z, are the actual materials supposedly created by McNair Studio and billed to USI. R28-228:866; R29-229:1011.

Several McNair Studio employees testified that the studio could not and did not create the materials in the GX53 series of exhibits, and several USI employees testified that USI created those materials in-house. Kim McNair Brock described how McNair Studio was paid by USI. For each invoice in the 51 series, Ms. Brock was given, either by her father or by facsimile from USI, a USI "work sheet" that contained purchase order numbers and billing information. R27-227:458-59. Singh, or someone else from USI, would tell her to expect the facsimile transmissions. R27-227:459. No other client provided McNair Studio with worksheets from which to prepare invoices for that client. R27-227:553.

Ms. Brock prepared an invoice from the worksheet and told her father when it was finished. Without the worksheets she would have had no idea what to put on the invoices. R27-227:553. She or her sister would then fax or send the invoice to USI. R27-227:467, 469-70, 472, 475, 478, 480. For every invoice shown to her at trial, Ms. Brock was not aware of any work that McNair Studio had performed to earn the payments that USI made. R27-227:461-65, 470-71,

475, 477, 480, 482. Nevertheless, USI paid those invoices. R27-227:459.

In addition to telling McNair Studio how much to charge it and for what, USI also gave McNair Studio's invoices special attention. From 1999 to mid-2000 USI paid its vendors weekly, and after mid-2000 changed to bi-weekly. R29-229:1032. But USI typically paid McNair Studio either the day or the day after USI received McNair's invoices.[6] R29-229:1038-43; R27-227:446, 461-63, 465, 467-68, 474, 488. In addition, while Singh normally did not hand-deliver checks to any other vendor, Singh routinely delivered the check to either McNair or his studio. R27-227:460; R29-229:1037-38.

The "work" that McNair Studio supposedly did for USI was embodied in the "53" series exhibits – letters of interest, marketing proposals and qualifications. But Shenita Hatcher, who was hired by McNair in October 1999 and "was the graphic design department" at McNair Studio (R29-229:995), did not create and was unaware of anything at McNair Studio that resembled the binders that were admitted as GX53A-1, 53A-2, 53D-1, and 53D-2. R29-229:998-99. She also did not recall McNair Studio having a binding machine that would have

[6] For example, on October 25, 2000, USI faxed McNair Studio a worksheet, McNair Studio prepared its invoice, and Singh signed a check to pay the invoice. GX50P; GX51P, pp. 1-3. GX51N is an example of a McNair Studio invoice prepared the day after USI faxed the worksheet. Singh signed the check the same day. GX50N.

produced those binders, and explained that McNair Studio did not have a lamination machine of the kind that created the front of the binders. *Id.*

Likewise, Ms. Hatcher did not create, and never saw, the materials that were admitted as GX53G-1, 53G-2, 53F-1, 53H-1, 53I-1, 53o-1, 53R-1, 53R-2, 53V-1, 53V-2, 53X-1, 53X-2, and 53X-3, at any time during her employment at McNair Studio. R29-229:1000-1002. In fact, she never created any document while at McNair Studio that even resembled those exhibits. R29-229:1002.

Mary Duffy, who worked for both Singh and Key from May 1995 to September 1999, identified GX52A as an invoice from McNair Studio for $12,595 for "Marketing and proposal services for Atlanta proposal." R26-226:394, 408. But she explained that USI had prepared this proposal itself, using a Kinko's copy service. R26-226:406-09; GX53A-1, 53A-2 (materials prepared by USI engineers). She acknowledged that the McNair Studio invoice described work that USI had done internally. R26-226:409.

Rosherren Williams, who worked at USI from March 1999 to November 1999, typed a series of letters of interest for Key. R27-227:567-73; GX53D-1, 53E-1, 53E-2, 53F-1, 53R-1. The letters were all similar, typically 2-4 pages long, with the project name and address changed to reflect each recipient. R27-227:573.

When preparing the letters she talked to Key but never to McNair.[7] R27-227:574. Once the form was typed into the computer, "[t]he only thing I had to do was make adjustments." R27-227:576. In fact, at least one such letter USI prepared after Ms. Williams left the company had her initials as the typist. R27-227:574-75; GX53R-1.

Angela Wilson, who worked at USI from June 1998 to February 2006, explained that she or other USI employees created a series of presentations, proposals, and statements of qualifications contained in the 53 series exhibits. R27-227:582-83, 588-605; GX53D-2, 53G-1, 53G-2, 53H-1, 53I-1, 53I-2, 53J-1, 53O-1, 53R-2, 53S-1, 53T-1, 53U-1, 53V-1, 53X-1, 53X-2, 53X-3, 53Y-1, 53Y-2, 53Y-3, 53Z-1, 53Z-2, 53Z-3. The text for these documents came from USI's files, and she used materials that were available in-house. R27-227:598-605. She did the binding and laminating herself.[8] R27-227:590-92. Ms. Wilson prepared these documents at Key's request, and she did not talk to or work with McNair Studio to create any of

[7] Defense witnesses Rhonda Vines and Singh's son-in-law Carson Spencer asserted that letters of interest required research and substantial effort. Ms. Vines conceded, however, that the actual letters were "sometimes" form documents, and much of the language in an example letter, GX53R-1, was standardized. R30-230:1288-92. Spencer conceded that two letters of interest, prepared by USI two years apart, were substantially the same. R30-230:1359-60; GX53D-1, 53R-1.

[8] USI purchased a lamination machine in 1999. R30-230:1294.

them. R27-227:590-91, 597. Moreover, during the seven years that she prepared these letters and proposals she never once heard Key say that he needed to consult with McNair on any of them. R27-227:630.

Ms. Wilson further explained that USI's letters of interest were essentially standardized forms used to get new business. R27-227:593. And when the documents in the GX53 series included photographs, some of them were stock photographs taken by USI personnel and stored on a computer for re-use. R27-227:626-27.

Finally, not only is the record devoid of any evidence that McNair consulted with USI on any of the series 53 projects, the Jefferson County contracts awarded USI during the period in question strictly prohibited USI from hiring McNair, or any other county employee, in any capacity whatever. R28-228:812-13; GX36B, p. 11.

B. The Cash Bribes Conspiracy

GX60A-F summarize documents that establish a pattern of substantial cash withdrawals from USI funds, and comparable cash deposits by McNair into his personal bank account at similar times. The Indictment charged that this pattern constituted the manner and means of the conspiracy in Count 50. R29-229:1012; GX60A-F. Ms. Brock identified GX5A-5Z, 6A-6Z, and 7A-7N, as deposit tickets to The Bank of Birmingham, which was her father's bank at that time. R27-227:492-

93. The name of the account was Chris McNair Frame & Photo Art Construction Account. R27-227:494. This was a personal, not a McNair Studio, account that Ms. Brock assumed was for the construction of the studio addition. R27-227:497.

The deposits by McNair consisted of both checks and thousands of dollars in cash. R27-227:494-520. McNair gave Ms. Brock the cash and instructed her to write out deposit slips for him or make the deposits herself. R27-227:496, 498-99. Although Ms. Brock did not know where her father got the cash for these deposits, she knew it did not come from the McNair Studio register or cash box and was not reflected in any of the studio's books. R27-227:514. Ms. Brock thought it unusual that her father had so much cash, but when she asked him about it, "[h]e would tell us to just do what he asked, to make the deposit, or whatever he asked us to do." R27-227:502. McNair had no businesses other than McNair Studio. R27-227:510. McNair's deposits were substantial, totaling $46,100 in December 1999, $35,000 in January 2000, and $44,260 in July 2000. R27-227:524-26; GX12B-D.

At the same time that McNair made cash deposits into the construction account – that is, on the same days or the days immediately preceding those deposits – Key and Singh were cashing USI checks or withdrawing thousands of dollars in cash, sometimes in amounts identical to the McNair deposits, from accounts at

Compass Bank and AmSouth Bank in Birmingham.[9] *See* GX60A-F.

Appellants had large sums of cash available to use to bribe McNair. Key routinely cashed checks for Singh, but the largest checks were for $9,000 because Key knew that banks were required to send Currency Transaction Reports to the government for transactions greater than $10,000. R29-229:902. The checks cashed, and other cash withdrawn, by Key and Singh from 1999 to 2001 include GX8K, 8N-8Z, 9A, 9J, 9o, 10B, 10D. R29-229:911-19. Key could not explain many of these withdrawals and could not explain what he did with the money. R29-229:914, 918.

Additionally in January 2000, Key deposited a $90,000 check from USI into a newly-opened personal account at Compass Bank and immediately began a series of $9,000 withdrawals. The following month Key deposited a second $90,000 check into the account, and the $9,000 withdrawals continued. In July 2002 Key deposited yet a third $90,000 check, this time into his account at AmSouth Bank. R29-229:903, 905-06, 910, 916; GX8M, 8T, 9T. *See also* R29-229:1055; GX54G, 8L (check request form and check issued to Key that correspond to GX8M), R29-

[9] For example, on December 2, 1999, Key cashed a $9,000 USI check to Singh, and McNair made a $9,000 cash deposit. GX8I & 5C. Similarly, on November 17, 1999 and again on November 18, 1999, Key cashed a $9,000 USI check to Singh. McNair made two cash deposits the next day, one for $9,000 and one for $8,000. GX8G, 8H, 5A & 7o.

