No. 07-11476
(Consolidated with Nos. 07-11644, 08-10428 & 08-10433)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK W. SWANN, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee, the United States of America, believes that the following persons and entities have an interest in the outcome of this appeal:

1. Alston & Bird LLP
2. Brashier, Keith Edward
3. Brown, Michael L.
4. Clark, William N.
5. Chain, Laura Gibson
6. Coogler, Honorable L. Scott
7. Dillon, William D.
8. Dougherty, Floyd W. Pat
9. Flint, David H.
10. Fonte, John P.
11. Fredricks, James J.
12. F. W. Dougherty Engineering & Associates, Inc.
13. Gale, Fournier J., III

14. The Gardner Firm

15. Gloor, Terry W.

16. Gloor & Strickland, LLP

17. Greene, Honorable Paul W.

18 Hagoad, Sandra Payne

19. Haskell, Slaughter, Young & Rediker, LLC

20. Hammond, Scott D.

21. Heldman, Sam

22. Jefferson County (Alabama) Environmental Services Department

23. Jones, G. Douglas

24. Lee, Natalie C.

25. Limarzi, Kristen C.

26. McNair, Jewell C.

27. Markham, Carrie B.

28. Martin, Alice H.

29. Maynard, Cooper & Gale, P.C.

30. Miller, Gerald L.

31. Mujumdar, Anil Ashok

32. Powers, John J., III

33. Proctor, Honorable R. David

34. Propst, Honorable Robert B.

35. Pugh, Andrew

36. Pugh, Grady Roland, Jr.

37. Pugh, Grady R. Roland

38. Putnam, Honorable T. Michael

39. Rasumussen, Michael

40. Rast, Bobby J.

41. Rast Construction, Inc.

42. Rast, Daniel B.

43. Redden, Mills & Clark, LLP,

44. Rodriguez, Cristina

45. Roland Pugh Construction, Inc.

46. Salter, J. Stephen

47. Schreeder, Wheeler & Flint

48. Singer, Janice

49. Swann, Jack W.

50. Thompson & Singer, P.A.

51. Timberlake-Wiley, Deana

52. United States of America

53. Vreeland, Katie L.

54. Wallace, Kyle G.A.

55. Yessick, Joseph E. (“Eddie”)

James J. Fredricks
Attorney

STATEMENT REGARDING ORAL ARGUMENT

Because of the voluminous record in these four consolidated appeals and the numerous issues raised, the United States believes that the Court would benefit from oral argument.

STATEMENT OF RELATED CASE

On August 26, 2005, a federal grand jury sitting in Birmingham, Alabama returned a 127-count Second Superseding Indictment charging public officials of Jefferson County, Alabama, and various construction and engineering contractors with bribery, conspiracy to commit bribery, and related offenses stemming from a scheme to profit illegally at the county's expense. The crimes arose from the $3 billion repair and rehabilitation of the region's sewer and wastewater treatment system, supervised by the Jefferson County Environmental Services Department (JCESD). On December 2, 2005, Senior District Judge Propst severed the Indictment into five separate cases for trial. This appeal is from four of those five trials, consolidated for appeal by the Court on March 13, 2008.

The fifth case, 05-543, involved charges that US Infrastructure, Inc. (USI), USI's President and principal owner Sohan Singh, and USI's Vice President Edward Key, Jr. conspired to commit bribery by paying Jefferson County Commissioner Jewell "Chris" McNair approximately $140,000 for work not actually done by McNair (18 U.S.C. § 371) (Count 32); bribed McNair by giving him checks for that bogus work (18 U.S.C. § 666) (Counts 38-49[*]); conspired to commit bribery by giving McNair approximately $335,000 cash drawn from USI funds (Count 50); bribed JCESD Assistant Director Harry Chandler with a $2,000

[*] Count 46 was dismissed prior to trial.

gift card (Count 73) and an envelope containing $1,500 in cash (Count 74); and obstructed 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 also charged with bribing JCESD Engineer Donald Ellis with an envelope containing $500 cash (Count 88). Finally, while McNair was charged with several offenses in this case, he ultimately entered a conditional plea of guilty to one conspiracy count (Count 32).[**] On December 8, 2006, a jury found all of the remaining defendants guilty on all counts.

The appeal by USI, Singh, and Key of their convictions is docketed in this Court as No. 07-14648. The Court heard oral argument on December 12, 2008.

[**] Under the terms of his plea agreement, McNair reserved the right to challenge on appeal the district court's denial of his motion to dismiss Count 32 in 05-543. Those McNair arguments are addressed in this brief as part of the consolidated appeal before this Court.

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TABLE OF AUTHORITIES

* Indicates cases upon which Appellee primarily relies**.**

CASES

FEDERAL STATUTES AND RULES

MISCELLANEOUS

TABLE OF ABBREVIATIONS

This brief refers to the records by the last three digits of the district court docket number followed by R then the document number and, where applicable, the page number preceded by a colon (*e.g.*, 061R934:1543 refers to page 1543 of the document entered as number 934 on the 05-061 docket).[***] Similarly, government exhibits are referred to by the last three digits of the district court docket number followed by GX then the exhibit number and, where applicable, the page number preceded by a colon (*e.g.*, 544GX28M:2 refers to page 2 of government exhibit 28M admitted during the trial of the 05-544 case).

This brief also uses the following abbreviations:

Appellants' Briefs

FWDE-Br.	Brief of Appellants Floyd W. "Pat" Dougherty and F.W. Dougherty Engineering & Associates, Inc.
McN-Br.	Brief of Appellant Jewell "Chris" McNair
PUGH-Br.	Brief of Appellant Roland Pugh Construction, Inc.
Rasts-Br.	Brief of Appellants Bobby J. Rast and Daniel B. (Danny) Rast
RP-Br.	Brief of Appellant Grady Roland Pugh, Sr.
Swn-Br.	Brief of Appellant Jack W. Swann

[***] This format was adopted after consultation with the Clerk's Offices for this Court and the district court because no single comprehensive Certificate of Readiness was prepared for any of these four cases, and, thus, no volume numbers are available. Letter to Brenda Wiegmann, Deputy Clerk, from John P. Fonte (January 7, 2009).

Individuals and Companies

Barber	Clarence R. Barber, Chief Construction Maintenance Supervisor for JCESD (witness)
Bill Bailey	William R. Bailey, Inspector for FWDE (witness)
Besco	Besco Steel Supply, Inc.
Bechtel	David Bechtel, Second in command at FWDE
Bobby Rast	Bobby J. Rast, President of RAST (defendant-appellant)
Chandler	Harry T. Chandler, Assistant Director of JCESD (witness)
Creel	Larry P. Creel, Field Supervisor for JCESD (witness)
Danny Bailey	Danny Baily, Owner of Bailey & Sons
Danny Rast	Daniel B. Rast, Vice President of RAST (defendant-appellant)
Dawson	William H. Dawson, Owner of Dawson Engineering, Inc. (witness)
Dougherty	Floyd W. “Pat” Dougherty, President of FWDE (defendant-appellant)
Dougherty defendants	Floyd W. “Pat” Dougherty and F.W. Dougherty Engineering & Associates, Inc.
Ellis	Donald R. Ellis, Engineer for JCESD and Chairman of the PRC (witness)
FWDE	F.W. Dougherty Engineering & Associates, Inc. (defendant-appellant)

Guthrie	Paul Guthrie, owner of Guthrie Landscaping (witness)
Grady Pugh or Grady	Grady Roland Pugh, Jr., CEO of PUGH (witness)
Hendon	Wayne Hendon, Field Director for FWDE (witness)
Hale	Tom Hale, Manager for PUGH (witness)
Janice Kuykendall	Janice Kuykendall, Secretary for Roland Pugh (witness)
Kim McNair	Kimberly McNair Brock, Daughter of Chris McNair (witness)
McNair	Jewell “Chris” McNair, Jefferson County Commissioner (defendant-appellant)
Mosely	Barry Mosely, Owner of Mosley Construction (witness)
PUGH	Roland Pugh Construction, Inc. (defendant-appellant)
Pugh defendants	Roland Pugh Construction, Inc., Grady Roland Pugh, Sr., and Joseph E. “Eddie” Yessick
RAST	Rast Construction, Inc. (defendant-appellant)
Rast defendants	Rast Construction, Inc., Bobby J. Rast, and Daniel B. (Danny) Rast
Roland Pugh or Roland	Grady Roland Pugh, Sr., Chairman of the Board of PUGH (defendant-appellant)
Stanger	John Stanger, Resident Observer for FWDE (witness)

Swann	Jack W. Swann, JCESD Director (defendant-appellant)
Tammy Hughes	Tammy Johnson Hughes, PUGH Project Administrator/Safety Manager (witness)
USI	US Infrastructure, Inc.
Wilson	Ronald K. Wilson, Chief Engineer for JCESD (witness)
Yessick	Joseph E. “Eddie” Yessick, President of PUGH (defendant, witness)

Other Abbreviations

EPA	U.S. Environmental Protection Agency
FBI	Federal Bureau of Investigation
JCESD	Jefferson County Environmental Services Department
PRC	Product Review Committee
PSR	Presentence Investigation Report
UAB	University of Alabama at Birmingham

STATEMENT OF JURISDICTION

The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether conviction under the federal funds bribery statute, 18 U.S.C. § 666, requires proof of a specific *quid pro quo* as an element of the offense.
2. Whether the Indictment was defective for failure to allege a specific *quid pro quo*.
3. Whether the district court erred in instructing the juries.
4. Whether the juries' guilty verdicts lack sufficient evidentiary support.
5. Whether the evidence established a material variance from the Indictment.
6. Whether the district court abused its discretion in admitting certain evidence.
7. Whether the district court abused its discretion in denying Swann's motion to sever.
8. Whether Count 75 was time barred.
9. Whether Count 15 was duplicitous.
10. Whether Wharton's Rule precludes conviction for conspiracy to commit bribery.
11. Whether the prosecutor committed misconduct by knowingly permitting false testimony.
12. Whether the sentences imposed were unreasonable.

COURSE OF PROCEEDINGS

In 1996, Jefferson County, Alabama, settled a Clean Water Act lawsuit by county residents and the EPA with a consent decree requiring the county to repair and rehabilitate its sewers and wastewater treatment plants. 061R931:736.[1] The Jefferson County Environmental Services Department (JCESD) supervised the project. Jefferson County Commissioner Jewell "Chris" McNair oversaw operation of the JCESD, which included Director Jack Swann, Assistant Director Harry Chandler, Chief Engineer Ronald Wilson, Chief Construction Maintenance Supervisor Clarence Barber, Engineer Donald Ellis, and Field Supervisor Larry Creel.

On August 26, 2005, a federal grand jury sitting in Birmingham, Alabama, returned a 127-count Second Superseding Indictment (Indictment), 061R293, charging Roland Pugh Construction, Inc. (PUGH) and two of its principals, Grady Roland Pugh Sr. (Roland Pugh or Roland) and Joseph "Eddie" Yessick (collectively the Pugh defendants); Rast Construction (RAST) and its principals, brothers Bobby and Danny Rast (collectively the Rast defendants); F.W. Dougherty Engineering & Associates, Inc. (FWDE) and its principal Floyd "Pat" Dougherty (collectively the Dougherty defendants); McNair; Swann; and other contractors and

[1] See the Table of Abbreviations, *supra* p. xxi, for an explanation of how this brief references the record.

JCESD employees with various conspiracies to give and accept bribes (18 U.S.C. § 371) and giving and accepting bribes (18 U.S.C. § 666(a)(1)(A), (a)(2)).[2] The Indictment also charged PUGH, RAST, and Bobby Rast with obstruction of justice (18 U.S.C. § 1503) and PUGH, Yessick, and Swann with mail fraud (18 U.S.C. § 1341).

On December 6, 2005, Judge Propst, on the motions of four JCESD defendants, severed the Indictment into five separate cases. 061R455; 061R457; 061R458; 061R460. Four of those cases, as well as issues preserved by McNair's conditional plea of guilty in the fifth case,[3] are addressed in this brief. This brief refers to each of the four tried cases in this consolidated appeal by the name of the principal JCESD defendant in the case: *McNair* (05-061), *Swann* (05-544), *Barber* (05-542), and *Wilson* (05-545).

A. *McNair*

This trial involved bribes paid to McNair, Chandler, and Ellis, by the Pugh, Rast, and Dougherty defendants. Trial began on April 6, 2006.[4] On April 21, the jury convicted all of the defendants (McNair, PUGH, Roland Pugh, Yessick,

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[2] This brief uses forms of "gives" and "accepts" or "receives" as shorthand, respectively, for the statute's and the charges' "offers, gives, or agrees to give" and "solicits or demands . . . or accepts or agrees to accept."

[3] *See* Statement of Related Case, *supra* p. ii.

[4] Judge Propst dismissed Counts 16-18, 25-27, and 29-31 on April 14.

RAST, Bobby Rast, Danny Rast, FWDE, and Dougherty) of conspiring to give and accept bribes (Count 1).

McNair was also convicted for accepting the following bribes in connection with the JCESD's sewer rehabilitation:

From PUGH, Roland Pugh, Grady Pugh, and Yessick	Count
hand railings ($5,500)	2
hand railings ($11,700)	3
From RAST, Bobby Rast, and Danny Rast	
Construction work provided by Barry Mosley ($52,990)	5
Master Access Controls security gate installation ($5,866)	6
Carpet installation by Clint Gilley ($5,300)	7
Landscaping by Bailey and Sons ($5,500)	8
Stairs construction (several thousand dollars)	9
Concrete deck construction (several thousand dollars)	10
From FWDE and Dougherty	
Supervision/project management by Bill Bailey ($27,434)	11
From William Dawson	
Installation of audio-video system ($16,400)	12

061R634.

The contractors were convicted for giving the following bribes:

Things Given to McNair	**Convicted**	Ct
Installation of hand railings worth $17,200	PUGH	15
Construction work provided by Barry Mosley ($52,990)	RAST, Bobby & Danny Rast	19
Master Access Controls security gate installation ($5,866)	RAST, Bobby & Danny Rast	20
Carpet installation by Clint Gilley ($5,300)	RAST, Bobby Rast	21
Landscaping by Bailey and Sons ($5,500)	RAST, Bobby & Danny Rast	22
Stairs construction (several thousand dollars)	RAST	23
Concrete deck construction (several thousand dollars)	RAST	24
Supervision/project management by Bailey ($27,434)	FWDE, Dougherty	28
Things Given to Chandler		
Pelican Beach condo rental ($610)	PUGH, Yessick	71
$2,500 cash	RAST, Bobby Rast	72
Things Given to Ellis		
$1,000 cash	RAST, Bobby Rast	87

061R626-31; 061R633.[5]

[5] The jury acquitted on several bribery charges: McNair on Count 4; PUGH on Counts 13, 14, and 70; Roland Pugh on Count 14; RAST on Count 89; and Danny Rast on Counts 21 and 89. RAST and Bobby Rast were also acquitted on an obstruction charge (Count 126).

B. *Swann*

This trial concerned the bribery of Swann by the Rast and Dougherty defendants, PUGH, and Yessick.[6] Trial began on September 19, 2006,[7] and the jury returned a verdict on October 2, 2006. All defendants except Danny Rast were convicted of conspiring to give and accept bribes (Count 51).

Swann was also convicted of accepting the following bribes:

From PUGH and Yessick	Count
Landscaping from Guthrie Landscaping ($100,000)	52
Waterfall/pond installation by Aquatic Gardens ($7,422)	53
Alabama Booksmith gift certificates ($1,000)	54
From RAST, Bobby Rast, and Danny Rast	
Painting by Kimro Painting ($9,733)	57
Plumbing by Brown Mechanical Contractors ($8,940)	58
From FWDE and Dougherty	
Supervision of construction by John Stanger ($24,176)	60

544R126.

[6] On a joint motion by Swann and the Dougherty defendants, *Swann* was consolidated for trial with another case, 06-084, in which Swann and the Dougherty defendants were charged in a separate indictment with seventeen counts of honest services mail fraud. 544R62.

[7] Counts 55-56, 64-65 were dismissed on the government's motion prior to trial.

The contractors were convicted for giving the following bribes:

Things Given to Swann	**Convicted**	Ct
Landscaping from Guthrie Landscaping ($140,680)	PUGH, Yessick	61
Waterfall/pond installation by Aquatic Gardens ($7,433)	PUGH, Yessick	62
Alabama Booksmith gift certificates ($1,000)	PUGH, Yessick	63
Painting by Kimro Painting ($9,722)	RAST, Bobby Rast	66
Plumbing by Brown Mechanical Contractors ($8,940)	RAST, Bobby Rast	67
Supervision of construction by Stanger ($24,176)	FWDE, Dougherty	69

544R127-29; 544R131-33. Swann, PUGH, and Yessick were also convicted on eleven counts of honest services mail fraud in connection with the landscaping by Guthrie Landscaping that PUGH and Yessick gave Swann (Counts 90-100).[8] 544R126-28.

C. *Barber*

JCESD Construction Maintenance Supervisor Clarence Barber and the Pugh defendants were charged with conspiring to commit bribery (Count 78). The Pugh defendants were also charged with bribing Barber by giving him a parcel of land worth about $48,000 (Count 83) and paying nearly $1,200 for Barber's lodging at three different resorts during an October 2001 vacation (Counts 84-86), and Barber

[8] The jury acquitted on several bribery charges: Danny Rast on Counts 66-68; RAST and Bobby Rast on Count 68; Swann on Count 59. It acquitted PUGH of obstruction (Count 125). The jury also acquitted on all 06-084 counts.

was charged with accepting those bribes (Counts 79-82).

Before trial Barber and Yessick pleaded guilty to the conspiracy charge, and the government dismissed the other charges against them. On January 17, 2007, a jury found PUGH guilty on all charges and Roland Pugh not guilty on all charges. 542R109-10.

D. *Wilson*

JCESD Chief Engineer Ron Wilson and PUGH were charged with conspiring to commit bribery (Count 75). Wilson was charged with accepting from PUGH a bribe in the form of a "scholarship" for his son to attend the University of Alabama at Birmingham (UAB) (Count 76).[9] On June 13, 2006, the jury convicted on all charges. 545R89-91.

E. Sentencing

Appellants were sentenced based on all counts of conviction:

Defendant	**Sentencing Date**	**Judge**	**Sentence Imposed**
FWDE	March 28, 2007	Coogler, J.	60 months probation; $3,830,760 fine; $225,149 restitution.
Dougherty	March 28, 2007	Coogler, J.	51 months imprisonment; $750,000 fine; $225,149 restitution.

[9] Count 77 charged PUGH with bribing Wilson with the scholarship, but was dismissed before trial on the government's motion.

Bobby Rast	March 29, 2007	Coogler, J.	51 months imprisonment; $2,500,000 fine; $141,000 restitution.
Danny Rast	March 29, 2007	Coogler, J.	41 months imprisonment; $1,000,000 fine; $141,000 restitution.
RAST	March 29, 2007	Coogler, J.	60 months probation; $1,702,500 fine; $141,000 restitution
Swann	March 30, 2007	Coogler, J.	102 months imprisonment $250,000 fine; $355,533 restitution.
Roland Pugh	April 18, 2007	Propst, J.	45 months imprisonment; $250,000 fine.
McNair	September 19, 2007	Smith, J.	60 months imprisonment; $851,927.43 restitution.[10]
PUGH	November 13, 2007	Proctor, J.	60 months probation; $19,400,000 fine; $239,652 restitution.

061R826; 061R823; 061R829; 061R837; 061R840; 544R184; 061R897; 061R956; 061R996.

PUGH, Roland Pugh, RAST, Bobby and Danny Rast, FWDE, Dougherty, McNair, and Swann filed timely notices of appeal. Individual appellants remain free on bond, and all fines have been stayed pending appeal.

[10] McNair's sentence also reflects his conditional guilty plea to one count of conspiracy to commit bribery (Count 32). 061R956; s*ee* Statement of Related Case, *supra* p. ii.

STATEMENT OF FACTS

A. Background

After entry of the 1996 consent decree, JCESD was responsible for ensuring that the work required by the decree was completed. 061R931:736; 061R932:884. The decade-long effort was by far the largest public works project ever done in Jefferson County and, under the consent decree, had a mandatory time schedule. 061R931:735-36; 061R932:887. The cost of compliance was estimated to be $1.2 to $1.5 billion, but it ultimately cost approximately $3 billion. 061R932:884-87.

Jefferson County had five commissioners. 061R931:734. From 1996 through March 2001, Commissioner McNair, nicknamed "big man" by the contractors, was the commissioner in charge of JCESD. 061R929:309-10; 061R932:884; 061R933:1351. Jack Swann, nicknamed "little big man," was the Director of JCESD and reported directly to McNair and, after McNair retired in March 2001, to McNair's successor. 061R929:309-10; 061R932:884; 061R933:1351. Harry Chandler was the Assistant Director of JCESD, reporting to Swann, and was in charge of organizing the construction program for the consent decree. 061R929:310, 061R932:883-84. Chandler and Swann were two of the primary negotiators for the County on the consent decree. 061R932:1095. JCESD also employed Ron Wilson as chief engineer and Don Ellis as an engineer, both of whom worked under Chandler, and Clarence Barber, the department's construction

maintenance supervisor, who oversaw twenty-six county inspectors. 061R932:887, 932-34; 542R127:520-22. Chandler, Wilson, Ellis, Barber, and Creel were also members of the Product Review Committee (PRC), a technical committee that reviewed materials, specified the products that could be used on the sewer project, and qualified contractors for certain kinds of work on the project. 061R932:924-26.

Jefferson County hired outside consulting engineers, like the Dougherty defendants, to help perform the work on the consent decree, including designing plans and deploying inspectors to make sure construction contractors performed the work according to the specifications. 061R929:264-65; 061R932:888. Outside engineers were paid under no-bid professional services contracts and were selected initially on the recommendation of Chandler, Swann, or McNair. 061R932:888, 914, 1027. McNair ultimately selected the consulting engineer for each sewer project; the full commission then voted to approve.[11] 061R932:888, 061R934:1542.

Appellant FWDE and Dawson Engineering were outside engineers chosen by McNair. 061R932:889, 1065; 061R934:1542. Pat Dougherty was the owner and president of FWDE and hand-signed all of his company's checks.

[11] Although the full Commission had to vote on McNair's selections, there is no evidence that the Commission ever questioned or disapproved them.

061R934:1492. His second-in-command was David Bechtel, and under Bechtel was Wayne Hendon who supervised the inspectors, including Bill Bailey and John Stanger. 061R929:263. During the time relevant here, a "good portion" of FWDE's work was on JCESD jobs from which it made millions of dollars per year. 061R928:230; 061GX33C. Likewise, the vast majority, "[e]ighty percent or . . . more" of Dawson Engineering's work, generating millions of dollars in revenues per year, was on JCESD jobs. 061R934:1542-43, 1554-55; 061R931:727; 061GX33D.

The rehabilitation work itself was done by construction companies including appellants PUGH and RAST. Roland Pugh, the founder and chairman of PUGH, owned 70% of the company.[12] The remaining 30% was held in three equal portions by (1) its CEO and Roland's son, Grady Roland Pugh Jr. (Grady Pugh or Grady); (2) its president Eddie Yessick; and (3) Roland's other son, Andy Pugh. 061R929:304, 308-09; 061R931:859; 061R933:1363. Brothers Bobby and Danny Rast owned 85% of RAST, split equally between them, and worked closely together. 061R933:1212-13. Bobby Rast was the company president and oversaw its field, administrative, and financial operations. 061R933:1212. Danny Rast was executive vice-president and acted as a field superintendent. 061R933:1212.

[12] In 2002, the stock ownership changed but Roland retained 51% of the voting stock. 061R930:498-99.

Jefferson County awarded construction projects through a bidding process. After a contract was awarded, however, any changes and additions to the project were made without further bidding. Additional work, in the form of a "field directive," was approved by the outside engineer in charge of the project and the county's project engineers, including Chandler and Ellis. 061R932:892-894. If the field directives exceeded the amount of the contract, then a "change order" or contract modification for additional funds was needed, which required first the approval of the project engineer and then approval by Swann and McNair. 061R932:890-95. McNair then placed it on the commission's agenda for its approval. 061R932:890-95. Such no-bid work along with the no-bid professional service contracts amounted to tens of millions of dollars.

In addition to no-bid change orders on projects that originally were bid, JCESD awarded millions of dollars per year in "emergency" work to contractors, including RAST and PUGH, on a no-bid basis. 061R932:932, 935-36. Barber, as construction maintenance supervisor, typically awarded this emergency work. 061R932:932. When an emergency arose, he found a contractor for the job and negotiated the price. 061R932:933. He initially approved the contractors' pay requests on that work and then sent them to Chandler, Swann, and McNair for their approval. 061R931:749-50; 061R932:934-35.

B. *McNair*

The evidence in *McNair* established that McNair was approving hundreds of millions of dollars in payments to the contractor-appellants, millions of dollars of change orders benefitting PUGH and RAST, and millions of dollars in no-bid contracts to FWDE, all while these companies were contributing workers, material, and cash amounting to hundreds of thousands of dollars to expand and renovate McNair's photography studio.

PUGH's CEO admitted the "general benefit" of giving McNair "envelopes of cash" was that "Jefferson County treated us real well. We had an opportunity to do a tremendous amount of work there. The work that we did there generated huge profits . . . . [I]t took our company from a normal struggling contracting company in mid to late '90s, to a thriving, wealthy, strong construction company." 061R930:566-67. During the relevant period, about 70% of PUGH's work was on the Jefferson County sewer rehabilitation. 061R929:310; 061GX42A. In 1996 and 1997, at the sewer rehabilitation's outset, PUGH made gross profits of 10%, but as the project continued and payments were made to JCESD officials, the company's sewer rehabilitation profits increased to 50% in 1999, 40% in 2000, and 45% in 2001, making PUGH tens of millions of dollars each of these years. 061GX42A. Similarly, RAST received tens of millions of dollars per year, and the engineering firms millions of dollars per year from their work on the sewer rehabilitation.

061GX33C-D.

Every time FWDE or Dawson was selected as the outside consulting engineer and awarded a professional service contract, McNair made the decision. 061R932:888, 917; 061R934:1542. JCESD payments received by the contractor-appellants were approved by McNair and Swann.[13] 061R932:920; 061R930:705. And each item requiring commission approval, such as contract awards or modifications, needed McNair first to approve them and then to put them on the commission's agenda for its approval.[14] 061R932:889-91, 910-18.