229:1053-54; GX54J (check request form that corresponds to GX9T).

When the FBI questioned Key about these $90,000 deposits, Key kept changing his story. He originally said that when he joined USI, Singh gave him some USI stock for free, and that he eventually gave the stock back to Singh without compensation. R29-229:899. However, when shown the first $90,000 check he deposited, Key said Singh paid him $90,000 for the stock. R29-229:904. Key did not, however, remember what he did with that $90,000, although he no longer had it.[10] R29-229:905. When shown the second $90,000 check, Key "then said that he thinks Mr. Singh gave him $180,000 for the stock." R29-229:907. Key could "not recall the third 90,000-dollar check" at all. *Id.*

Singh asked USI Controller William Thomas to issue the first $90,000 to Key. R29-229:1053-54. When Singh requested the third $90,000 for Key, Thomas said he did not know that there was supposed to be another payment. Singh told him "you made a mistake. You should issue another one." R29-229:1055. The third check to

[10] Accountant Jerry Brannan, an expert witness, said he traced the $90,000 payment through Key's account, and opined that none of this money went to McNair. R31-231:1405. On cross-examination, however, Brannan admitted that his analysis was based on information provided to him by Key and Singh, did not account for the second $90,000 deposited to that account, and also did not include any of the $9,000 or $9,500 cash withdrawals that Key made from the account and that the Indictment charged as bribes, for example, GX8N-8Q, 8S, 8W, 8X, 9U. R31-231:1431-40. He also conceded that when Singh had Key cash Singh's per diem checks from USI, that money could have gone to McNair. R31-231:1423.

Key, signed by Singh, does not say "stock repurchase" like the earlier checks, but "promissory note." R29-229:1056. Thomas, however, never saw any promissory note relating to that $90,000. *Id.*

One day before the first $90,000 check was issued to Key, Singh requested two checks from USI. The first was for $406,895.20, the second for $150,000. Both checks were payable to Singh. R29-229:908, 1057; GX54H, 54I. William Thomas issued the checks after "Mr. Singh said that he had loaned money to the company and he wanted to be reimbursed." R29-229:1057. Singh showed Thomas a handwritten ledger, on notebook paper, as evidence that he had loaned money to USI. It was not an official company document, and there was nothing in USI's accounting records indicating that USI owed Singh $406,000. R29-229:1058. FBI Agent Mayhall said he traced the $406,000 check to a new account in the name of Singh and his son Anoop in Nashville. The second $90,000 check to Key came from this account. R29-229:909.

III. BRIBERY OF HARRY CHANDLER

By 1996, Chandler was the Assistant Director of JCESD. R27-227:632. USI could not be paid without Chandler's approval. R28-228:678, 680-81; GX31G, H. In 2003 and 2004, Key gave Chandler various "gifts," including a gift card for Parisian's Department Store worth $2,000 (R28-228:704-05, 713); $1,500 cash; a

watch; and another $800 cash. R28-228:687-88, 704-05. Chandler considered them Christmas presents. R28-228:760.

After his indictment for taking bribes from Pugh Construction Company, Chandler cooperated with the government and wore a hidden recording device while talking to both Key and Singh. R28-228:691, 729. Chandler recorded his conversation with Key at USI's offices. R28-228:691-92; GX58B (transcript), 58C (CD-ROM containing recording). They discussed the grand jury subpoena that had been served on USI (GX34A) and whether USI had any records of the things that Key had given Chandler. R28-228:698-700. Chandler mentioned the cash he had received and asked if USI's accountant knew or had records of it. Key responded: "No its . . . Sohan and me, of course, you know." R28-228:698-99. Key then assured Chandler "that ain't ever going to come to light here." R28-228:699. Key added: "You don't need to worry about that," "that'll never never come up . . . you don't need to be scared because that - that's never gonna come up." R28-228:703-04.

When Chandler said he was "scared that'd be a paper trail" for the Parisian's gift card, Key responded "there's nothing on that either," "[t]here's no connection to you or anybody else," "I'm not gonna expose you to anything." R28-228:705, 708.

Key said that if he did charge it, "you know, I gave it to my wife." R28-228:713.[11]

Chandler also recorded a lunch conversation with Singh. R28-228:729-30; GX58A (transcript), 58D (CD-ROM). When they discussed the gifts given to Chandler, Singh said:

> Whatever things are they talking about, it is part of our business basically. That's the way systems working. That's the way we all are. So we have some little things what are, you call gifts, or whatever you call them kind of thing. That's the way we do business in society now.

R28-228:740. When Chandler referred to the Parisian's gift card, Singh said "No. We never gave you nothing. You shouldn't even think about that you know." R28-228:741. Singh added that "all I'm saying, sir, for your convenience kinda thing . . . that never happened here." R28-228:742.

When Chandler expressed concern about his potential criminal liability Singh replied:

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[11] Post-indictment Key told former USI Assistant Controller Stephen Roberts that Key "did give someone, I believe it was Mr. Chandler, a couple of gift cards from Parisian Department Store as Christmas gifts." R26-226:357. Key "also said there was an allegation that there was some cash that had changed hands between he and Mr. Chandler, which he did say that happened, but that is was just a gift, and that . . . it was not a bribe." R26-226:358. Key also told Controller William Thomas that he had received a call from Chandler asking whether Key knew if the gift card to Parisian's Department Store could be traced, and that he had told Chandler "no." R29-229:1063-64.

> "If somebody ask me that, 'Well, did you ever give a gift?' 'No,' I never gave nothing period. That's it. Because as USI we never did, as a friend . . . I give you any damn thing I wanted to and nobody's business. And, Harry, this is not the first time, this is not the first time it is the way the relationship in this whole country is happening period . . . in any city you go that why we relate to each of them that what we can afford to work together."

R28-228:748. Singh added, "under the oath, you know, or any damn thing. It's zero." R28-228:750. "In other words, just didn't happen it did not happen period." "So from our side we never did nothing for you or for Jack [Swann] or for anybody period zero." R28-228:750-51. Singh also offered to pay some of Chandler's legal expenses (R28-228:732-33, 744), and offered Chandler a future job at USI. R28-228:745.

IV. BRIBERY OF DONALD ELLIS

Donald Ellis was a JCESD senior civil engineer who oversaw projects awarded to USI. R28-228:673-74:833-34, 839-40. When Ellis served as project engineer for USI contracts, USI could not be paid without Ellis's approval. R28-228:681.

In Ellis's office in 2002, Key gave Ellis an envelope containing $500 cash. R28-228:836. Key said the money was for Ellis and another county employee to take a business trip for which the county would not pay Ellis's expenses. R28-

228:837. Ellis took both the money and the trip. *Id.* Key also gave Ellis at least one gift card for Parisian's Department Store, which Ellis believes was worth $200, as an Easter gift in 2001. R28-228:837-38. Key told Ellis to spend it on his family. R28-228:838.

V. OBSTRUCTION OF JUSTICE

Key told the FBI that neither he nor USI had ever given a gift greater than $50 to any government official. R29-229:899. USI's letter of compliance with the grand jury subpoena echoed Key's claim.[12] GX34B. But USI never told the FBI or the grand jury about the gifts to Chandler and Ellis that were greater than $50. At trial, Controller William Thomas testified that USI's letter of compliance was not consistent with what Key told him after Key had been arrested, because Key told Thomas about the gifts to Chandler worth more than $50. R29-229:1067. In fact, as noted above, in recorded conversations both Key and Singh told Chandler of their intent to hide the fact that such gifts were given. *E.g.*, R28-228:699 (Key explaining that the $1,500 cash to Chandler "ain't ever going to come to light"); R28-228:750-

[12] The subpoena requested records of "[a]ny and all payments . . . made directly or indirectly by USI and/or by any of its officers . . . for the benefit of any current or former elected or appointed public officials or employees . . . ." GX34A. USI's letter of compliance, signed by Key, purported to provide "[a] listing of all payments made by USI and its officers," explained that Key gave gifts to USI's "clients" every Christmas, and stated: "In all cases these gifts were valued at less than $50 each." GX34B, p.3.

51 (Singh explaining that "from our side we never did nothing for you or for Jack [Swann] or for anybody period").

STANDARDS OF REVIEW

Because of the number of issues and sub-issues presented, the standard of review for each is contained in the various Argument sections below.

SUMMARY OF ARGUMENT

This case concerns a gross abuse of the public trust by several Jefferson County officials who, along with appellants, repeatedly used the county's sewer rehabilitation program for their own personal gain.

1. Appellants' attack on the sufficiency of the evidence is without merit. With respect to the bogus invoice scheme, several McNair Studio employees testified that the studio did not create the materials for which it billed USI, and several USI witnesses testified that those materials were, instead, produced by USI itself. Appellants' claim that the invoices were for consulting services performed by McNair – a government employee their JCESD contracts prohibited them from hiring – is unsupported by the evidence. With respect to the cash bribes conspiracy, there is substantial circumstantial evidence showing that the unexplained source of McNair's sudden acquisition of large amounts of cash was USI's contemporaneous cash withdrawals that USI similarly could not account for. The continuing

relationship between appellants and McNair, characterized by numerous, unusual and unexplained transactions that resulted in repeated transfers of money for lucrative government contracts, fully established appellants' corrupt intent.

2. The district court did not abuse its discretion in admitting or excluding evidence. Dawson's testimony, that McNair told him that Singh had been paying him a bribe, was admissible both as evidence of Singh's "other crimes" under Fed. R. Evid. 404(b), and as a statement against McNair's own penal interest – his admission of guilt – under Rule 804(b)(3). Because the conduct by Singh that McNair described – bribing McNair – was identical to the offenses charged, the statement's relevancy was not outweighed by any prejudicial effect it may have had.

Henson's testimony, that he approached McNair for a government contract after he had performed about $10,000 worth of work for McNair Studio for free, was properly admitted as "inextricably intertwined" with the charged offenses. Henson's testimony tended to show that Singh had knowledge of McNair's willingness to exchange his influence for things of value, and the opportunity to take advantage of that willingness. In any event, because Henson's testimony did not implicate appellants in any wrongdoing, it was not prejudicial.

Finally, the court properly refused to allow appellants' experts to testify. Appellants put on extensive evidence of their defense – that the cash withdrawals the

Indictment charged as bribes, were actually sent to India to pay for Singh's son's wedding. And they argued that defense at length to the jury. The government never disputed the cost of the wedding or that it was paid for with cash taken to India. Because appellants' experts could not shed light on whether that cash came from USI funds or the Singhs' personal account, their testimony would have been cumulative at best.

3. Appellants' claims of error in the jury charge were all waived below and, therefore, are subject to review only for plain error. In any event, the court properly charged the jury about the requisite "corrupt" intent to influence, so the jury could not have convicted if it found that the payments to government officials were either legitimate payments for services rendered or truly gifts. Thus, the additional verbiage in appellants' requested instructions was unnecessary.

4. There was no abuse of the grand jury process. After the grand jury indicted appellants for bribing Chandler and Ellis and obstructing justice, it continued to investigate whether appellants also bribed McNair. The district court correctly found, therefore, that the primary purpose of the continuing investigation was to discover new and additional crimes, not to obtain evidence concerning pending charges.

5. Key's Sixth Amendment right to counsel was not violated. FBI agent

Mayhill's July 2005 non-custodial interview with Key concerned almost exclusively appellants' bribery of McNair. Moreover, Mayhill's testimony about that interview did not touch on any charges that were pending at the time. Since nothing about charges pending against him at the time of the interview was used against him at trial, Key's right to counsel was not violated.

ARGUMENT

I. THE EVIDENCE FULLY SUPPORTS THE GUILTY VERDICTS

This Court reviews the sufficiency of the evidence *de novo*, examining the evidence in the light most favorable to the government and resolving all reasonable inferences and credibility issues in favor of the guilty verdicts. *United States v. Suba*, 132 F.3d 662, 671 (11th Cir. 1998). Moreover, the Court "will not overturn a conviction on the ground of insufficient evidence 'unless no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Wright*, 392 F.3d 1269, 1273 (11th Cir. 2004) (quoting *United States v. Christo*, 129 F.3d 578, 579 (11th Cir. 1997)). The evidence does not have to be inconsistent with every hypothesis other than guilt, "as the jury is free to choose among reasonable constructions of the evidence." *Suba*, 132 F.3d at 671-72.

A. Bribery of McNair

From 1996, when McNair first selected USI, until 2005, when the sewer

rehabilition project was completed, USI was awarded numerous JCESD contracts that totaled nearly $50 million. R27-227:638-41. As Singh admitted, USI ensured contracts would continue to be awarded to it by giving "gifts, or whatever you call them kind of thing. *That's the way we do business in society now.*" R28-228:740 (emphasis added). USI's way of doing business, however, was illegal.

The jury convicted appellants under 18 U.S.C. §371 of conspiring to bribe McNair through the payment of bogus invoices sent by McNair Studio to USI (Count 32), and of conspiring to bribe McNair with cash that he deposited in his personal bank accounts (Count 50). The jury also convicted appellants of 11 counts of bribing McNair, in violation of 18 U.S.C. § 666, through the payment of bogus invoices (Counts 38-49).

To sustain the conspiracy convictions, the government must prove the existence of an agreement to achieve an unlawful objective – here, exchanging things of value for McNair's influence; the defendant's knowing and voluntary participation in the conspiracy; and an overt act in furtherance of it. *See Suba,* 132 F.3d at 672. Because the nature of an illegal conspiracy is secretive, direct evidence of the conspiracy is not necessary; rather, existence of the agreement and the defendant's participation in it may be proven wholly from circumstantial evidence. *Id.; accord United States v. Massey,* 89 F.3d 1433 (11th Cir. 1996) (conspiracy to

commit bribery). "To hold otherwise 'would allow [defendants] to escape liability . . . with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money.'" *Massey*, 89 F.3d at 1439 (citations omitted). The requisite meeting of the minds is provable through inferences drawn from the participants' conduct or other circumstantial evidence of a scheme. *United States v. Obregon*, 893 F.2d 1307, 1311 (11th Cir. 1990). To sustain the bribery convictions, the government must prove that appellants paid the bogus McNair Studio invoices with the corrupt intent to influence or reward McNair. *United States v. Castro*, 89 F.3d 1443, 1454 (11th Cir. 1996).

1. The Bogus Invoices

Evidence of the bogus invoice scheme was overwhelming. Although McNair's daughter prepared those invoices, she was not aware of any work that the studio did to earn the payments, and would not have known what work to charge USI for, or what amounts to charge, but for the "work sheets" provided by USI. R27-227:461-82, 553. No other McNair Studio customer sent her such worksheets. R27-227:553. And while USI paid its other invoices by mail every two weeks, Singh almost always delivered McNair Studio a check the day the Studio sent USI the bill. No other USI customer received this personal service. R27-227:460; R29-229:1032, 1037-38.

Moreover, Ms. Hatcher – the "graphic design department" at McNair studio (R29-229:995) – never created or even saw anything resembling the workproduct in the GX53 series of exhibits that USI claimed was the work that it paid McNair Studio to perform. R29-229:998-1002. In fact, several USI witnesses identified those exhibits as materials USI created in-house. R26-226:406-09; R27-227:568-75, 585-605.

Appellants argue that USI was not necessarily paying McNair Studio for creating the GX53 exhibits but, rather, for McNair's consulting services that went into those exhibits. Br. 38-39. They also argue that "[e]ven assuming there was some unlawful payment in these counts [32, 38-49], there was no proof presented at trial that the USI defendants intended to reward and influence McNair." Br. 40. Both arguments ignore the evidence.

Appellants' claim that McNair consulted on the invoiced projects ignores the fact that USI's JCESD contracts prohibited USI from hiring McNair in any capacity whatever. *E.g.*, GX36B, p.11. In any event, there is no evidence that McNair was ever consulted on any of the subject projects.[13] *See* Br. 37-38 (McNair "*could* have

[13] Appellants' wrongly claim that McNair's daughter and USI employee Wilson "testified that they would not have been privy to McNair's consulting services for USI." Br. 39. Rather, both testified that they were not aware of any such consultation. R27-227:535, 625. Even Singh's son-in-law, who testified generally that McNair Studio "did some marketing development work for us"

performed the invoiced services") (emphasis added). Finally, USI's own employees who explained that USI created the GX53 series of materials in-house, all testified that they never heard from any source that McNair had input into any of them. *E.g.*, R27-227:574, 590-91, 597, 630.

As this Court noted in *Suba*, "'a common purpose or plan may be inferred from a development and collection of circumstances.'" 132 F.3d at 672 (citation omitted). Here, the evidence showed an extended plan or scheme by USI, a company that received $50 million in government contracts over a period of years, to pass nearly $140,000 – through bogus invoice payments – to the County Commissioner almost wholly responsible for that $50 million. R28-228:638-39, 655, 670-71. The large sum of money on both sides strongly suggests a common goal to increase each other's wealth through illegal means. *See, e.g., United States v. Poole*, 878 F.2d 1389, 1392 (11th Cir. 1989) (intent to distribute illegal drugs can be shown from the quantity of drugs involved); *United States v. Perez*, 648 F.2d 219, 221 (5th Cir. 1981) (same).

United States v. Sutherland, 656 F.2d 1181 (11th Cir. 1981), is instructive. In that case, Maynard and Walker each collected numerous traffic tickets, and those

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(R30-230:1345), admitted that he was not familiar with any of the invoices charged in the Indictment. R30-230:1355.

tickets were favorably disposed of by Sutherland, a municipal court judge. Significantly, for any specific ticket there was no evidence "(1) that the ticket was delivered by Walker or Maynard to Sutherland, (2) that money was delivered by Walker or Maynard to Sutherland, or (3) that Sutherland favorably disposed of the ticket in exchange for such money." 656 F.2d at 1187. Nonetheless, this Court affirmed their conspiracy convictions based on "the overwhelming *circumstantial* evidence introduced by the government."[14] *Id.* That evidence included the large number of tickets that were collected by Maynard and Walker, and testimony that Sutherland regularly directed two court clerks to process tickets "irregularly." *Id.* at 1188. In this case, there were a comparable number of bogus invoices paid by USI and, as explained above, not only were those invoices irregularly created at McNair Studio, they were irregularly processed and paid by USI. *Compare id.* at 1187 *with* GX52A-Z. *See also United States v. Johnson*, 899 F.2d 1032, 1035-36 (11th Cir. 1989) (jury may infer agreement from a continuing relationship that results in repeated transfers of illegal drugs).