Likewise, Chandler and project engineers, like Ellis, reviewed and approved

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[13] *See, e.g.*, 061GX31A:3, 10 (Chandler, Swann, and McNair approving $1,168,788.02 payment to PUGH for work done January 2001); 061GX31B (Chandler, Swann, and McNair approving $2,652,820 payment to PUGH for work done in June 2000); 061GX31C:3, 6 (Chandler, Swann, and McNair approving $1,000,000 payment to RAST in October 2000); 061GX31D (Swann and McNair approving – in one day on emergency basis without Chandler's or county engineer's usual approval, 061R932:922-24 – $1,152,888 payment to RAST for work done in October 2000).

[14] *See, e.g.*, 061GX32A (December 1999 Commission Agenda: modification adding $1,081,621 (or 25%) to PUGH contract, and $112,600 contract award to FWDE); 061GX32D (February 2000 agenda: modification adding $400,724 to RAST contract, and $721,132 contract award to FWDE); 061GX32E (March 2000 agenda: $5,289,002 contract award to PUGH); 061GX32F (April 2000 agenda: $994,640, $602,680, and $348,103 contract awards to FWDE; $783,930 contract award to Dawson Engineering; modification adding $439,722 to RAST contract; modification adding $850,264 to PUGH contract).

the contractors' pay requests and issued field directives.[15] 061R932:894-96, 919. In addition, Chandler and Ellis were members of the PRC, which decided initially to qualify only three contractors to do "cured-in-place" work: W.L. Hailey, Insituform, and Reynolds. 061R932:925-26. Because the traditional "dig-and-replace" work was grouped with "cured-in-place" work for all the major construction contracts,[16] this PRC decision essentially limited the "big jobs" to only three bidders: the RAST-Hailey joint venture, the PUGH-Insituform joint venture, and Reynolds, which did its own dig-and-replace work. 061R932:925-27; 061R930:572, 591-92. In late 1999, the PRC changed the criteria making it more difficult for other contractors to qualify for "cured-in-place" work and thus potentially delaying by two years the qualification of otherwise qualified contractors. 061R932:928-932; 061R934:1462-63.

In total, from August 1999 to January 2002, Jefferson County paid $178 million to PUGH, $100 million to RAST, $11.4 million to FWDE, and $8 million to Dawson. 061GX33A-D.

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[15] *See, e.g.*, 061R933:1395-96; 061GX37A-C (Ellis-approved field directive).

[16] See PUGH's brief at 6 for an explanation of "dig-and-replace" and "cured-in-place" work.

1. Services, Materials, And Money Provided To McNair

McNair undertook a major renovation and expansion of his photography studio in 1999, at least doubling its size and adding an apartment for his daughter. 061R928:153-57; 061R930:610-11. The contractor-appellants' contribution and coordination to make the renovation a reality was impressive. In 1999, Dougherty sent Bill Bailey, an employee he initially hired as an inspector for county jobs, to work as the construction superintendent for the studio's renovation. 061R928:152-54. FWDE paid Bailey for the approximately eighteen months he spent working at the studio. 061R928:153-54, 170; 061R929:255-56; 061R934:1493-94; 061GX25A, C. Bailey did not track his hours as he did for a paying county job, and while some of his time was charged to administration, Dougherty charged some of Bailey's studio time to a JCESD sewer project.[17] 061R928:170-71; 061R929:259-62, 266-67; 061GX25E.

As superintendent, Bailey oversaw construction by numerous contractors, including PUGH and RAST. 061R928:159, 166-68, 170; 061R933:1357. RAST excavated for the expansion's footings. 061R928:159-60. And in July 1999, PUGH ordered concrete and for four weeks had a four-man crew pour concrete

[17] FWDE also paid the salaries of its employees, Wayne Hendon and John Stanger, while they acted as construction superintendents overseeing renovation of JCESD Director Swann's home. 061R928:174-183; 061R934:1494-97; 061GX25A.

walls and do other work. 061R928:139-41, 144-48, 158-59; 061GX26A. PUGH's crew supervisor talked to McNair while the concrete work was in progress, but McNair did not question why he was there or where he was from, or offer to pay. 061R928:148-49.

In late 1999, Bailey asked Mosley Construction to do the wood framing and other finish work at the studio. 061R928:108-09, 111, 114-15. Initially, McNair paid Mosley, first with a check and then with cash, but eventually McNair stopped paying. 061R928:110-12, 161-62; 061GX1W. Bobby Rast then told Bailey that "McNair was running out of funds" and that RAST would begin paying Mosley. 061R928:112, 161-62. From July 2000 to December 2000, RAST wrote twenty checks totaling $52,990 to Mosley as his work at the studio progressed and, at Bobby Rast's direction, coded these payments as expenses on a JCESD sewer project. 061R928:114-18; 061R933:1219-24, 1257-58; 061GX1A-1T, 2A-2T, 24A. Either Bailey or someone from RAST's office, such as Danny Rast, brought Mosley the checks. 061R928:137-38.

In January 2002, RAST gave Mosley two more checks totaling $7,200 for work he and his crew did on the studio's "guard shack," a two-story, 12 x 12 building designed by Pat Dougherty, built, in part, by RAST and FWDE, and depicted on the left in the following photograph, 061GX21F. 061R928:120-23, 168-70; 061R933:1357-58; 061GX19.

Bobby Rast had these payments coded as expenses on the "Upper Valley Rehab" or Kilsby contract, a JCESD sewer project. 061R933:1224-27; 061GX1U-V, 2U-V. For tax purposes, all the payments to Mosley were deducted as business expenses on sewer projects. 061R933:1223-24, 1245-55; 061GX2W. Mosley never did any work on those projects. 061R928:125. And once a local newspaper reported RAST's construction work at JCESD Director Swann's house, RAST decided to amend its tax returns for 1998-2000 and 2002 to eliminate these and other deductions. The deductions, which totaled over $140,000, were based on contributions toward McNair's studio and Swann's house that had been cost-coded to sewer projects and treated as business expenses. 061R928:125; 061R933:1247-57, 1271-72; 061GX24B-E.

Likewise, after the newspaper publicity, Bobby Rast told his bookkeeper in "effect that we really didn't need any document invoices in the files with Jack Swann's or Chris McNair's shipping address on them." 061R933:1247-48. She then found and discarded several invoices related to work at McNair's studio and Swann's house. 061R933:1248.

RAST furnished the labor and PUGH furnished the materials to construct a second-story deck for the rear of the studio. 061R928:219-20; 061GX21H. Bailey handwrote a list of materials and ordered the necessary steel. 061R928:165-66; 061GX29C. When Besco Steel Supply, Inc. (Besco) delivered the steel, its delivery tickets identified PUGH and Yessick as its customer and indicated that some of the steel was for the Valley Creek Treatment Plant, a JCESD sewer job on which PUGH was the contractor and FWDE the consulting engineer. 061R928:166-68, 203-04; 061GX29D-E. PUGH paid Besco and charged JCESD for the steel with FWDE's approval, and RAST poured the concrete deck and stairs and fabricated the metal steps. 061R933:1348-49; 061R935:1840-42; 061GX29A, 29L:3, 6-9.

Two sets of aluminum handrails for the deck and its staircase were ordered by Dave Bechtel, another FWDE employee, from Thompson Fabricating, which was told to bill PUGH. 061R931:797-98, 805. A $5,500 invoice for the first set made the work look like a change order for additional work on the Valley Creek

Treatment Plant and falsely indicated that the handrails were shipped there. 061R931:800-04, 806-07, 826-29; 061GX10C. An $11,700 invoice for the second set referenced "CHRIS MC." as the customer, but also falsely indicated that the handrails were shipped to Valley Creek when in fact they went to the McNair studio. 061R931:801, 806, 810-12, 822, 837; 061GX10F. PUGH paid both invoices and billed the county for the first set after adding a markup and charges for labor and equipment. 061R931:801-03, 847-49; 061R935:1837; 061GX10B, 10D, 29L:4-5. RAST installed the handrails. 061R933:1348-49. The completed deck and staircase are depicted in the following photograph, 061GX21H.

In May 2000, at McNair's request to Roland Pugh, Grady Pugh flew McNair's daughter and Bailey on PUGH's airplane to Georgia, where they picked out carpet for the studio. 061R928:162-63; 061R929:327-30; 061R930:635-37;

061GX3A. Before take-off, Roland told Grady that "McNair has called [again] and says that he's broke and he doesn't have enough money to leave for the deposit on the carpet" and "[s]o, if you would, write a check for the deposit." 061R929:328. Grady paid the deposit with a $4,820 PUGH check and had it treated on the company's books as an expense on the "last rehab contract." 061R928:163-64; 061R929:328-30; 061R930:637; 061R931:863-64; 061GX3A-B.

Bailey hired Clint Gilley to install the carpet at the studio and, in October 2000, called RAST, requesting checks for Gilley, but RAST's bookkeeper refused because FWDE's Bailey could not authorize issuance of RAST checks. 061R930:665-69; 061R933:1235-36; 061GX9C-D. After Bobby Rast was consulted, however, RAST gave Gilley two checks totaling $5,301 for his work at the studio. 061R930:668; 061R933:1234-36; 061GX9A-B.

Paying for materials and providing work crews were not PUGH's only contributions to the studio. When the project began, Roland Pugh told PUGH's other three owners, Grady, Andy, and Yessick, that they had to give money to McNair because he was building a studio and, as ten percent owners, they had to "kick in" their ten percent. 061R929:311. Grady gave approximately $1,500 in cash to Roland's secretary that time. 061R929:311-13.

On another occasion, Roland again collected money from the other owners to give to McNair for his studio. 061R929:313-14. On July 18 and 19, 2000, three of

them wrote checks to cash in proportion to their ownership interests. 061R929:316-17; 061R930:601-05; 061GX4A-C (Roland: $7,000, Andy: $1,000, Yessick: $1,000). Roland gave Grady an envelope of money and asked him to give it to McNair. 061R929:313-14. Grady took it to the studio where he saw Bailey and told him he was there to help McNair, and it was "financial help" that McNair needed at that time. 061R928:164; 061R929:314. Grady then visited with McNair for a few minutes and gave him the envelope by setting it down between the seats of the van they were in as McNair watched. 061R929:314.

McNair also wanted a security gate for the studio. In August 2000, Danny Rast hired Master Access Controls (MAC) to install an electronic gate and agreed that RAST would provide the electrical conduit, wiring, and concrete pad for the gate's motor. 061R933:1189-93; 061GX8A-B. MAC met with Bailey at the site, installed the gate, and sent its invoices to the attention of Danny Rast. 061R933:1193-95, 1233. RAST paid the contractor $5,866.92. 062R933:1193-95, 1233; 061GX8C-D.

When the studio needed an air conditioning system, McNair again called Roland wanting PUGH to pay for it. 061R929:324. Roland told Grady that McNair needed $40,000, but that "y'all don't have to put up any money this time, I'm going to do it in a different way." 061R929:324, 327. Roland gave a $10,000 check dated December 22, 2000 to Grady's wife, Genae Pugh, who cashed it and

handed the money to Roland. 061R929:324-25; 061GX4G. The same day, Roland also wrote a $10,000 check to Angie Pugh (Andy's wife) and a $9,750 check to cash; a week earlier he had written a $9,000 check to cash. 061R929:325-26; 061GX4F, 4H-I. Around Christmas 2000, at Roland's request, Grady picked up another envelope containing cash from Roland's secretary, went to McNair's house, chatted with him for a few minutes, and set the money down on the couch as McNair watched. 061R929:326-27.

Also in December 2000, at Danny Rast's request, RAST gave Danny Bailey's company, Bailey & Sons, a $5,500 check for landscaping at the studio. 061R933:1174-79, 1238-39; 061GX12A-C. RAST's records falsely indicated that Danny Bailey was working on a JCESD sewer project. 061R933:1239-40, 061GX12B. While Danny Bailey had done work for RAST before, he did not send the invoice for the studio work through regular billing, as he normally would, but instead sent it "attention of Dan Rast."[18] 061R933:1176-77; 061GX12D.

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[18] Huffman Electric was hired to do electrical work at the McNair studio by FWDE but was told to bill RAST. 061R933:1199-1202. When Huffman sent an $11,252 invoice to RAST in November 1999 without making it to the attention of Bobby or Danny Rast, RAST's vice president, Roy Weaver, responded that they "have no job at this location," the McNair studio. 061R933:1199-1202; 061GX23B. Huffman then began billing McNair directly. 061R933:1202-03; 061GX23C-E.