This case law also refutes appellants' second claim that the government failed to prove "that the USI defendants intended to reward and influence McNair." Br. 40.

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[14] In *Sutherland*, there were two separate conspiracies, one involving just Maynard and Sutherland, the other just Walker and Sutherland. *See* 656 F.2d at 1187.

Moreover, both Key and Singh told Chandler of their intent to hide the fact that they had given things of value to Jefferson County employees. *E.g.*, R28-228:699 (Key), 750-51 (Singh). Indeed, USI's letter of compliance with the grand jury subpoena falsely stated that neither USI, Singh nor Key ever gave anything worth over $50 to a county employee. GX34B, p.3. Whatever limits there might be in using acts of concealment to prove the existence or continuation of a conspiracy (Br. 38-39), a defendant's concealment and falsification are relevant to his intent. *E.g., United States v. Strickland*, 509 F.2d 273, 276 (5th Cir. 1975), *quoted in United States v. Young*, 955 F.2d 99, 103-04 (1st Cir. 1992). McNair's admission to Dawson that Singh had been "making [a] note for" McNair but that McNair needed Dawson's "help" because Singh "had quit doing that" (R29-229:1117), is additional powerful evidence of Singh's knowledge and intent, and common scheme with McNair, to exchange things of value for McNair's influence.

In short, the record is more than sufficient to sustain the jury's verdict on the bogus invoice conspiracy (Count 32). And to the extent that the appellants' challenge to the substantive bribery convictions (Counts 38-49) is grounded on those same arguments (Br. 38-40), that challenge must also be rejected.

Appellants do offer a separate ground for reversing their convictions on Counts 39 and 40: that no "witness[] provided any testimony whatsoever specifically

about th[ose two] invoices." Br. 40. Because appellants' files did not contain the workproduct for those two invoices (GX51P & Q), there was no 53 series exhibit for a witness to identify. However, both invoices were prepared from worksheets faxed from USI to McNair Studio (GX51P, p.3; GX51Q, p.3), so the jury could reasonably find that both invoices were bogus and convict appellants on both counts.

Finally, appellants do not argue in this Court, as they did below, that they cannot be convicted on Counts 43-49 because those counts involved invoices sent after McNair had retired. Accordingly, they have abandoned that claim. *E.g.*, *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003); *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001). In any event, the court instructed the jury that to find appellants guilty on those counts it must find that appellants "*believed* that Mr. McNair continued to possess the ability to influence an agent of Jefferson County." R32-232:1667-68 (emphasis added). There is substantial evidence supporting the jury's guilty verdicts on those counts.

The invoices for Counts 43-49, like all the previous invoices charged in the Indictment, continued to be produced from USI worksheets in accordance with the overall scheme. R27-227:458-59, GX51T, U, V, X. Moreover, USI's Wilson testified that she prepared, in-house, the workproduct that McNair Studio billed USI for in those invoices, confirming that they were part of the continuing scheme. R27-

227:588-605 (referring to GX53T, U, V, X, Y, & Z). That USI willingly continued its bogus invoice bribery scheme after McNair retired is strong proof that USI believed that McNair still had influence within the County government. Finally, Dawson's testimony that McNair had solicited a bribe from him in late 2003 after Singh had stopped "making a note" for McNair (R29-229:1117), also supports the conclusion that Singh had knowledge of McNair's continuing influence within the County government, and that the bribes USI paid McNair after he retired were part of the continuing scheme and not paid by mistake or for any lawful purpose.

2. The Cash Bribes Conspiracy

Appellants are wrong that the record contains no evidence linking the substantial USI cash withdrawals to the similarly substantial McNair deposits. As in *Sutherland* (656 F.2d at 1187), while there is no direct evidence of such a link there is substantial circumstantial evidence of that link. Indeed, the two conspiracies are not "inconsistent in theory" as appellants claim. Br. 37. Rather, evidence establishing appellants' participation in the bogus invoice conspiracy also supports the conclusion that appellants participated in the cash bribes conspiracy. *See* Fed. R. Evid. 404(b).

McNair's daughter, who handled the McNair Studio checking account and cash receipts from 1993-2001 (R27-227:432), testified that she was "sure" her father

could not afford the studio expansion (R27-227:491), that she thought it was "unusual" that her father had so much cash (R27-227:502), and that when she questioned him about that cash he would tell her "to just do what he asked." *Id.* While she did not know where that cash came from, she knew it did not come from the studio (R27-227:514) and that he had no other businesses. R27-227:510. Additionally, those deposits went into McNair's personal, not business, account. R27-227:497.

While McNair's daughter could not explain the source of McNair's cash, Singh and Key were simultaneously withdrawing cash in roughly the same amounts as McNair was depositing. *See* note 9, *supra;* GX60A-F. For example, on October 22, 1999, Key deposited to his Compass account a $9,000 check from Singh but kept $5,000 of it in cash (GX8D), and also cashed another $4,000 check from Singh. GX8E. That same day USI paid a bogus McNair Studio invoice with a check for $10,279. GX50F. On November 1, 1999, McNair deposited that $10,279 check into his personal account along with $8,100 in cash. GX7N.

Similarly, on November 17, 1999, Singh had USI Controller Thomas convert a personal Singh check for $18,000 into two $9,000 USI checks. Singh told Thomas he had to have this cash as soon as possible. R29-229:1045-48; GX8G & H. Key cashed the checks the next day (R29-229:1048), and the day after that McNair made

a $9,000 cash deposit into one of his personal accounts and an $8,000 cash deposit into another. GX5A, GX7o.

Similarly telling was Key's inconsistent story about his USI stock, and his inability to account for the three $90,000 checks that he deposited to his accounts. The jury could justifiably view Key's inconsistent claims that he gave his stock back for free and that he was paid $180,000 for that same stock as incredible. That Key also claimed not to recall receiving and depositing a $90,000 check is similarly incredible. R29-229:907. Indeed, that someone with an annual salary of $140,000 (R26-226:335; R29-229:901) could not recall how he spent such a $270,000 windfall, is perhaps most incredible of all. In fact, what the evidence showed is that much of that $270,000 was withdrawn in roughly $9,000 increments at times when McNair was making similar cash deposits. GX60A-F.

Thus, the record was more than adequate to support the jury's guilty verdicts on Count 50.[15]

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[15] Appellants' claim that "[t]he indictment charged in other counts that McNair received bribes from many sewer contractors other than the appellants" (Br. 42) ignores the record. The jury received a redacted Indictment and therefore was unaware of any charges other than those against appellants. R32-232:1652-53. In fact, the court dismissed one juror who had heard on the radio that McNair had been convicted. R26-226:240-42. In any event, while Count 50 alleged that USI gave McNair over $330,000 in cash bribes, the only other counts alleging cash bribes to McNair (Counts 4, 13 and 14) totaled $60,000.

B. Bribery of Chandler and Ellis

Appellants claim that the evidence established only that "gifts" were given to Chandler and Ellis, and that there is no evidence that those gifts were given with the requisite corrupt intent to influence. Br. 42-43. However, the nature and size of the "gifts" themselves – $500 cash in an envelope, $1,500 cash in an envelope, and a $2,000 gift card – belie their claim. In addition, Key and Singh expressed their intent to Chandler to hide the fact that those "gifts" were given, *e.g.*, R28-228:699 ("that ain't ever going to come to light here"), and carried out that intent in both FBI interviews and USI's letter of compliance with the grand jury subpoena. *See* p. 20, *supra*. Thus, the record was sufficient to allow the jury to conclude that the payments to Chandler and Ellis, individuals who had to approve USI's payments (R28-228:678-80, 681), were bribes.

C. Obstruction of Justice

Appellants' challenge to their obstruction of justice conviction (Br. 43-44) ignores the evidence. As explained above, Key expressly told the FBI that neither he nor USI had ever given a gift greater than $50, and USI's letter of compliance, signed by Key, said the same thing.[16] Key never revealed the $500 he gave to Ellis

[16] The subpoena requested records of any payments made "directly or indirectly" by the company or "any of its officers." GX34A.

or the $1,500 he gave to Chandler. Thus, substantial evidence supports the jury's verdict.

II. THE COURT DID NOT ERR IN EITHER ADMITTING OR EXCLUDING EVIDENCE

A. Dawson's And Henson's Testimony Was Admissible

1. Dawson

Appellants challenge the admissibility of William Dawson's testimony about a statement made by McNair. Br. 13-24. Because McNair's statement inculpated both McNair and Singh, it was admissible either as other-crimes evidence under Fed. R. Evid. 404(b), or as a declaration against interest under Fed. R. Evid. 804(b)(3). Accordingly, the district court did not abuse its discretion in allowing Dawson's testimony.