At first McNair paid the bills, 061GX23J, but eventually fell behind in his payments and owed approximately $45,000 by July 2000, 061R933:1203-06; 061GX23F-H. From July 7 to August 8, 2000, McNair made a series of payments totaling $35,000. 061R933:1208; 061GX23J. At about the same time, July 2000,

In November 2000, McNair asked Dawson Engineering to contribute to the studio's renovation. 061R934:1542-43, 1554-55. McNair called William Dawson, the company's founder, and said they needed to talk. 061R934:1542-43, 1554-55. At McNair's studio, the commissioner handed Dawson a brochure for an audio-video system and told him that, while he had never asked Dawson for anything before, he needed to ask Dawson to help with something. 061R934:1543. McNair had opened it to a specific page, showed it to Dawson, and indicated he wanted Dawson to pay for the equipment and its installation. 061R934:1543. Dawson went to Holt Audio Video (Holt) and purchased the equipment for $16,400, something he would not have done if McNair, the man who decided whether or not Dawson Engineering got a contract, was not part of the sewer rehabilitation process. 061R934:1542, 1544, 1555-56; 061GX11A. Dawson, who pleaded guilty to conspiring to commit bribery, 061R934:1556, was "uncomfortable with the whole situation," and when he saw that the invoice said bill to Dawson Engineering but ship to McNair's studio, he asked Holt to cover-up the ship to information, which the store did. 061R934:1546-48; 061GX11B-C.

Even after McNair retired in March 2001, he continued to ask for, and the Pugh, Rast, and Dougherty defendants continued to give him, things of significant

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Grady made his first delivery of cash to McNair, and RAST took over paying Mosley. *See supra* pp. 19, 24.

value. Work at the studio continued after McNair retired.[19] In addition, Roland Pugh told Grady that "that GD McNair has called again, and he wants us to do some work over in Arkansas" and that "surely this is the last time we'll have to do anything for him since he's out of office." 061R929:330-31. Grady flew McNair to Arkansas to look at the site and plans, and Yessick hired George Word, an Arkansas building contractor, in August 2001 to build the 3000-square-foot retirement home for McNair depicted in 061GX21P below. 061R933:1152-58; 061GX15B.

[19] Bill Bailey hired Buchanan Plumbing and Sewer Service to plumb the "guard shack." 061R928:170-71; 061R933:1181-82. FWDE employees signed Buchanan's invoices and sent them to RAST, which paid them. 061R928:171-72; 061R933:1183-84, 1187-88; 061GX17C-D. RAST recorded the payments as "Plumbing Work at Kilsby Circle," a sewer project, even though Buchanan never did any work there. 061R933:1184-85; 061GX17B.

Both PUGH and FWDE paid for its construction.[20]

2. Services, Materials, And Money Provided To Chandler And Ellis

The Pugh, Rast, and Dougherty defendants also paid off JCESD staffers below the "big man" and "little big man," though the payments got smaller as the recipient's rank decreased. Over lunch, Yessick offered to landscape Chandler's home. 061R932:941-42. Chandler at first refused, but at lunch weeks later Yessick offered again, and Chandler agreed to consider it and later called to accept.[21] 061R932:942-43. PUGH provided crews and paid for the materials for the extensive landscaping, including grading, drainage work, and new sod, as well as construction of a patio, walkway, and retaining walls. 061R932:942-46; 061R929:342; 061GX41A-H.

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[20] PUGH paid Word $44,192.75 in the first half of October 2001, and, per Yessick's instruction, internally charged the expense to miscellaneous jobs/construction materials. 061R929:332; 061R933:1160-61, 1365-69; 061GX15D-E, 15G-H, 15J. McNair told Word that FWDE would make the next payment. 061R933:1161-62. On October 24, 2001, after FWDE's bookkeeper saw Dougherty talking with McNair in the company's parking lot, Dougherty asked the bookkeeper to write a $50,000 check to a construction company. 061R934:1499-1500. About 20-30 minutes later, Word's $50,000 invoice, dated a day earlier, arrived by fax. 061R934:1500; 061GX16A. The bookkeeper wrote the check, 061GX16B, gave it to Dougherty, and then did something he had never done before: made an extra copy of the paperwork and kept it at home. 061R934:1501. When the subpoenas arrived, the bookkeeper searched FWDE's records, but could not find the invoice; the only copy was the extra one he had stashed at home. 061R934:1501-03.

[21] Chandler pleaded guilty to conspiracy to commit bribery. 061R932:956.

Yessick also invited Chandler on an all-expenses-paid-by-PUGH fishing trip to Bienville Plantation in Florida. 061R932:947; 061R929:342-43. In April 2000, Grady flew them down in the company's airplane. 061R932:947; 061R929:342-43; 061GX27A-B. When Chandler asked PUGH for a load of sand for his house, PUGH delivered. 061R932:951. And in October 2001, Yessick arranged and paid for a $610 condo rental for the Chandler family vacation at the Pelican Beach Resort in Destin, Florida. 061R932:948-50; 061GX27C.

In spring 2002, Chandler asked Bobby Rast to help with his expenses for a trip to Europe to attend technical conferences, which Ellis was also planning to attend. 061R932:951-52, 955; 061R933:1399. At RAST's office, Bobby Rast gave Chandler a thick envelope of cash containing $5,000 and told him to split it with Ellis. 061R932:952-53. Chandler had expected $250-$500 and was "uncomfortable and thought about giving it back, but [he] didn't"; instead, he "eventually gave half" to Ellis.[22] 061R932:954; 061R933:1401-02; *see also* 061R932:1117-18 (Chandler given Disney World tickets and San Antonio trip by Dougherty defendants).

[22] Other JCESD employees also received cash from the contractors. 061R934:1528-29, 1534-35 ($1,500-$2,000 in envelope from Danny Rast to Larry Creel, who sometimes awarded emergency work); 061R929:344-45, 373-74 ($500 in an envelope from PUGH to Creel for airplane tickets after Creel asked for flight on company airplane); *see also* 061R929:348-49; 061R931:768-75, 869-71.

C. *Swann*

The evidence in *Swann* also proved that while Swann was recommending and approving JCESD actions worth millions of dollars to the contractor-appellants, they were providing hundreds of thousands of dollars in materials and services to renovate and expand Swann's home.

Swann was tasked with implementing the EPA consent decree, 544R232:1604, and, among other things, recommended engineering firms to McNair and negotiated the scope and price of engineering contracts. 544R232:1286-88. Swann also had authority unilaterally to approve or disallow certain field directives that altered the nature or amount of work under construction contracts and, ultimately, the amount paid to the construction companies. 544R232:1618-19. Swann also approved all payments to construction companies under these contracts. 544R232:1621.

Over a period of three years during the sewer rehabilitation, FWDE, RAST, and PUGH gave Swann more than $300,000 in home remodeling and landscaping work. Throughout this extensive endeavor, Swann lived next door to the house being remodeled, and he periodically came over to observe the progress. 544R232:105, 140, 146, 510, 512-16. The extent of the remodeling is shown in the following before and after photographs, 544GX30A-B.

In the fall of 1998, Dougherty sent FWDE Superintendents Wayne Hendon and Bill Bailey to meet with Jack Swann and his wife, Nila Swann, about plans to enlarge and remodel the house next door to the Swann's home, which the Swanns had purchased. 544R232:136-38, 206-07. During the entire three-year project, FWDE employees supervised the expansion and complete remodeling of the home.

544R232:139-46, 148-53, 160; 544GX25A; 544GX25C. Hendon spent approximately half of every day at the site for two years supervising subcontractors. 544R232:148, 160. FWDE also hired a framing subcontractor to frame the addition, altering the roof line and extending the back of the house, at a cost of more than $28,000. 544R232:144-46; 544GX80A-L. Dougherty periodically visited the site to observe the work of his crew. 544R232:146-47. Hendon understood that this work for Swann was not a "paying job" for FWDE. 544R232:135, 159. Swann admitted that he did not reimburse FWDE or Dougherty for the payments to the framing subcontractor. 544R232:1734.

Hendon was supervising work at the Swann home when Bobby Rast sent RAST superintendent Luke Cobb and his crew to do demolition work and pour concrete for the basement, walls, stairs, and elevator pit. 544R232:506-16. *See also* 544R232:140-43, 150-51. Later in 1999, RAST's Derek Houston began working at the site and served as a point of contact for suppliers and subcontractors provided by RAST. 544R232:542-43, 545-46. For example, RAST purchased concrete and bricks and hired subcontractors to repair plumbing and to paint. 544R232:239-48, 252-59, 816-18, 821-22; 544GX81A-D, 84A-D, 83A-D, 83H, 85A, 85C. RAST also paid Don's Carpet One to install hardwood floors and stairs, including an inset of Brazilian cherry wood in the dining room floor designed to look like an area rug. 544R232:265-66, 269-73; 544GX82A, 82C-D. Don's Carpet One was initially

hired by Mrs. Swann, but she directed the company to invoice RAST because "they would be paying for it." 544R232:268.

RAST avoided using Swann's name on invoices, delivery tickets, and internal accounting reports. For example, the delivery ticket for ready-mix concrete RAST purchased directed delivery to the Swann address but identified it as the "Rast Residence." 544GX81C-D. When RAST paid for plumbing, floor installation, and painting at Swann's home, Bobby Rast directed that the payments be coded in RAST's accounting system to "Annual Rehab" and "Minor Pump Station," jobs that RAST was performing for Jefferson County. 544R232:709-11, 714-15; 544GX85B, 24A. Only after the government investigation began did RAST's bookkeeper learn that these expenses actually reflected work done at the Swann home, and that other payments coded to county jobs on Bobby or Danny Rast's instructions reflected work done at McNair's studio. 544R232:714-17, 722-24. At that time, RAST amended its 1998, 1999, 2000, and 2002 tax returns to reflect that these were not actually business expenses incurred on county jobs, as RAST had originally claimed. 544R232:713, 716-17, 722-28; 544GX24B-E.

In the summer of 2000, PUGH began contributing to the Swann remodel. PUGH President Yessick hired Aquatic Gardens to install a waterfall and koi pond at a cost of $7,422. 544R232:92-105; 544GX29A-E. Yessick directed Aquatic Gardens to send the invoices directly to PUGH and not to include any reference to

the Swann residence on the invoice. 544R232:99.

After Swann told Yessick that he had overspent renovating his home, Yessick offered to send a PUGH crew over to plant some grass. 544R232:1828. When that was not enough to "please" Mrs. Swann, Yessick hired Guthrie Landscaping to plant tress and shrubs, lay sod and ground cover, and do grading and drainage work. 544R232:571-75, 1828; 544GX30F. Guthrie's initial estimate in July 2000 totaled nearly $40,000. 544GX30F. Beginning in 2001, PUGH paid Guthrie approximately $1,200 a month for lawn maintenance at Swann's properties. 544R232:587-88; 544GX30S-Z, 30AA-CC. At Yessick's request, Guthrie identified his work at Swann's property by job number, rather than Swann's name. 544R232:578-80; 544GX30G, I, K, M, Q, S, U, W, Y, AA. Yessick directed PUGH's controller to accrue the expense to "Metro Park Roadway" – a county job, 544R232:910-14 – and PUGH's payments to Guthrie were costed to that job, even though the work was performed at Swann's residence. 544R232:968-69. By December 2001, PUGH had paid Guthrie over $93,000 for landscaping at Swann's property depicted in the following photographs, 544GX30C-D. 544GX30FF.

In January 2002, Yessick asked Guthrie to stop submitting invoices to PUGH, and instead advanced Guthrie $47,000 for three years of landscaping and maintenance. 544R232:589-91; 544GX30DD. PUGH's manager of accounts payable testified that she filed Guthrie's invoices and that PUGH ordinarily retained such records for five to seven years. 544R232:1466-68. But the invoices were not found in PUGH's files during the government's investigation. 544R232:1447-48.

On June 20, 2002, the Jefferson County Employees Credit Union received a grand jury subpoena for any loan files related to Swann. 544R232:1128-29; 544GX28K. Shortly thereafter, the credit union CEO told Swann that his records were being subpoenaed by the FBI. 544R232:1129-31, 1684-87. By August 2002, both Grady Pugh and Yessick had heard rumors of an FBI investigation of Jefferson County. 544R232:1823-26. That same month, Guthrie was abruptly asked to stop working at the Swann house, even though there was a balance remaining on the advance Yessick had given him. 544R232:591, 594-95. On

August 13, 2002, approximately two years after hiring Guthrie, Yessick directed his assistant Tammy Hughes to create an invoice to Swann's mother-in-law in the amount of $12,572 for tree removal and "remodeling work." 544R232:1011-13; 544GX28D. On September 26, 2002, Yessick directed Hughes to create a second invoice, this time to Jack Swann's mother, for $46,684 of landscaping work. 544R232:1018-20; 544GX28E. Although it was customary for PUGH invoices to include job numbers, neither of these did. 544R232:1020-21.

Beginning in November 2002, the Swanns paid PUGH $59,000 with checks from joint accounts they had with their mothers, a month after taking out two home equity loans in each of their mothers' names. 544GX28C, M-N. Yessick gave these checks directly to PUGH's controller, telling her they were partial payment for the landscaping he had previously directed her to accrue to miscellaneous income. 544R232:1421-23, 1418-19. These checks were unusual because they did not come in the mail and the controller never saw any invoices associated with them. 544R232:1422-24.

Yessick also purchased $1,000 in gift certificates from the Alabama Booksmith for Swann using a PUGH check. 544R232:846-49; 544GX86A, C.

As Grady Pugh testified, keeping Swann happy yielded benefits. 544R232:1905. Swann was able to grant time extensions and field directives that benefitted RAST and PUGH. Swann also exercised great influence over the

selection of engineers, like FWDE, for JCESD projects, which were awarded contracts through a no-bid process. 544R232:1288, 1672-73.

In May 1998, PUGH, along with its joint venture partner, was awarded the Vestavia Trunk Sewer Replacement project by the JCESD. 544R232:1331-32. The $12.6 million contract imposed liquidated damages of $1,000 per day for failure to meet the May 17, 2000 completion date. 544R232:1333-34, 1353-54; 544GX36A-B. Swann had the authority, however, to grant an extension, and on March 20, 2000, Yessick requested a 120-day extension on the Vestavia project. 544R232:1335; 544GX36C. According to a March 7 letter from PUGH's joint venture partner to Yessick, the extension was needed because of delay in receiving a new tunnel boring machine and performance problems once it arrived, as well as "personnel changes." 544GX36C.

Nonetheless, on May 11, Swann denied the request, noting that timely completion of the project was "a requirement of the specifications," and that "Jefferson County repeatedly stressed the critical nature of finishing this project on time." 544GX36D. Emphasizing upper management's failure to address equipment problems in a timely manner, Swann also noted a "disturbing . . . pattern developing on Roland Pugh Construction/Insituform Mid-American projects" of poor decisions and bad management. *Id.* On June 13, the request was renewed, this time for a 180-day extension. 544GX36E. And on July 10, five

days after Yessick hired Guthrie to landscape Swann's property, Swann granted a 180-day extension. 544R232:1338-39; 544GX30F, 36F. The extension saved PUGH's joint venture $180,000 in liquidated damages. 544R232:1353-54.

In July 2000, RAST, together with its joint venture partner W.L. Hailey, was awarded the Valley Creek Trunk Relief Tunnel project – a JCESD project designed by FWDE. 544R232:354-55, 357; 544GX35A. The contract required RAST-Hailey to complete the job by February 19, 2003, and included a performance bond for the value of the contract ($27.8 million). 544R232:358; 544GX35A. In December 2001, FWDE notified JCESD that RAST's tunnel boring machine had become stuck in the ground while performing the first phase of the project. 544R232:359-60; 544GX35B.

Before the Valley Creek Project was bid, JCESD hired Gallet and Associates to do a geotechnical survey of the area, which was included in the contractors bid package. 544R232:365-67, 376-78; 544GX35E. In its report, Gallet stated that this portion of the tunnel project "will be very difficult due to extremely poor rock conditions coupled with occasional hard rock and abundant groundwater." 544GX35D. Gallet noted this again in a letter to Swann after RAST's machine became stuck in the ground, and speculated that even though the problem areas were "fairly well depicted in the geotechnical report . . . [RAST] may have discounted the information . . . and relied more heavily on past

experience in the immediate area." *Id.*; 544R232:375-76. *See also* 544R232:360 (JCESD's supervising engineer: "It was just the wrong machine to use for the ground they were in.").

After RAST's machine became stuck, Swann authorized RAST to remove it at an additional cost to the county of $2.6 million. 544R232:363-64, 384-85; 544GX35C. Swann also declined to invoke the performance bond against RAST, which would have guaranteed the project's completion at the original contract price of $27.8 million. 544R232:390-92; 544GX35A. Instead he re-bid a portion of the project, which RAST won for an additional contract worth $23.8 million. 544R232:378-79, 381; 544GX35G. As a result, the county paid RAST over $50 million for work RAST was obligated to complete under the original $27.8 million contract. 544R232:387-88.

Swann also approved lucrative field directives that benefited RAST and PUGH. Ordinarily, field directives are requested by the contractor, reviewed by the project engineer, and ultimately approved by JCESD project supervisors and Swann. 544R232:351-52. In 2000, however, Swann brought a field directive concerning the Paradise Lake Sewer project to one of his project supervisors and asked her to include it in the payments for an unrelated project. 544R232:351-53. PUGH was the beneficiary of this $827,417 no-bid field directive. 544R232:353-54. Swann approved three other field directives in 2001 that paid RAST

$2,020,367. 544GX35G. Each of these directives was charged to the Valley Creek Tunnel Project; however, none of them involved work on that project. 544R232:382-84.

In 1999 alone, PUGH earned 50% gross profit of $15,869,711 on JCESD work – up from only 10% gross profit in 1997. 544R232:1434; 544GX42A. During the conspiracy period, RAST (together with its joint venture partner) was awarded more than $100 million in work for the county. 544R232:1682-83; 544GX33B.

D. *Barber*

Barber was JCESD's construction maintenance supervisor and oversaw twenty-six county inspectors. He was responsible for hiring contractors to do no-bid emergency work, and he negotiated the price of more than 1,200 such contracts. 542R127:520-22, 558, 678-79; 542R129:1077-80, 1123-29. Barber also was responsible for approving the contractors' paperwork and certifying the expenses they submitted before sending them to Chandler. 542R129:1134-36. For example, in February 2002 Barber approved a PUGH pay request for $475,000, 542GX111, and in May 2001 he approved an emergency work payment to PUGH for $50,000, 542GX112.

Beginning at least as early as 1997, Yessick had PUGH send Barber on annual beach vacations paid for by PUGH. In 1997, 1998, and 1999, Roland

Pugh's administrative assistant, Janice Kuykendall, made the reservations and signed the PUGH checks that paid for Barber's vacations. 542R127:719-28; 542R129:1087; 542GX16-18. Yessick explained that he pleaded guilty to rewarding Barber because:

> Clarence was in the position that he could make decisions for inspectors. We had maybe 20 projects going at the time which had inspectors hired by our consultants, and some of them didn't know what they were doing. And the intent was that if we had an inspector on the job that was being what I thought was irrational, we could call Clarence, and Clarence could interject with one of his inspectors and get a decision made on the job.

542R128:806-07.

In January 2000, Barber concluded that the Paradise Lake subdivision's sewer pipes should be replaced on an emergency basis instead of being repaired. 542R129:1082-85. On January 7, Barber told the city inspector, Charles Hodges, that he had a contractor lined up that could do the work in about 45 days. 542R127:748-49; 542R129:1136-38. After Yessick was told to send Barber a price quote for the work, Yessick sent him a proposal for $1.2 million.[23] 542R127:750-52; 542GX45H. The same day he sent Barber PUGH's price proposal, Yessick sent Hodges a letter stating that "we will be replacing the existing sewer line." 542R127:748-49; 542GX45G. Because emergency work contracts were limited to

[23] Some emergency work was performed on a cost plus basis, while the county asked the contractor to price out other such work. 542R127:751-52.

$50,000 or less, 542R129:1080-81, PUGH eventually was awarded an $857,000 no-bid field directive to do the work, on which it made a 50% profit. 542R127:749, 751-52. However, because Barber had classified the work as emergency, there was no contract for Paradise Lake on which to put the field directive. It therefore was placed on the unrelated multi-million dollar Cahaba River project. 542R128:767-70; 542GX31B.

In the spring of 2000, Barber asked Yessick if he would find and purchase a piece of property in McCalla on which Barber could retire. 542R127:728-29; 542R129:1089-91, 1140-43. Yessick engaged a realtor for this purpose, and, in November 2000, he signed a contract to purchase a parcel of land in the name of "Roland Pugh" for $47,500. 542R127:565-68, 731; 542GX45J. The following week Yessick provided the realtor with an earnest money check for $1,000, signed by PUGH's CFO Lorelei Heglas. 542R127:732; 542R129:1203-05; 542GX45L. In anticipation of the cost PUGH would incur for the land purchase, Yessick had Heglas accrue $45,000 to the Paradise Lake project. 542R127:734-35, 542R128:898-99; 542R129:1182-86; 542GX45A.

Days before the closing, however, Kuykendall told Yessick that the company no longer was going to purchase the land in PUGH's name and, instead, was going to give Barber a cashier's check to buy it in his own name. She told Yessick to pick the check up in Tuscaloosa and to get back from the realtor all documents

referring to PUGH. 542R127:736-40; 542GX45M. Yessick picked up the check, which was made out to the settlement attorney for $46,877, and on which the "NAME OF REMITTER" line was left blank. 542R129:1146; 542GX45C. Yessick gave Barber the check, and Barber closed on the contract in his own name on December 18, 2000. 542R127:737-47; 542GX45B-D, J. Yessick also gave Barber a cashier's check for $1,050 to replace the earnest money check he had previously given the realtor. The realtor prepared papers for a fictitious house sale and putative cancellation in order to refund PUGH's earnest money deposit. 542R127:741-44; 542R129:1145-47; 542GX45F, N, 46A-B.

In 2001, Yessick arranged for Barber to visit Vicksburg and Biloxi, Mississippi, and Orange Beach, Alabama. 542R127:555-57; *see* 542GX19A. Barber took the trip, and PUGH paid $148 for his stay in Vicksburg, $546 for his stay in Biloxi, and $481 for his stay at the beach. 542R127:559-65; 542R128:800; 542GX19B-C, F. PUGH's books expensed those payments to sewer "rehab" projects.[24] 542R127:560-64.

In September 2002, a newspaper article revealed the investigation. 542R128:779-80. Six months later, Barber "repaid" PUGH over a seven-week period with a series of $8,000 checks. 542R128:770-71; 542R129:1156;

[24] Barber failed to disclose any of his trips to the FBI when he was questioned about them. 542R129:1158-59.

542GX21A-F. Barber did not pay PUGH any interest on the "loan," and no documents evidencing a loan from PUGH to Barber were created.[25] 542R128:772; 542R129:1095, 1154-57.

E. *Wilson*

As JCESD's Chief Engineer, Ron Wilson was in charge of all sewer line work, and also was the project engineer on several construction contracts, including some of PUGH's. 545R139:79; 545R142:1034. As project engineer, Wilson had to approve all contractor pay requests, which were submitted monthly, before sending them on to Chandler. 545R139:82-83; 545R141:583-84; 545R142:1034. Project engineers also approved requests for extensions of time to complete contracts. 545R141:688. Contractors were subject to $1,000 per day in liquidated damages if they failed to complete a contract on time. 545R142:1063.

In 1999, Wilson complained to Grady Pugh about how expensive "it was to have kids in college and that he was in a financial bind and there was a possibility that he might not be able to send his son [Justin] to college the next semester because of it." 545R142:1053-54. But Wilson failed to tell Grady that FWDE was paying for Justin's tuition and fees for the 1999-2000 school year. 545R142:1060; 545GX2A, C. Grady responded that PUGH "had done a lot of things for colleges

[25] Although Barber had $91,000 in his bank account in December 2000, which was about the same amount he had when he decided to pay PUGH back, he did not use that money to buy the McCalla property. 542R129:1158-60.

and contributed a lot of money towards education," and that if PUGH "could help sponsor a scholarship to help [Justin], that we would do that." 545R142:1054. Wilson later called Grady saying "if y'all are still interested in sponsoring that scholarship . . . I would like to take you up on it." 545R142:1055.

Thereafter, on August 20, 1999, using a JCESD fax machine, Wilson sent Grady a letter with instructions for sending the money to UAB. 545R142:1055-56; 545GX5A. Wilson told Grady the check should be for $4,500, 545R142:1059, and Grady sent UAB a check in that amount on August 24, 1999.[26] 545R142:882-89; 545GX5C-D. Kuykendall, who typed the letter to UAB and signed Grady's name for him, did not remember seeing any application by Justin for a scholarship, nor could she remember PUGH ever giving a scholarship to an individual, as opposed to donations to educational institutions. 545R142:883, 893-94. For his part, Grady had never met or talked to Justin prior to sending UAB the $4,500, nor had he seen either a résumé or scholarship application for him. 545R143:1132.

During this same time period, on July 26, 1999, PUGH submitted to USI, the outside consulting engineer for the Village East 3 contract, a request for a 175-day extension to complete work on the project. 545R142:1062; 545GX7A:2. The next day, USI forwarded the request to Wilson. 545GX7A:1. When PUGH requested

[26] UAB disbursed the $4,500 in four equal payments: in September and December 1999, and in March and June 2000. 545R141:777; 545GX5F-G.

the extension, completion was already 76 days overdue, subjecting PUGH to $1,000 liquidated damages for each of those days. 545R142:1063; 545GX7A:2 (noting contract's May 11, 1999 completion date). Three days after sending Grady his letter with the scholarship information, 545GX5A, and one day before Grady sent UAB the check, 545GX5C, Wilson approved the extension on August 23, 1999, 545GX7B.

On cross-examination by PUGH's counsel, Grady, who pleaded guilty to bribing Wilson and McNair, 545R142:1104, explained his intent in giving Wilson the "scholarship":

> When you offer somebody something like that, Mike [Brown], you expect them to help you if they can. And when I did that for Ron [Wilson], I felt like if he got a chance to help us, he would.

545R143:1144; *accord* 545R143:1153 ("When I offered that, Mike, I felt like if Ron got a chance to help us and *return the favor*, he would") (emphasis added). Grady also explained that giving things of value to county employees provided PUGH with the "general benefit" of "hav[ing] preferential treatment and, you know, if we had problems it would help resolve the problems. Numerous ways that things could be made easier." 545R142:1105; *accord* 545R143:1377 ("People that wanted to help could make things easier, make changes that would make things more profitable.").

STANDARDS OF REVIEW

Because of the numerous issues presented, the applicable standards of review are contained in the Argument sections below.