Dawson was an engineering contractor who received no-bid contracts from the JCESD between 1999 and 2003. He was convicted separately of paying bribes to McNair. R29-229:1115-16. He testified that McNair called him in late 2003 and asked for money, telling him that "Singh had been making a note for him [McNair] and that he had quit doing that, and he was behind and he needed some help." R29-229:1117. Dawson explained that "the agreement we reached was that I would buy a framed piece of art that was in his studio" for $2,700. R29-229:1118.

a. Fed. R. Evid. 404(b)

The district court considered the admissibility of Dawson's testimony at both a pretrial hearing and again just before Dawson testified. R24-223:25, 45; R29-229:1111-1114. The court's pretrial Order held that Dawson's testimony would be "admissible to show intent, knowledge, and a common plan or scheme under Federal Rule of Evidence 404(b)." R18-121:2-3. In a sidebar before Dawson testified at trial, the district court overruled appellants' renewed objection to his testimony, but appellants did not request a contemporaneous limiting instruction that would have restricted the jury's use of Dawson's testimony.[17] R29-229:1111-14. Thus, at the time Dawson finished testifying, the jury had no way of knowing whether it was to consider his testimony in any limited way.

The district court's final jury instructions included a general limiting instruction regarding other-acts evidence, but did not specifically identify any evidence over the seven-day trial that fell within that category. R32-232:1641-42.[18]

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[17] Before trial appellants did propose a general Rule 404(b) jury instruction predicated on the assumption that a limiting instruction would be given during a particular witness's testimony. *See* R2-124:29 (Instruction 17) ("During the course of the trial, as you know from the instructions I gave you then . . ."). Appellants, however, never requested a limiting instruction contemporaneous with Dawson's testimony.

[18] The district court instructed the jury:

Appellants did not object that the charge failed to specifically limit Dawson's testimony, either before (R31-231:1520-22) or after (R31-231:1686) the charge was given. Appellants have thus waived any argument that a general limiting instruction was insufficient. *See United States v. Chance*, 306 F.3d 356, 388 (6th Cir. 2002) (general limiting instruction sufficient when defendants did not seek "particularly tailored" instruction).

Admissibility under Rule 404(b) requires proof that "(1) the evidence in question is relevant to an issue other than the defendant's character, (2) the evidence is sufficient for a jury to find that the defendant committed the extrinsic act, and (3) the evidence must meet all of the requirements of Rule 403, specifically that its probative value is not substantially outweighed by its undue prejudice." *United*

> Now, at various points during the course of trial, you heard evidence concerning acts of some of the defendants which may be similar to those charged in this indictment, but which acts were committed on other occasions. You must not consider any of that evidence in deciding whether these defendants committed the acts charged in this indictment. You may consider so-called other act evidence for other—only for other very limited purposes.
>
> * * *
>
> In other words, you may take the other similar act evidence into account only for the purpose of determining whether these defendants committed the acts for which they are charged and for which they are on trial by accident or mistake, as opposed to knowingly, willfully, intentionally, or corruptly.

R32-232:1641-42.

States v. LeCroy, 441 F.3d 914, 926 (11th Cir. 2006). This Court reviews the district court's admission of Rule 404(b) evidence only for a "clear abuse of discretion." *United States v. Lindsey*, 482 F.3d 1285, 1294 (11th Cir. 2007). There was no abuse here.

Appellants mistakenly argue that the "other acts" are those of McNair, Dawson, or Henson. *See*, Br. 13, 15. Rather, McNair said that *Singh* had been paying McNair's note. R29-229:1117. That particular conduct by Singh was relevant to the jury's consideration of whether appellants gave cash and paid bogus invoices intentionally or by "accident or mistake."

McNair's statement was sufficient for a jury to find that Singh had, in fact, "been making a note" for McNair. R29-229:1117. McNair made his statement as he was soliciting a bribe from Dawson during a private conversation. Because Dawson previously had bribed him (R29-229:1118), McNair had no reason to lie about or exaggerate separate payments from Singh. McNair's statement, in turn, was admissible as a statement against interest under Fed. R. Evid. 804(b)(3). *See* section **b**., *infra.*

Finally, the probative value of McNair's statement is not outweighed by undue prejudice. This is not a situation where, say, evidence of Singh bribing officials in Georgia was adduced, or, as appellants argue (Br. 13-15), evidence of McNair's

propensity to take bribes from other contractors was being used against Singh. Rather, McNair's statement involves the same person bribing the same government official as part of the same overall scheme as alleged in the Indictment. It is not tangential at all. Thus, Dawson's testimony regarding McNair's statement was properly admitted under Rule 404(b).

b. Fed. R. Evid. 804(b)(3)

Notwithstanding the district court's pretrial ruling that Dawson's testimony would be admitted under Rule 404(b), during closing argument defense counsel referred to Dawson's testimony as if it had been admitted for the truth of the matter asserted in McNair's statement: that Singh had been paying McNair's note. R31-231:1582.[19] If so, that admission was proper under Rule 804(b)(3).

A district court's evidentiary rulings are reviewed only for "a clear abuse of discretion," *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998), and this Court "will not hold that the district court abused its discretion where it reached the correct result even if it did so for the wrong reason." *United States v. Samaniego*,

[19]"They bring Bill Dawson in here. He . . . said McNair told him Sohan Singh had been 'paying my mortgage and he quit.' . . . That's what you call hearsay. It's an exception to the hearsay rule, but it's still hearsay. . . . I sure hope you don't convict my client because of that." R31-231:1582.

345 F.3d 1280, 1283 (11th Cir. 2003).[20] A hearsay statement that inculpates the accused is admissible if "(1) the declarant is unavailable; (2) the statement so far tends to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement is corroborated by circumstances clearly indicating its trustworthiness." *United States v. Costa*, 31 F.3d 1073, 1077 (11th Cir. 1994). Those conditions are satisfied here.

First, the declarant, McNair, was "unavailable" within the meaning of Rule 804(a) because he was a codefendant under the same indictment as appellants and, therefore, could not be called as a witness.[21] *United States v. Georgia Waste Sys., Inc.*, 731 F.2d 1580, 1582 (11th Cir. 1984); *accord United States v. Robbins*, 197 F.3d 829, 838 n.5 (7th Cir. 1999).

Second, McNair's statement that Singh had been paying McNair's note clearly was against McNair's penal interest, as it tended to show he had accepted bribes. *See*

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[20]At the pretrial hearing, the district court asked several questions indicating that McNair's statement was admissible as that of a coconspirator. *See* Fed. R. Evid. 801(d)(2); R24-223:28, 36, 39-40. Appellants' arguments below and to this Court assume that that was the basis on which it was admitted. *See* R24-223:38; R31-231:1582; Br. 18-24.

[21] McNair pled guilty to conspiring with appellants two months after appellants' trial ended. R3-157.

United States v. Ford, 435 F.3d 204, 215 (2d Cir. 2006). As the Supreme Court has noted, "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States*, 512 U.S. 594, 599 (1994). McNair's statement was "truly inculpatory to him only because [it] did not seek to lessen blame *as to his crime* by spreading blame to others." *United States v. Centracchio*, 265 F.3d 518, 525-26 (7th Cir. 2001). *See Williamson*, 512 U.S. at 603 (contrasting self-inculpatory statements with those "merely attempt[ing] to shift blame or curry favor").

Finally, McNair's statement is trustworthy because, as discussed in section **a.** above, "'it [is] unlikely, judging from the circumstances, that the statement was fabricated.'" *Jernigan*, 341 F.3d at 1288 (quoting *United States v. Gomez*, 927 F.2d 1530, 1536 (11th Cir. 1991)). Given the context of McNair's conversation with Dawson, McNair had no reason to lie about Singh's payments.

Thus, Dawson's testimony was admissible under Rule 804(b)(3), and the jury was free to consider that testimony for the truth of the matter asserted in McNair's statement: that Singh had bribed McNair. Appellants were free to – and did – argue that the jury should assign little weight to such hearsay (R31-231:1582), but the

district court did not err by admitting it.[22]

2. Henson

Appellants are wrong that the court erroneously permitted Gus Henson to testify under Rule 404(b). Br. 13-18. As the district court properly concluded, Henson's testimony, that after he worked for free on McNair Studio he approached McNair for a government contract, was admissible as "inextricably intertwined" with the charged offenses.

Henson owned an electrical engineering firm and, prior to 1999, had attempted to work for the JCESD. He was told by Chandler, however, that the Department's work was performed almost exclusively by civil, not electrical, engineers. R28-228:675-76; R29-229:982, 988. Subsequently, in 1999 Henson designed the electrical, plumbing, and air conditioning systems for the McNair Studio addition, using elevations sent to him by USI. R28-228:857-58; R29-229:982, 984, 986; GX18A, 18C (USI fax containing elevation drawing). Henson was asked to do the

[22]Because McNair's statement to Dawson was part of a private conversation, it is "nontestimonial" within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), and *Crawford*'s strict Confrontation Clause requirements do not apply. *See United States v. Brown*, 441 F.3d 1330, 1359 (11th Cir. 2006) (the "*Crawford* rule applies only to testimonial evidence"); *id*. at 1360 (private conversation "was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*").

work for free and he agreed, although "if I had billed that work as a normal project, it would have been in the range of $10,000." R29-229:982-83.