SUMMARY OF ARGUMENT

This case involves a gross abuse of the public trust. As Judge Proctor noted when sentencing PUGH, it is "a case in which a number of public officials working for Jefferson County put their offices up for sale." 061R982:5. These corrupt officials received, and in many cases solicited, hundreds of thousands of dollars in goods, services, and cash for their own personal gain from contractors doing the sewer rehabilitation work. The corrupt contractors, in turn, profited enormously from favorable decisions made by the public officials whose integrity they had compromised. As Roland Pugh explained to his co-conspirators: "this was how we do business." 542R127:713 The judges and juries correctly concluded, however, that this way of doing business was a crime. None of appellants' arguments, individually or collectively, warrants disturbing either the verdicts rendered or sentences imposed.

1. The federal funds bribery statute, 18 U.S.C. § 666, does not require proof of a specific *quid pro quo* – an identifiable act that the contractors intended to receive and the officials intended to give in exchange for bribes paid. The plain language of Section 666 does not include the words *quid pro quo* or any equivalent

phrase, nor does it limit the statute's reach to gifts intended to influence a specific official act. Rather, the statute expansively prohibits corruptly giving or receiving a thing of value with the intent to influence or be influenced "in connection with any business, transaction, or series of transactions." 18 U.S.C. § 666(a)(1)-(2). Courts have construed the statute broadly, consistent with its language and purpose. Schemes, like appellants', which put public officials on retainer so they act favorably when opportunities arise, are prohibited by Section 666. For this same reason, the Indictment's allegations charging violations of Section 666 and the jury instructions, both of which tracked the language of the statute, were adequate and proper.

2. The evidence of bribery was overwhelming. Indeed, appellants only meaningfully disputed the intent with which they gave and received the massive sums, claiming that the goods, services, and cash were given out of friendship. The evidence, however, showed that the contractors' "friends" included numerous JCESD officials with multi-million dollar decision-making authority that affected the contractors' businesses on a daily basis over a period of years, that the so-called "friendship gifts" included hundreds of thousands of dollars in cash, labor, and materials, and that the donors and recipients attempted to conceal evidence of their "gifts." Thus, the juries reasonably concluded that these items were not given out of friendship but with the corrupt intent to influence or be influenced.

3. The same evidence supports the juries' conclusions that appellants conspired, not for the lawful purpose of renovating McNair's studio or Swann's house, but to unlawfully influence JCESD officials and, further, that Swann, PUGH, and Yessick used the U.S. mail to implement a scheme to deprive the citizens of Jefferson County of Swann's honest services.

4. PUGH's argument that the conduct underlying its conspiracy convictions is analogous to a buy-sell drug transaction that does not show a conspiracy to distribute narcotics misunderstands the law. The line of cases discussing such transactions deals with the sale of some commodity for personal use and does not apply to bribery, which contemplates a continuing compromise of the official's fiduciary duty.

5. The claim by appellants in *McNair* and *Swann* that the evidence only proved multiple smaller conspiracies – rather than the overarching conspiracies to bribe McNair and Swann – lacks merit. The juries – properly instructed on the charges in the indictment – found a single conspiracy to bribe McNair and a single conspiracy to bribe Swann. Their conclusions are supported by substantial evidence that the contractors shared a common goal to bribe McNair and Swann in order to secure favorable treatment from the JCESD, and that they accomplished this goal by working side-by-side on large scale renovation projects for those county officials. Even if the evidence showed multiple conspiracies, appellants

cannot establish that they were prejudiced by this alleged variance.

6. The district court did not abuse its discretion in refusing to sever these cases further, or by admitting evidence in *McNair* and *Swann* of other acts of bribery. The bribes at issue in *McNair* and *Swann* were part of an extensive scheme to bribe employees at each level of the JCESD hierarchy; thus, these "other acts" of bribery are part of the "chain of events explaining the context, motive[,] and set-up of the crime." *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007) (citation omitted). Even if this evidence is viewed as extrinsic, it was still properly admitted under Federal Rule of Evidence 404(b) to show the appellants' intent, plan, and *modus operandi*. Evidence that the contractors gave these supposed "friendship gifts" to several different JCESD employees with power to award, negotiate, and modify contracts worth millions of dollars is highly probative of their intent and is, as Judge Coogler recognized, "exactly what 404(b) testimony is here for." 544R232:113-14. The court's limiting instructions were sufficient to prevent undue or spillover prejudice from either the joint trials or evidence of other acts, and the split verdicts demonstrate the juries were able to segregate the evidence and make individual assessments of guilt.

7. Appellants' remaining legal arguments are also without merit. PUGH's claim that its conviction in *Wilson* is barred by the statute of limitations is based upon a misunderstanding of the object of the conspiracy, which was not achieved

until Wilson received the full benefit of PUGH's bribe in March and June 2000. PUGH's duplicity challenge to Count 15 is premised on an incorrect understanding of the conduct charged: aiding and abetting the installation of handrails for McNair. That PUGH made two purchases of handrails in its efforts to aid and abet RAST's installation does not render the charge duplicitous. And McNair's resort to the antiquated Wharton's Rule is unavailing because the concept does not apply to Section 666.

8. PUGH's claim of prosecutorial misconduct is nothing more than hyperbole. There is no evidence that Grady Pugh's trial testimony was false – much less that the prosecutor knew it was false. Moreover, vigorous cross-examination and argument by counsel on this very point prevented the jury from "laboring under a Government-sanctioned false impression of material evidence." *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979).

9. Finally, there was no procedural error at any of the sentencings, and the sentences imposed were all reasonable. Since the public officials "put their offices up for sale," 061R982:5, the sentencing judges not surprisingly focused on the enormous profits made by the contractors who benefitted from their corruption during the sewer rehabilitation project. Three different judges concluded the contractors' profited at the expense of Jefferson County due to their bribery scheme, and they sentenced appellants accordingly. These conclusions are

supported by the record, and appellants' arguments regarding sentencing are meritless.

ARGUMENT

I. DEFENDANTS WERE PROPERLY CHARGED WITH BRIBERY IN VIOLATION OF 18 U.S.C. § 666

Appellants argue that 18 U.S.C. § 666 requires proof of a "specific" act – which they call a *quid pro quo* – that the contractor-appellants intended to receive in exchange for each of the things of value they gave to JCESD employees. They claim that the Indictment was defective for failing to charge a specific *quid pro quo*, that the jury instructions were erroneous because the jury was not required to find a specific *quid pro quo*, and that the evidence was insufficient because the government failed to prove a specific *quid pro quo*. All of these arguments are wrong for exactly the same reason – they ignore the plain language of 18 U.S.C. § 666.

A. Section 666 Does Not Require Proof Of A Specific *Quid Pro Quo*

1. The Statutory Language

"When construing a criminal statute, [this Court] begin[s] with the plain language; where 'the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said.'" *United States*

v. Browne, 505 F.3d 1229, 1250 (11th Cir. 2007) (quoting *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*)).

In relevant part, 18 U.S.C. § 666(a)(1) prohibits "an agent of . . . [a] local . . . government, or any agency thereof . . . [from] corruptly solicit[ing] or demand[ing] for the benefit of any person, or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such . . . government, or agency involving anything of value of $5,000 or more."[27] Subsection (a)(2) in turn prohibits "corruptly giv[ing], offer[ing], or agree[ing] to give anything of value to any person, with intent to influence or reward an agent of a . . . local . . . government, or any agency thereof, in connection with any business, transaction, or series of transactions of such . . . government, or agency involving anything of value of $5,000 or more."[28] The statute nowhere contains the Latin phrase *quid pro quo*, nor similar language such as "in exchange for" or "in return for," nor requires proof of a specific act (other than the proscribed giving or accepting). Thus, there is "no support in the statute's text" for appellants' claim that Section 666 requires

[27] The predicate for a Section 666 offense is that the local entity in question has received $10,000 in federal benefits in a one-year period covering the bribe payment. 18 U.S.C. § 666(b).

[28] Throughout this brief use of the terms "to influence" and "to be influenced" is shorthand for the statute's wording "influence(d) or reward(ed)."

proof of a specific *quid pro quo*.[29] *United States v. Abbey*, __ F.3d __, No. 07-2278, 2009 WL 874487 at *6 (6th Cir. Apr. 3, 2009).

Like the unsuccessful appellant in *Abbey*, appellants here base their argument not on the express language of Section 666 but, rather, the Supreme Court's decision in *United States v. Sun-Diamond Growers*, 526 U.S. 398, 119 S.Ct. 1402 (1999). *Sun-Diamond*, however, concerned a different statute, 18 U.S.C. § 201, that criminalizes both bribes and gratuities paid to federal officials. The bribery provision, Section 201(b), prohibits "corruptly giv[ing] . . . anything of value to any public official . . . with intent . . . *to influence any official act* . . . [and further prohibits] a public official . . . [from] corruptly . . . accept[ing] . . . anything of value . . . *in return for . . . being influenced in the performance of any official act.*" (Emphasis added). Section 201(c), the illegal gratuity provision, proscribes "giv[ing] . . . anything of value to any public official . . . *for or because of any official act* performed or to be performed by such public official . . . ." (Emphasis added). In *Sun-Diamond*, the district court believed that providing "unauthorized compensation" to a public official "simply because he held office" was an illegal gratuity in violation of Section 201(c), and that '[t]he government need not prove

[29] Appellants' assertion that the $5,000 minimum "has to have reference to some identifiable *thing*," FWDE-Br. 24, is wrong. That statutory minimum requires no particular precision and can be met by aggregating value over time. *See United States v. Hines*, 541 F.3d 833, 837 (8th Cir. 2008).

that the alleged gratuity was linked to a specific or identifiable official act or any act at all.'" 526 U.S. at 403, 119 S.Ct. at 1405.

The Court explained that the intent element distinguishes a bribe from an illegal gratuity. In doing so, the Court equated bribery's requisite intent to influence or be influenced to a *quid pro quo* – which it defined, paraphrasing the express language of Section 201(b),[30] to mean an intent to exchange something of value for an official act:

> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act.

526 U.S. at 404-05, 119 S.Ct. at 1406 (underline added).[31] The Court then relied on the express language of Section 201(c) to reject the district court's view that an illegal gratuity "did not require any connection between [a defendant's] intent and a specific official act." 526 U.S. at 405-06, 119 S.Ct. at 1406-07. The statute's "insistence upon an 'official act,' carefully defined, seems pregnant with the

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[30] *See* 18 U.S.C. § 201(b)(2) ("accepts . . . anything of value . . . *in return for* . . . being influenced in *the performance of an official act*") (emphasis added).

[31] PUGH wrongly asserts that in *Sun-Diamond* the Court "addressed the meaning of . . . 'corruptly,'" PUGH-Br. 72, or "interpreted the term[] 'corruptly,'" PUGH-Br. 73. The Court did neither.

requirement that some particular official act be identified and proved."[32] *Id.* at 406, 119 S.Ct. at 1407.

Noting the Supreme Court's concern in *Sun-Diamond* that a broader interpretation of Section 201's gratuity provision might criminalize "token gifts" and other legal conduct, *id.*, appellants argue that for similar reasons "the text of the two statutes [§§ 201 and 666] can and should be read so as to make them parallel." FWDE-Br. 27; *accord* PUGH-Br. 72-74; RP-Br. 51; McN-Br. 30-34 (arguing Section 666 must be read to contain Section 201's "but for" prerequisite because text of Section 666 alone is inadequate). But if Congress had intended Section 666 to be interpreted the same as Section 201, it would have used the same language. It did not.

In fact, Section 201 is "a markedly different statute than . . . 18 U.S.C. § 666." *Abbey*, 2009 WL 874487 at *6. While Section 201 prohibits "a public official [from] corruptly . . . accept[ing] . . . anything of value . . . *in return for* being influenced *in the performance of any official act*," Section 666 more broadly prohibits a local government official from "corruptly . . . accept[ing] . . . anything of value . . . *intending to be influenced or rewarded in connection with any business*" of that government. (Emphasis added). In addition, while the term

[32] The statute defines "official act" as "any decision or action on any question [or] matter . . . which may at any time be pending." 18 U.S.C. § 201(a)(3).

"official act" in Section 201 is "carefully defined" by the statute, *Sun-Diamond*, 526 U.S. at 406, 119 S.Ct. at 1407, Congress chose not to limit the otherwise broad meaning of "in connection with *any business*" in Section 666. (Emphasis added). *See United States v. Svete*, 556 F.3d 1157, 1169 (11th Cir. 2009) (*en banc*) (construing 18 U.S.C. § 1341 and concluding that "the word 'any' conveys the broad and unambiguous reach of the statute"). This choice was not by accident. As *Sun-Diamond* explained, "§ 201[] is merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions" by federal employees. 526 U.S. at 409, 119 S.Ct. at 1408; *see Abbey*, 2009 WL 874487 at *6.

With respect to federal funds programs, however, Congress enacted Section 666 specifically to "fill[] the regulatory gaps" in existing law, including Section 201, by extending federal prohibitions against corruption to bribes paid to local and state officials whose agencies received federal funding.[33] *Sabri v. United States*, 541 U.S. 600, 606-08, 124 S.Ct. 1941, 1946-47 (2004). But while Section 666 was

[33] Congress believed that existing statutes such as Section 201 had failed sufficiently to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S. Rep. No. 98-225, at 369-70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11. Section 666 filled this "serious gap in the law" by "*creat[ing] new offenses* to augment the ability of the United States to vindicate" such criminal activity. *Id.* at 3510 (emphasis added).

enacted to fill a "gap" not covered by Section 201, Section 666 is not patterned on the language of Section 201. Rather, the wording of Section 666, both as originally enacted and in its current form, "parallels the bank bribery provision (18 U.S.C. 215)." H.R. Rep. No. 99-797, at 30 n.9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138, 6153 n.9.