After Henson prepared the McNair Studio designs, he met with McNair "in his existing photo studio" to ask about getting work from the JCESD. R29-229:987. Singh was in the room. R29-229:989-90, 992. Henson explained:

> [H]e [McNair] knew by my doing this work [for McNair Studio], he knew what my background was and what my experience and what I normally do. And I wanted to express to him how I could do that for the County on other projects, and asked him how I might go about that.

R29-229:987. McNair "said there may be a possibility and he – he said I needed to talk with Mr. Swann." *Id*. Before Henson left, McNair placed a call to a secretary "to see about getting [Henson] an appointment with Mr. Swann." R29-229:991-92.

McNair then asked Chandler "to see if we could develop a project . . . that Henson Engineering could perform" (R28-228:674), and Chandler's secretary set up a meeting between Swann, Chandler and Henson. R29-229:988. At that meeting Henson proposed a stream monitoring system, was thereafter awarded a contract to build that system, and was paid about $25,000. R28-228:677; R29-229:989; GX18D-F. Chandler explained that because Henson was not able to do the work that JCESD more typically required, Chandler actually developed a project that "primarily was electrical and controls in nature" at McNair's request. R28-228:675-76.

During trial, the court ruled that Henson's testimony would be admitted as inextricably intertwined with the charged offenses because the government had established the requisite "linkage" or "nexus" between appellants and Henson's testimony. R28-228:659-61 (quoting from court's 11/21/06 pretrial order (R18-121)).[23] The court reasoned, correctly, that Henson's testimony would "tend to be evidence of a common plan, scheme and design of how business was being carried on in the Environmental Services Department at that time." R28-228:655. The "linkage" was not only that Singh was with McNair when Henson approached McNair for a JCESD contract, but also that USI had sent Henson the McNair Studio elevations that Henson needed to perform his design work for the studio.[24]

This Court has long held that evidence of criminal activity other than the crime charged is not extrinsic under Fed. R. Evid. 404(b) if it is inextricably intertwined

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[23] The government had offered evidence of Henson's contract as inextricably intertwined (R13-95:8) and, in a pretrial conference, conceded that it was not Rule 404(b) evidence. (R24-223:26-27). The court therefore ruled that "if it comes in . . . it has to come in as inextricably intertwined." (R24-223:45). Thus, appellants wrongly argue that Henson's testimony was admitted under Rule 404(b).

[24] USI itself had prepared a resurvey and plat (GX19A-B), and also a landscape plan (GX19D-E), for the McNair Studio renovation. R28-228:850, 854-55. Although Key told the FBI that USI had invoiced McNair Studio when the work was done in August 2000 and January 2001 (R28-228:860, 862; GX19F-G), Key told Chandler that he created those phony invoices after the government began its investigation. R28-228:722.

with evidence of the charged offense. *E.g.*, *United States v. Wright,* 392 F.3d 1269, 1276 (11th Cir. 2004); *Gomez,* 927 F.2d at 1535. Nor does Rule 404(b) apply when the other act evidence is linked in time and circumstances with the charged crime and concerns the context, motive or setup of the crime; or forms and integral part of the crime; or is necessary to complete the story of the crime. *E.g.*, *Wright*, 392 F.3d at 1276. Moreover:

> Rule 404(b) does not specifically apply to exclude [Henson's testimony] because it involves an extraneous offense committed by someone other than the defendant. The evidence was not introduced "to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith," so the policies underlying Rule 404(b) are inapplicable.

United States v. Morano, 697 F.2d 923, 926 (11th Cir. 1983) (citation omitted); *accord United States v. Meester,* 762 F.2d 867, 877 (11th Cir. 1985). Nonetheless, the exceptions listed in Rule 404(b) are relevant to a determination whether such third-party evidence was properly admitted.[25] *Morano,* 697 F.2d at 926.

In *Gomez,* Gomez was charged with importing and conspiring to import cocaine. The court allowed evidence that Zuluago entered into a drug transaction two months after Gomez's arrest because a book found in Gomez's car contained

[25] Rule 404(b) allows other-acts evidence to show, *inter alia,* a defendant's motive, opportunity, intent, knowledge, or absence of mistake.

Zuluago's phone number, and another witness testified that he discussed Zuluago's drug activity with Gomez. 927 F.2d at 1535. This Court upheld the admission of that evidence as inextricably intertwined because of its "relevan[ce] to the scheme and chain of events surrounding the charged importation conspiracy." *Id.* Similarly in *Meester,* the Court held that evidence that an unindicted co-conspirator had engaged in crimes similar to those charged against the defendants was admissible because it "served to establish a background for the later substantive acts charged in the indictment and was therefore relevant to prove the existence and purpose of the ongoing conspiracies." 726 F.2d at 877. And in *United States v. Smith,* 122 F.3d 1355, 1359-60 (11th Cir. 1997), this Court found evidence of a third party's bank robbery inextricably intertwined with the bank robbery with which defendant was charged because "strong links" and "integral connections" between the two established "similar *modus operandi*."

In this case, Henson's testimony was relevant to the chain of events surrounding the charged crimes, including context and setup; specifically, that Singh had knowledge of McNair's willingness to exchange his influence for things of value and, also, the opportunity to take advantage of that willingness. Indeed, USI, which itself performed free services for the McNair Studio renovation, assisted Henson in also performing free services for McNair by giving Henson the elevations that he

needed to construct the engineering designs.

Finally, appellants are wrong (Br. 15-16) that Henson's testimony should have been excluded under Fed. R. Evid. 403 because, allegedly, the relevance of Henson's testimony was outweighed by its prejudicial effect. As this Court has noted on numerous occasions, Rule 403 is an extraordinary remedy that must be used sparingly because it results in the exclusion of concededly probative evidence. *E.g., Wright*, 392 F.3d 1276. Thus, in cases where this Court has found other acts evidence inextricably intertwined with the crimes charged, the Court has refused to find that the evidence should nonetheless be excluded as unduly prejudicial, even when the other acts included evidence of violent crimes such as bank robbery, murder and arson. *See Smith*, 122 F.3d at 1360; *United States v. Fortenberrry*, 971 F.2d 717, 721 (11th Cir. 1992); *Morano*, 697 F.2d at 926. Even appellants' own cited authority (Br. 15-16) explains that the test under Rule 403 is whether the other acts evidence was "'dragged in by the heels' solely for prejudicial impact." *United States v. Veltmann*, 6 F.3d 1483, 1500 (11th Cir. 1993). Given the strong connection between Henson's testimony and the crimes charged, that was not the case here. In any event, Henson did not implicate any of the appellants in a crime. Thus, if his testimony was admitted in error, that error was harmless. *E.g., United States v. Jones*, 28 F.3d 1574, 1582 (11th Cir. 1994).

B. The Court Did Not Err In Excluding Appellants' Proffered Experts

The district court did not abuse its discretion when it excluded a wedding planner's testimony "regarding the customs, obligations and social pressures associated with the lavishness of an Indian wedding," a jewelry expert's testimony "regarding the expense and value of jewelry purchased in association with the wedding in question," and an Indian economist's testimony about "India's 'cash-culture' and the importance of United States currency in that culture." Br. 24.

A district court has broad discretion in deciding whether to permit expert testimony. *United States v. Frazier*, 387 F.3d 1244, 1258-59 (11th Cir. 2004). Exclusion of expert testimony will constitute reversible error only if it is "manifestly erroneous" (*id.*), or "had a 'substantial impact on the outcome'" of trial. *United States v. Paradies*, 98 F.3d 1266, 1289 (11th Cir. 1996), *quoting United States v. Sellers*, 906 F.2d 597, 601 (11th Cir. 1990). In this case, the excluded testimony was both cumulative and irrelevant and thus properly excluded.

The defendants' "theory of defense concerning the cash withdrawals from banks was that the currency was not paid to McNair but actually was sent to India for the purpose of financing a wedding of Mr. Singh's son." Br. 10. Several defense witnesses testified at length about Indian culture generally and Indian weddings specifically. Singh's wife, Kusum Singh, and others explained how Indian weddings

are very lavish affairs, and that her son's wedding was no exception. R30-230:1171-72, 1222, 1225-26, 1232, 1274, 1349-50.[26] Mrs. Singh rented rooms and catering for her family and friends for 10 days (R30-230:1151-52), purchased a new dress and jewelry for each day of the 10-day ceremony (R30-230:1171-74), purchased over 70 necklaces as gifts for wedding attendees (R30-230:1169, 1171), and paid about $140,000 for the requisite custom jewelry.[27] R30-230:1161. Mrs. Singh estimated that, in total, the wedding cost the Singhs between $180,000 and $190,000. R30-230:1174-75.

Mrs. Singh and several other witnesses also explained that because American dollars command large discounts in India, and because the "bureaucracy" there makes obtaining cash from checks or wire transfers very difficult, it was a "common practice" to take American dollars into India whenever traveling there. R30-230:1150, 1152-53, 1174, 1270-71, 1273, 1348. Thus, when the Singhs, their relatives or friends traveled to India, they each carried about $9,000 cash and gave the money to Mrs. Singh's uncle, U.B. Singh, who held it for her and her husband. R30-230:1150-54, 1212-18, 1221, 1267-71, 1347-50; R31-231:1382. U.B. Singh verified

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[26] S.P. Singh, from Aligarh, India, testified that the Singh wedding was "one of the most fabulous . . . and most lavishly arranged" Indian weddings that he ever attended. R30-230:1274.

[27] Mrs. Singh actually brought the jewelry to court. R30-230:1163-70.

that he had received envelopes of cash from many different people on numerous occasions, and that he kept the money for the Singhs who then spent it on the wedding. R30-230:1208-15, 1221-27, 1332-38.

Defense counsel argued at length about the cost of the wedding and how it was paid for in American dollars. R31-231:1574-75, 1584-91. The government never disputed appellants' evidence that the Singhs' wedding costs were about $200,000, or that those costs were paid for in cash taken to India in $9,000 increments. R31-231:1612 ("there's no dispute that the money was taken out of the country into India, none at all; that they bought a lot of jewelry and snuck it back in. No dispute"); R31-231:1620. But Mrs. Singh admitted on cross-examination that the cash that was taken to India for the wedding came from two cash withdrawals made by her husband from their private Sun Trust Bank account in Nashville. R30-230:1192. Those cash withdrawals totaled $380,000. R30-230:1188-91.

Under these circumstances, the jury would have learned nothing from the expert witnesses that it did not already know and, in fact, was undisputed – that the wedding was very expensive and paid for by large amounts of cash sent to India for that purpose. *See*, *e.g.*, *Frazier*, 387 F.3d at 1263 (expert testimony can be excluded if it is "cumulative"). Moreover, the real issue for the jury was whether the cash that went to India to pay for the wedding came from the cash that Singh withdrew from

the Singh's personal Sun Trust account in Nashville, as Mrs. Singh testified it had (R30-230:1192), or whether it came from the numerous cash transactions that occurred in Birmingham (that the Indictment alleged were used to bride McNair), as the appellants claimed.[28] None of the proffered defense testimony would have helped resolve that issue. Thus, the court did not abuse its discretion by excluding that testimony.

III. THE JURY WAS PROPERLY INSTRUCTED

The District Court did not abuse its discretion when it refused to give appellants' proposed jury instructions 7 thru 13.

While a court should instruct a "jury on the defendant's defense theory if the theory has a foundation in the evidence and legal support," *United States v. Schlei*,

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[28] After Mrs. Singh admitted that the cash for the wedding came from their personal Nashville account, appellants called Vicki Pelamati, a former Sun Trust teller and Branch Manager, who testified that the coding on the back of the two withdrawal slips in question, GX61H & 61I, does not necessarily show that cash was taken out of the bank but, more likely, that the money was transferred from one account to another. R31-231:1470-71, 1479-80. She admitted, however, that if the money was used to purchase a certificate of deposit, a "credit" withdrawal slip for that transaction should have been produced (it was not). R31-231:1475-76. She also admitted that the Singh's were one of her best customers and could arrange for very large six-figure cash transactions and, after acknowledging that there was no record that the two withdrawals were transferred to another Singh account, she speculated that "[i]t could have been a certificate of deposit. It could have been a loan account," even though the bank produced no such record. R31-231:1499-1501. Under these circumstances, the jury had every right to believe Mrs. Singh.

122 F.3d 944, 969 (11th Cir. 1997) (citation omitted), a theory of the defense instruction is not required "when the charge given adequately covers the substance of the requested instruction." *United States v. Ndiaye*, 434 F.3d 1270, 1293 (11th Cir. 2006). Refusing to give a proposed "instruction is reversible error only when (1) the proposed instruction is correct, (2) the instruction was not addressed in the charge actually given, and (3) the failure to give the requested instruction seriously impaired the defendant's ability to present an effective defense." *Id.*; *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1185 (11th Cir. 2006). In this case, appellants waived the arguments they make in this Court concerning the jury instructions. Accordingly, the court's instructions are reviewable under Fed. R. Crim. P. 30(d) only for plain error. *Paradies*, 98 F.3d at 1289. In any event, the instructions the court gave adequately addressed the issues raised in appellants proposed jury instructions to the extent they were legally correct.

After the court provided the parties with a copy of its "draft instructions" (R31-231:1515), it asked if there was "any request for revision by defense counsel?" R31-231:1520. Appellants asked the court to include in its charge the final paragraph of its proposed Instruction 11, stating that bribery requires a "specific" *quid pro quo.* (R1-122:16-17). The court refused that instruction. R31-231:1520-21. Appellants then asked the court to give their proposed Instruction 10 (R1-122:12), that "holiday

gifts" to public officials are not illegal "so long as such items are not given with the intent to corrupt." The court refused appellants' specific language explaining: "I think I cover this adequately in my instructions . . . ." R31-231:1521-22. Appellants raised no further objections. After the court charged the jury, it specifically inquired if there were "[a]ny exceptions to the oral charge of the court by any attorneys for the defendants." R32-232:1686. Appellants replied:

> Your Honor, we just reiterate the previous requests to include the instructions regarding *quid pro quo* that we had previously asked the Court for. *But other than that, there are no further exceptions.*

Id. (emphasis added).

In this Court, appellants now belatedly claim that the district court erred by refusing its proposed Instructions 7 thru 13.[29] Br. 53-54. However, they never objected to the court's decision not to include their Instructions 7-9. And while they originally objected to the court's decision not to include their Instruction 10, after the court explained that its draft instructions "cover this adequately," they did not object to the charge as given. Thus, appellants claims of error with respect to their Instructions 7-10 have been waived, and can be reviewed only for plain error.

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[29] Instructions 7, 8 and 9 were identical except they applied to Singh, Key and USI respectively. R1-122:9-11. Likewise, Instructions 11, 12 and 13 were identical except they applied to USI, Singh and Key respectively. R1-122:14-25.

Paradies, 98 F.3d at 1289.

Similarly, the specific claim of error appellants raise concerning their Instructions 11-13 (Br. 53) were never raised in the district court. As noted above, appellants asked the court to include in its charge the final paragraph of their proposed Instruction 11, that bribery requires a specific *quid pro quo*, but said nothing about the court's decision not to give earlier language in that same Instruction. R31-231:1520-21. In this Court, appellants do not complain about the district court's failure to use their proposed *quid pro quo* paragraph. Instead, they now complain that the court refused to include earlier language in that proposed Instruction that states that 18 U.S.C. § 666 only prohibits those gifts to government officials that are "given with the intent to influence or reward." Br. 53. They further complain that the court should have included their proposed Instruction's definition of "corruptly." *Id.* Because these claims were never raised below, they were waived.

In any event, the court did not err by refusing any of appellants' proposed Instructions, because the charge given by the court adequately covered appellants' theories of the defense. Indeed, the words they claim the court should have used are virtually identical to the words the court did use. *Compare* Br. 53 *with* R32-232:1670-71. Specifically, the court charged the jury that to convict any defendant of bribery under section 666, it must find that the defendant "knowingly gave . . . things

of value" to a government employee, and in doing so "acted corruptly" in "intend[ing] to influence or reward" that government employee. R32-232:1669-70. The court defined acting "corruptly" as an act "performed voluntarily, deliberately, and dishonestly for the purpose of accomplishing an unlawful end or result, or for the purpose of accomplishing some otherwise lawful end or lawful result by an unlawful means or unlawful method." R32-232:1670-71. The court then expressly charged that not all gifts to government employees are unlawful (R32-232:1674):

> Section 666 does not prohibit all gifts to a public official or governmental agent, but only those gifts that are given with the corrupt intent to influence or reward . . . .

Thus, notwithstanding the arguments appellants make in this Court (Br. 54), under the court's charge, the jury could not convict unless it found that the particular payment to McNair was made "with the corrupt intent to influence or reward." R32-232:1671. Since a jury is presumed to follow the court's instructions, it could not have convicted appellants because they made legitimate payments for services rendered. Rather, the jury must have found that payments were made with the corrupt intent to influence or reward McNair. Because a defendant is not entitled to his specific wording so long as the charge given accurately states the requested proposition, *United States v. Duff*, 707 F.2d 1315, 1320-21 (11th Cir. 1983), the court's refusal to give appellants' Instructions 7-9 was not plain error.

For the same reasons, the court's refusal to give appellants' Instruction 10 was not erroneous. In fact, the court expressly charged that section 666 "does not prohibit all gifts" to public officials, only those "given with the corrupt intent to influence." R32-232:1671. Adding Instruction 10's additional language about "holiday gifts" would have added nothing, because any gift given without the requisite corrupt intent would not be unlawful, while an alleged gift "given during respective holiday seasons" (Br. 54), but given with a corrupt intent, would be unlawful.

Finally, to the extent that appellants have not abandoned their *quid pro quo* argument,[30] the district court's instructions adequately addressed that issue. This Court has rejected the argument that the government must "show a direct *quid pro quo* relationship between [the defendants] and an agent of the agency receiving federal funds." *Castro*, 89 F.3d at 1454; *Paradies*, 98 F.3d at 1289; *accord United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (a "payment need not be correlated with a specific official act . . . the intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that'"). Appellants' *quid pro quo* instruction was, therefore, an incorrect statement of the law. Thus, the district court correctly explained to the jury that the government was required to prove that

[30] *See, e.g.*, *Jernigan*, 341 F.3d at 1283 n.8; *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001).

appellants acted corruptly in giving things of value to a county official with the intent "to influence or reward" that official "in connection with any business transaction, or series of transactions." R32-232:1670. Given these and other instructions charged to the jury, the court did not commit plain error by refusing appellants' *quid pro quo* instruction. *Paradies*, 98 F.3d at 1289.