As originally enacted in 1984, Section 666 prohibited giving or receiving "anything of value for or because of the recipient's conduct in any transaction or matter or any series of transactions . . . concerning the affairs" of a state or local government agency. 18 U.S.C. § 666(c) (Supp. II 1984). Section 215, passed that same year, used similar wording to prohibit giving to or receiving by an employee of a financial institution "anything of value . . . for or in connection with any transaction or business of such financial institution." 18 U.S.C. § 215(b) (Supp. II 1984).

By the following year, however, Congress recognized that "[b]ecause section 215 does not require a corrupt or bad purpose, it reaches all kinds of otherwise legitimate and acceptable conduct . . . without regard to the intention of the [bank official or of] the giver, . . . [such as] a company's donation of free space to a credit union serving its employees." H.R. Rep. No. 99-335, at 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1782, 1784. Congress therefore amended Section 215 to "require for criminal liability that the person giving or receiving a bribe or reward act

corruptly." *Id.* at 1786. Congress intended that this *mens rea* addition would confine prosecution to "conduct that involves an effort 'to undermine an employee's fiduciary duty to his or her . . . employer,'" and thereby "punish[] only that activity which ought to be illegal." *Id.* (citation omitted).

Thus, Section 215(a) as currently written prohibits "corruptly" giving or receiving "anything of value to any person, with intent to influence or reward an . . . employee . . . of a financial institution in connection with any business or transaction of such institution." Shortly after amending Section 215, Congress amended Section 666 to its present form, using virtually identical language to that of Section 215, "to avoid its possible application to acceptable commercial and business practices." H.R. Rep. 99-797, *supra*, 1986 U.S.C.C.A.N. at 6153. As amended, Section 666 does not criminalize all acts of giving things of value to a state or local official with the intent to influence government business, but only those done "corruptly." For example, a local minister would not violate Section 666 by giving members of a zoning commission a book explaining how adult entertainment establishments harm a community's business and residential development, intending to honestly persuade and thereby influence the commissioners to rezone their community's red-light district out of existence. It is the *mens rea* element of acting "corruptly" with an intent to influence that makes a particular intent to influence any government business criminal. *See, e.g., Abbey*,

2009 WL 874487 at *6; *United States v. Ford*, 435 F.3d 204, 212 (2d Cir. 2006).

For all the above reasons, the *Abbey* court held that "[t]here is simply no good reason, either in text or policy, to inject *Sun-Diamond*'s heightened requirements into § 666." 2009 WL 874487 at *6; *accord United States v. Ganim*, 510 F.3d 134, 146 (2d Cir. 2007) (same). This Court should do the same.

2. Section 666 Has Not Been Interpreted To Require Proof Of A Specific *Quid Pro Quo*

Contrary to appellants' contention, no Circuit has held that a violation of Section 666 "require[s] the jury to find that gifts were given with the specific intent that they were in exchange for specific favors . . . and should state what those favors were." Rasts-Br. 84; *accord* FWDE-Br. 22, 28. In fact, the Sixth Circuit has expressly rejected that contention. *Abbey*, 2009 WL 874487 at *5-7.

While appellants claim that Section 666 should be construed narrowly, both the Supreme Court and this Court have refused to do so. In *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469 (1997), the Court concluded that "[t]he enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered," and especially "[t]he word 'any,' which prefaces the business and transaction clause, undercuts the attempt to impose [petitioner's] narrowing construction" that would have limited Section 666 bribes to only those affecting federal funds. *Id.* at 56-57, 118 S.Ct. at 473-74. In *Sabri*, the Court observed that

Congress chose to protect the funds it disburses to state and local government agencies by ensuring "the integrity of the state, local and tribal *recipients* of federal dollars." 541 U.S. at 605, 124 S.Ct. at 1946 (emphasis added). The Court continued:

> Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. *And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers.*

541 U.S. at 606, 124 S.Ct. at 1946 (emphasis added).

In *United States v. Castro,* 89 F.3d 1443 (11th Cir. 1996), this Court similarly concluded that "appellants' narrow reading" of Section 666, to require "a direct *quid pro quo* relationship between [the briber] and an agent of the agency receiving federal funds . . . would belie the statute's purpose 'to protect the integrity of the vast sums of money distributed through federal programs.'" *Id.* at 1454 (quoting S. Rep. No. 98-225, *supra*); *accord United States v. Rooney*, 37 F.3d 847, 851 (2d Cir. 1994). Indeed, in *Castro,* the Court listed the elements of a Section 666 violation as:

> (1) g[iving] or offer[ing] to give a thing of value to any person (2) with the corrupt intent to influence or reward an agent of an organization that in a one-year period received benefits in excess of $10,000 under a federal program (3) in connection with any business transaction or series of transactions of such organization, government, or agency involving anything of the value of $5,000 or more.

89 F.3d at 1454. These elements track the express language of Section 666, and do not require "proof of the intent to influence or reward something identifiable and particularized." FWDE-Br. 22. *See United States v. Bornman*, __ F.3d __, No. 07-3447, 2009 WL 567072 at *12 (3d Cir. Mar. 6, 2009) ("argument that the government failed to introduce evidence of a *quid pro quo* is without merit because the statute requires no such evidence").

To be sure, many bribery cases will involve an identifiable and particularized official act – for example, "a $5,000 kickback for obtaining various regulatory approvals" needed to build a hotel and retail structure. *Sabri*, 541 U.S. at 602-03, 124 S.Ct. at 1944; *accord United States v. Siegelman*, __ F.3d __, No. 07-13163, 2009 WL 564659 at *2 (11th Cir. Mar. 5, 2009) ($500,000 payment "in exchange for" appointment to state board). But as the courts have explained, bribery can also take the form of "ongoing schemes . . . [including] a scheme involving payments at regular intervals in exchange for specific official acts as the opportunities to commit those acts arise." *Ganim*, 510 F.3d at 147; *accord United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998). If appellants were correct, their rule would permit someone to pay an official a significant sum of money intending that the payment would produce future influence and favors without violating Section 666. Such a result would "subvert the ends of justice" and, especially in cases like this one involving ongoing schemes, "would legalize some of the most

pervasive and entrenched corruption." *Ganim*, 510 F.3d at 147. Thus, the courts have concluded that in such cases, any *quid pro quo* required by Section 666 is satisfied "with the intent to retain the official's services on an 'as needed' basis," so the official will act favorably when opportunities arise. *Jennings*, 160 F.3d at 1014; *accord Ganim*, 510 F.3d at 147.

No case cited by appellants requires a different result. Contrary to the Rasts' claim, Rasts-Br. 63, *United States v. Massey*, 89 F.3d 1433 (11th Cir. 1996), does not hold that Section 666 requires "the evidence as a whole [to] show 'a meeting of the minds to exchange official action for money.'" Under Section 666, as with Section 201, giving a bribe and receiving a bribe are separate crimes, and each depends only upon the intent of the particular person at issue.[34] *See, e.g.*, *Ford*, 435 F.3d at 212; *United States v. Muhammad*, 120 F.3d 688, 693 (7th Cir. 1997) ("a defendant violates § 201 by merely seeking or demanding a bribe, regardless of whether he accepts or even agrees to accept it"). That the Court in *Massey* found "that sufficient evidence supports the jury's finding that Massey agreed to pay [Judge] Sepe's lunch bills at Buccione in exchange for court appointments," 89 F.3d at 1439, simply reflects the evidence in that case and does not suggest that a meeting of the minds is necessary in all cases. *See United States v. Gee*, 432 F.3d

[34] As the court explained in *McNair*, that a briber can be found guilty while the alleged bribee is acquitted, and *vice versa*, "undermines the argument that there must be a specific *quid pro quo*." 061R679:2.

713, 714 (7th Cir. 2005) ("money for a specific [official] act is *sufficient* . . . but . . . not *necessary*.").[35]

Thus, under Section 666 the courts have concluded that the intent – or *quid pro quo* – element is exactly what the express language of the statute says: a corrupt intent to influence or reward a government employee in connection with any business or transaction of the government agency. *See, e.g.*, *Abbey*, 2009 WL 874487 at *7 (holding "proper approach here is to hew to the statute's language"); *Ford*, 435 F.3d at 213 (accepting a "thing of value while 'intending to be influenced'" is equivalent to a *quid pro quo* under Section 666); *United States v. Agostino*, 132 F.3d 1183, 1189-90 (7th Cir. 1997) ("We decline to import an additional, *specific quid pro quo* requirement into the elements of § 666(a)(2).") (emphasis added). As the court explained in *Gee*: "A *quid pro quo* of money for a specific legislative act is *sufficient* to violate [Section 666], but it is not *necessary*. It is enough if someone 'corruptly solicits . . . anything of value from any person,

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[35] In *United States v. Griffin*, 154 F.3d 762 (8th Cir. 1998), a Sentencing Guidelines case which Roland Pugh also cites, RP-Br. 55, the court merely concluded that the "evidence of an agreement to exchange Simmon's money for Griffin's actions is sufficient" to sustain a sentence for bribery. 154 F.3d at 764. Finally, in *United States v. McCarter*, No. 05-11121, 2007 WL 708979 (11th Cir. Mar. 9, 2007), PUGH-Br. 74; Rasts-Br. 63; McN-Br. 23-24, the defendants were convicted of bribery under both Sections 201 and 666. *See id.* at *3-4. Having found sufficient evidence that the defendants gave an official things of value "in exchange for the award of contracts," *id.* at *6, the Court had no need to distinguish between the two statutes.

intending to be influenced or rewarded in connection with any business . . . .'"[36] 432 F.3d at 714-15.

Appellants' error is their assumption that the term *quid pro quo* always means "in exchange for." Rasts-Br. 61; PUGH-Br. 71, 74. "But not all quid pro quos are made of the same stuff." *Abbey*, 2009 WL 874487 at *3. For example, while the Hobbs Act, 18 U.S.C. § 1951, requires proof of an "explicit" *quid pro quo* for extortion "under color of official right," *McCormick v. United States*, 500 U.S. 257, 273-74, 111 S.Ct. 1807, 1816-17 (1991), that requirement is satisfied whenever "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[37] *Evans v. United*

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[36] Appellants' reliance on the Seventh Circuit's earlier opinion in *United States v. Medley*, 913 F.2d 1248, 1260 (7th Cir. 1990), PUGH-Br. 75; McN-Br. 29, where the court stated that "[t]he essential element of a section 666 violation is a 'quid pro quo,'" ignores the Seventh Circuit's subsequent explanation in *Agostino*. *Agostino* states that the *Medley* court's reference to a *quid pro quo* "was not positing an additional element to the statutory definition of the crime . . . . The elements of the offense remain those that are set forth in the statutory language." 132 F.3d at 1190. In light of that explanation, McNair's claim that the text of Section 666 is inadequate because it "does not explicitly sate (sic) the quid pro quo requirement," McN-Br. 30, and, therefore, that an instruction that follows the statutory language is similarly inadequate, *id.* at 30-36, is wrong.

[37] *McCormick* was based on the unique circumstances surrounding campaign contributions, 500 U.S. at 272-73, 111 S.Ct. at 1816-17, and expressly limited its holding to campaign contributions. *Id.* at 274 n.10, 111 S.Ct. at 1817 n.10. This Court's recent decision in *Siegelman* also involved a campaign contribution. Because the district court's instructions satisfied *McCormick*'s explicit *quid pro quo* requirement, however, the Court did not have to determine "whether or not a *quid pro quo* instruction was legally required" under Section 666. 2009 WL

States, 504 U.S. 255, 268, 112 S.Ct. 1881, 1889 (1992). Thus, an official can be guilty of Hobbs Act extortion without ever having had "any intention of *actually* exerting his influence on the payor's behalf." *Abbey*, 2009 WL 874487 at *4. In short, *quid pro quo* is simply used as a shorthand way of referring to the specific intent required by the particular corruption statute in question. *See, e.g.*, *United States v. Lopreato*, 83 F.3d 571, 575 (11th Cir. 1996) (noting that 18 U.S.C. § 1954's "'with intent to be influenced' language" equates to *quid pro quo*).

Finally, appellants' claim that Section 666 is ambiguous at best and, therefore, that this Court must apply the rule of lenity and construe the statute narrowly, is wrong. FWDE-Br. 25-26; Rasts-Br. 72-75. The rule of lenity is applied "when a broad construction of a criminal statute would 'criminalize a broad range of apparently innocent conduct.'" *Svete*, 556 F.3d at 1169 (quoting *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 2088 (1985)). The existence of some statutory ambiguity is not sufficient to warrant application of the rule, because most statutes are ambiguous to some degree. *United States v. Muscarello*, 524 U.S. 125, 138, 118 S.Ct. 1911, 1919 (1998). Nor does the mere possibility of a narrower statutory construction make the rule of lenity applicable. *Svete*, 556 F.3d at 1169. In order to invoke the rule there must be a "grievous ambiguity."

564659 at *7. Of course, the instant appeals do not involve campaign contributions.

Muscarello, 524 U.S. at 138-39, 118 S.Ct. at 1919 ("The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'") (citation omitted).