IV. THE GOVERNMENT DID NOT ABUSE THE GRAND JURY PROCESS

Appellants claim that after they were charged in the June 2005 Superceding Indictment, the government abused the grand jury process by subsequently using the grand jury for the primary purpose of preparing for trial on those charges. Br. 44-53. In fact, the grand jury's continued investigation centered almost exclusively on new offenses – appellants' bribery of McNair.

"[T]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 300 (1991); *accord United States v. Alred*, 144 F.3d 1405, 1413 (11th Cir. 1998). And while the grand jury cannot be used "solely or even primarily" to gather evidence against an indicted defendant,[31] it can be used to investigate whether a defendant committed crimes that are not covered in the indictment. *E.g., United*

[31] *E.g., United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985); *Beverly v. United States*, 468 F.2d 732, 743 (5th Cir. 1972).

States v. Brothers Const. Co. of Ohio, 219 F.3d 300, 314 (4th Cir. 2000); *Alred*, 144 F.3d at 1413. A defendant claiming grand jury abuse "has the burden of showing that the Government's use of the grand jury was improperly motivated."[32] *E.g.*, *United States v. Leung*, 40 F.3d 577, 581 (2d Cir. 1994).

In this case, the grand jury did not charge appellants with any crime in its February 3, 2005 Indictment (Doc. 1 in docket 2:05-cr-061). Appellants were first charged – with bribing Chandler and Ellis and obstructing justice – in the June 22, 2005 Superceding Indictment (Doc. 151 in docket 2:05-cr-061). While the grand jury's Second Superceding Indictment expanded the charges against appellants, the new charges all concerned appellants' bribery of McNair; none of the counts in the Superceding Indictment were expanded in any way.[33]

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[32] Appellants erroneously rely on *United States v. Kovaleski*, 406 F. Supp. 267, 271 (E.D. Mich. 1976) (Br. 50), as placing this burden on the government. That case presented a "special problem" that does not exist here. 406 F. Supp. at 270. Defendant had testified at trial but a mistrial was declared when a juror died. Prior to the new trial the prosecutor examined a witness in the grand jury to determine if the defendant had committed perjury. However, the perjury investigation involved the "same issues" that the first trial, and defendant's testimony at that trial, "centered on." *Id.* In this case, after the grand jury indicted appellants for bribing Chandler and Ellis, its continued investigation "centered on" appellants' bribery of McNair, a completely separate issue.

[33] Count 16 of the Superceding Indictment charged appellants with bribing Chandler by giving him a $2,000 gift card and $1,500 cash, while the Second Superceding Indictment charged the gift card and the cash as separate counts (Counts 73 and 74). Also, the Superceding Indictment charged appellants with

Moreover, Magistrate Judge Putnam concluded that there was no grand jury abuse after holding a pre-trial hearing which included reviewing the transcripts of the USI employees who testified in the grand jury after appellants were first indicted. R1-90:4-9. Although seven USI employees testified before the grand jury in August 2005 (*see* Br. 46), Judge Putnam found that the testimony of only two of them even touched on any charges in the Superceding Indictment.[34] R1-90:4-8. Judge Putnam further found, however, that "[m]ost of the questioning" of those two employees "dealt with payments made or dealings with McNair, not Chandler or Ellis." R1-90:9, ¶15. Thus, Judge Putnam correctly concluded that, on this record, "it cannot be said that the 'sole or principal' purpose of the grand jury process was for discovery relevant to the already-charged offenses." R1-90:14. *See, e.g., Alred*, 144 F.3d at 1413*; United States v. Beasley*, 550 F.2d 261, 266 (5th Cir. 1977).

Appellants' incorrectly state (Br. 52-53) that Key "was convicted of obstruction

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obstruction "by providing false documents and information to the Grand Juries" (Count 67), while the Second Superceding Indictment narrowed and clarified that charge to "providing a false letter of compliance with the grand jury subpoena to the Grand Jury" (Count 127).

[34] Judge Putnam correctly noted that because "the Government already possessed this evidence [concerning Chandler and Ellis] from interviews with the employees," their "testimony [about Chandler and Ellis] was used to persuade the grand jurors that Key, Singh, and USI were predisposed to bribe and to lie about it, and thus it was more believable that they had bribed McNair." R1-90:14.

of justice in Count 127, for allegedly failing to properly comply with the April [grand jury] subpoena, *while [he] was under indictment*." (Emphasis added). Count 127 charged appellants with "providing a false letter of compliance with the grand jury subpoena." As previously noted, on May 24, 2005, prior to any USI defendant being indicted, Key signed a letter on behalf of appellants claiming that "in all cases" any gift he had given to any government employee was "valued at less than $50.00." *See*, note 12, *supra*. This letter was false in light of Key's much larger "gifts" to Chandler and Ellis. Thus, Key was convicted of obstruction for actions he took prior to his indictment.

Finally, appellants are wrong that the grand jury subpoena issued in November 2005 amounted to grand jury abuse. Br. 52. That subpoena was issued to investigate possible tax evasion by Key, but never generated any documents and, in fact, provided the government with no information whatever.[35] *See* R1-90:14.

In short, because the government did not use the grand jury "primarily" to obtain evidence that appellants bribed Chandler or Ellis or obstructed justice, appellants' grand jury abuse claim must be rejected.

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[35] As appellants note, a new prosecutor subsequently issued a virtually identical subpoena in a tax evasion investigation, but the prosecutors in the instant case were "walled off" from that investigation. Br. 48; R29-229:967-68, 970; R1-90:14.

V. THE GOVERNMENT DID NOT ABUSE KEY'S SIXTH AMENDMENT RIGHT TO COUNSEL

The June 2005 Superceding Indictment charging appellants with bribing Chandler and Ellis and obstructing justice was sealed for one month to allow the government to continue investigating appellants' bribery of McNair. While the Indictment was sealed, the FBI arranged, through USI counsel Chriss Doss, a July 7, 2005, interview with Key at Doss's office. R28-228:862; R29-229:972. Doss "was there at the four-hour interview taking notes." R29-229:975. Agent Mayhill believed that Doss was Key's attorney, and both the magistrate judge and the District Court concluded that belief was reasonable. R29-229:977; R1-90:11 n.4.

The interview, which produced an 18-page FBI Form 302, concerned almost exclusively the formation of USI, Key's role in the company, USI's and Key's dealings with McNair and McNair Studio, and personal and corporate financial issues. Key was asked, however, a few questions concerning Chandler and Ellis.

Prior to trial Key moved to have the entire 302 suppressed as a violation of his Sixth Amendment right to counsel. At a hearing before Magistrate Judge Putnam, the government agreed to redact from the 302 all material relating to any of the charges pending against Key at the time of the interview. Judge Putnam found that the government's agreement to suppress the FBI agent's testimony about any statements Key made relating to his pending offenses mooted Key's motion to suppress. R1-

90:12. At trial, Agent Mayhill did not testify about any such statement made by Key, and the Form 302 was not entered into evidence or seen by the jury.

"[A]n accused is denied 'the basic protections' of the Sixth Amendment 'when there is used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel.'" *Fellers v. United States*, 540 U.S. 519, 523 (2004), *quoting Massiah v. United States*, 377 U.S. 201, 206 (1964). The penalty for violation of this Sixth Amendment right is suppression of the accused's incriminating statements. *E.g., McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991). This Sixth Amendment right, however, is "offense specific," and applies only to offenses for which an accused has been charged, and not to other offenses still under investigation. *E.g., McNeil*, 501 U.S. at 175-76; *United States v. Grimes*, 142 F.3d 1342, 1348 (11th Cir. 1998). Thus, "a defendant's statements regarding offenses for which he had not been charged [a]re admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses." *Texas v. Cobb*, 532 U.S. 162, 168 (2001). In this case, therefore, Key's July 7, 2005, statements to the FBI are admissible as to all matters except those that touched upon the charges then pending against him. Because the government agreed not to offer any of Key's statements concerning his pending charges, and because at trial it kept that promise, Key's Sixth Amendment right to

counsel was not violated.

Although he acknowledges the "charge specific" nature of his Sixth Amendment right, Key nonetheless claims that his entire statement to the FBI must be suppressed because he was never informed that "he was in trouble" of any kind.[36] Br. 57. That result, however, would be contrary to the very policy underlying the "charge specific" nature of the right to counsel. The government's "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil,* 501 U.S. at 181. To that end, the "charge specific" limitation provides "a sensible solution to a difficult problem." *Maine v. Moulton,* 474 U.S. 159, 179-80 (1985).

Accordingly, Key's Sixth Amendment rights were not violated.

[36] Key's speculation that, had he known that he already had been indicted "he more likely would not [have] consent[ed] to the interview" (Br. 59), "is not necessarily true, since suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions." *McNeil*, 501 U.S. at 178.

CONCLUSION

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

Respectfully submitted.

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Dated: March 21, 2008

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John P. Fonte

CERTIFICATE OF SERVICE

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