The rule of lenity is inapplicable here because the express language of the statute limits its scope so that the statute does not criminalize innocent behavior. Indeed, far from having to guess what Congress intended, Congress clearly explained that when it amended the statute to require that a defendant "act corruptly," it did so specifically to "punish[] only that activity which ought to be illegal." H.R. Rep. No. 99-335, *supra*, 1986 U.S.C.C.A.N. at 1786. The rule of lenity does not require that appellants' literal and specific *quid pro quo* be read into the statute as a separate element. *E.g.*, *Agostino*, 132 F.3d at 1190. Instead, the statutory language of Section 666 makes clear what Congress intended, and there is no "grievous ambiguity" here requiring application of the rule.

Accordingly, to establish a violation of 18 U.S.C. § 666, the government was not required to charge or show that a specific act was intended or done in exchange for a thing of value given to or received by a JCESD official. Rather the government had to allege and prove that a thing of value was given with a corrupt intent to influence or reward a JCESD official, or received by a JCESD official with a corrupt intent to be influenced or rewarded, in connection with any business of that agency.

B. The Indictment Sufficiently Charged A Violation of 18 U.S.C. § 666

Appellants claim that the Indictment is insufficient because it failed to charge a specific and literal *quid pro quo*. McN-Br. 42-45. Whether an indictment is sufficient is a question of law reviewable *de novo*. *United States v. Steele*, 178 F.3d 1230, 1233 (11th Cir. 1999).

"An indictment is sufficient 'if it (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *Id*. at 1233-34 (citation omitted). An indictment need not allege the factual details that will be relied upon to support the charges. *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006). An indictment that tracks the language of the statute is sufficient, as long as it also provides a statement of facts and circumstances that give notice of the offense to the accused. *United States v. Walker*, 490 F.3d 1282, 1296 (11th Cir. 2007).

The Indictment here is sufficient under this standard. The bribery counts track the language of Section 666. That those counts do not mention a specific and literal *quid pro quo* requirement is irrelevant because, as explained above, Section 666 contains no such requirement.

C. The Jury Was Correctly Instructed On Bribery

Relying on their flawed interpretation of Section 666, appellants argue that the jury instructions on the elements of a Section 666 violation were erroneous in each of their cases because they did not require proof of a specific *quid pro quo*.[38] They also argue that the courts should have given their proposed theory of the defense instructions. In fact, the Section 666 instructions given contained a correct statement of the law, and appellants' proposed instructions on Section 666 were either unnecessary, given the court's instructions, or wrong because they required proof of a specific *quid pro quo*.

The standard of review for jury instructions was recently explained by this Court in *Svete*:

> We review a district court's refusal to give a requested jury instruction for abuse of discretion. In considering the failure of a district court to give a requested instruction, the omission is error only if the requested instruction is correct, not adequately covered by the charge given, and involves a point so important that failure to give the instruction seriously impaired the party's ability to present an effective case. We review *de novo* whether a jury instruction mischaracterized the law or misled the jury to the prejudice of the defendant. [T]he district court is given wide discretion as to the style and wording employed in the instructions, and we will reverse only if we are left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations. Questions of statutory construction are reviewed *de novo*.

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[38] Essentially the same Section 666 jury instructions were given at all four trials. Thus, unless otherwise noted, the arguments in this section apply equally to all four trials.

556 F.3d at 1161 (citations and internal quotation marks omitted).

Consistent with their erroneous interpretation of Section 666, appellants asked the court to instruct the jury that Section 666 requires proof of a specific *quid pro quo*. For example, in *McNair* PUGH asked the court to charge the jury that:

> In order for you to find Defendant Pugh Construction guilty, you must find beyond a reasonable doubt that Pugh Construction gave something of value to Defendant McNair with the specific intent of obtaining a *quid pro quo,* that is, *that Pugh Construction gave the item of value with the specific intent to improperly cause Defendant McNair to commit a specific act* in favor of Pugh Construction, or with the specific intent of illegally rewarding Defendant McNair for having previously committed such an act. *In other words,* the United States must show that Pugh Construction provided the item of value either (1) *with the expectation that Defendant McNair would improperly provide something specific in return* or (2) for the purpose of rewarding McNair for something improper that Defendant McNair had previously done.

061R522:14 (emphasis added).[39] Similarly, the Rasts asked the court to further charge the jury that it must find that "there was a connection or link between a specific thing of value alleged in the Indictment . . . and some specific business, or a specific transaction, or a series of specific transactions connected with the JCESD." 061R606:51 (Instruction No. 41). *See also* McN-Br. 28-36.

Judge Propst rejected these arguments and the judges in the subsequent cases agreed with his rulings. Specifically, Judge Propst stated:

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[39] PUGH and the other appellants proposed virtually identical instructions in every trial. *See, e.g.*, 542R54:15; 544R104:38-39; 545R73:12.

> You're asking me to state "you must find that the defendant intended for the official to engage in some specific act or omission" and I'm not going to give that charge. I just don't think it's -- the statute doesn't say that, the pattern charge doesn't say that. I would be the first person to say it.

061R935:1902. Instead, the court explained, "the quid pro quo is if it is given to influence or reward." *Id.* at 1897. The court then pointed out a significant difference between the language of Section 201, on which appellants rely, and Section 666: "what I'm talking about is 201 talks about official acts. 866 [sic] does not use that term 'official act' it uses 'business' which is obviously more general than an official act." *Id.* The court therefore gave this Circuit's Section 666 pattern instruction[40] and told the jury:

> As I've said, the defendants, other than Jewell C. "Chris" McNair, are charged in various counts of violating a portion of Title 18, Section 666, which makes it a federal crime or offense for anyone to corruptly give, offer or agree to give anything of value to anyone who is an agent of a local government receiving significant benefits under a federal assistance program intending to reward or influence that agent in connection with any business, transaction, or series of transactions of such local government involving anything of value of $5,000 or more.
>
> * * *
>
> Fifth: And this is another thing that the government would have to prove beyond a reasonable doubt.
>
> That each such gift, offer or agreement to give, that by each of those gifts, offer or agreement to give, the Defendant [] corruptly intended to reward or influence Jewell C. "Chris" McNair in connection with a

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[40] *See* Eleventh Circuit Pattern Jury Instructions (Criminal Cases) at 180-81 (Offense Instruction 24) (2003).

> transaction, or series of transactions, with Jefferson County, Alabama, which transaction or series of transactions involved something of value of $5,000 or more.
>
> Sixth: That in doing so, the Defendant [] acted corruptly.
>
> An act is done "corruptly" if it is performed voluntarily, deliberately, and dishonestly, for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by an unlawful method or means.

061R938:2335-37.

Because appellants argued that they gave things to JCESD employees strictly out of friendship, they requested the jury be instructed that if it found that a thing of value was given out of friendship or merely to foster goodwill and not to corruptly influence or reward, then a not guilty verdict was required. *See*, *e.g.*, 061R552:13-14. The court therefore supplemented the Section 666 pattern instruction with the following:

> Section 666 . . . does not prohibit all gifts by or to a public official, but only gifts with the corrupt intent to influence or reward specified government officials in connection with business, or transactions, or series of transactions, of that governmental entity.

061R938:2337.[41] When appellants insisted that the court more specifically single out friendship and goodwill gifts as legal, the court responded that "if it's corrupt and dishonest, it's not for good will, is it?" 061R935:1893. The court explained

[41] *See* 061R938:2371-72 (Roland Pugh's counsel admitting "[t]hat's the *quid pro quo*" in discussing this instruction after it was charged to the jury).

that giving appellants' instruction would "carr[y] with it some sort of suggestion that I'm adopting that idea that that's what these payments were." *Id.* at 1895. The following exchange then took place:

> THE COURT: What if it's good will and corrupt?
>
> [Defense Counsel]: It can't be.
>
> THE COURT: Okay. That's your answer.

Id.

Thus, the instructions given not only followed this Circuit's pattern instructions, they also accurately tracked the language of Section 666. "Where a district court's jury instructions accurately track the language and meaning of the relevant statute, we generally will not find error." *United States v. Alfisi*, 308 F.3d 144, 150 (2d Cir. 2002); *accord United States v. Paradies*, 98 F.3d 1266, 1289 (11th Cir. 1996) (Section 666 jury instruction that "tracked the statutory requirements" was not "plainly erroneous").

Appellants' criticism of the Section 666 jury instructions is largely based on their erroneous interpretation of that statute. *E.g.*, McN-Br. 20, 23-29; Rasts-Br. 59-63; PUGH-Br. 71-74, 83-86, 98-99, 102. But Section 666 does not require proof of a specific *quid pro quo*, so the courts did not err in refusing to include that phrase in their instructions. In fact, in *Barber*, the court was understandably doubtful that "giving the jury a Latin term is going to clear things up for them."

542R130:1576. Accordingly, all objections to the jury instructions based on appellants' specific *quid pro quo* claim lack merit, and all of their proposed jury instructions, which reflected their flawed interpretation of Section 666, were wrong. *E.g.*, *Abbey*, 2009 WL 874487 at *7.

Appellants' contention that the Section 666 jury instruction in this case "was essentially identical," McN-Br. 38, or "nearly identical," PUGH-Br. 96, to the Section 666 instruction found to be plain error in *Jennings* is incorrect. In *Jennings*, the district court's Section 666 instruction erroneously conflated "corruptly" with "intent to influence" by charging that "the government must prove . . . that [Jennings] did so corruptly, that is, with the intent to influence or reward [Morris] in connection with [HABC] business . . . ." 160 F.3d at 1019. However, Congress clearly understood that not all things given with an intent to influence are illegal. It is the fact of acting "corruptly" – dishonestly seeking an illegal goal or a legal goal illegally – that separates permissible from criminal. *See supra* pp. 58-59. Thus, the *Jennings* court explained that "a correct definition of 'corruptly' must modify the 'to influence or reward' language" otherwise "an instruction mistakenly suggests that § 666 prohibits *any* payment made with a generalized desire to influence or reward (such as a goodwill gift)." 160 F.3d at 1020. The *Jennings* charge was therefore clearly incorrect.

In contrast, the Section 666 instructions in this case did not conflate

corruptly with intent to influence or be influenced. As Judge Proctor correctly observed, comparing the *Jennings* instruction to the ones given below was like comparing "apples and oranges." 542R130:1578-79. In explaining that the *Jennings* instruction was not "anything close to what we're giving here," Judge Proctor concluded that "I probably would have a problem with that instruction too. I don't know what it means." *Id.* at 1577.

Appellants also are wrong that the instructions in *United States v. Woodall*, No. 05-13836, 2006 WL 700933 (11th Cir. Mar. 21, 2006), "included the crucial *quid pro quo* language requested by [PUGH]," and that the government there argued that the instructions permitted conviction "*only* if the defendant knew he was being given the money 'in exchange for a specific requested exercise of his official power.'" PUGH-Br. 95 (quoting Brief of Appellee [hereinafter Appellee's Brief] at *28, *United States v. Woodall*, No. 05-13836, 2005 WL 4798529 (11th Cir. Nov. 14, 2005) (emphasis added)). In fact, the court's full instructions in *Woodall* (quoted on pp. *26-27 of Appellee's Brief) followed this Circuit's pattern instruction and did not include any *quid pro quo* language in the "elements" of the offense. Those instructions further told the jury that it could convict only "so long as the elements described on page 8 of the instructions are proven." Appellee's Brief at *27. The court's mention of a "payment in exchange for . . . official [action]" was made solely in explaining that the government did not have "to prove

that the defendant demanded or requested the money," or "that the defendant actually fulfilled an agreement to exercise his official power." *Id.* at *27-28. Moreover, the government argued that under the instructions given "the jury *had to find* that [defendant] accepted the money 'corruptly' and that . . . 'he intended to be influenced or rewarded.'" *Id.* at 28 (emphasis added).

Finally, appellants' proposed instructions were too argumentative and not necessary to explain their theory of the defense to the jury. PUGH-Br. 103-05. Many of appellants' proposed jury instructions sounded more like a closing argument than a statement of the law intended to guide the jury in its deliberations, and were objectionable on that ground alone. 061R935:1895 (Judge Propst observing that proposed instruction suggested how jury should characterize payments).[42]

In any event, considered in their entirety, the courts' instructions on the statutory elements of bribery were legally sufficient and did not permit the jury to convict if it believed that appellants had simply given or received honest gifts of *any* kind. In order to convict, each jury was told that Section 666 requires, in the case of a public official, a corrupt intent to be influenced or rewarded in connection with official JCESD business and, in the case of the bribe payer, a corrupt intent to

[42] In *Barber*, the court similarly commented that the appellants' proposed instruction "blends argument with an instruction on the law [and would] be confusing to the jury." 542R130:1580, 1584.

influence or reward an official in connection with JCESD business. Corruptly, they further were told, means acting dishonestly to accomplish an unlawful goal or a lawful goal through unlawful means. These instructions, which reflect the plain language of Section 666, prevented the juries from convicting for the giving or receiving of mere friendship gifts – as many of the appellants claimed they gave or received – or goodwill gifts that were accompanied by only a vague expectation or hope of some future benefit.[43] Indeed, the juries were explicitly told that "Section 666 . . . does not prohibit all gifts . . . but only gifts with the corrupt intent to influence or reward specified government officials in connection with business . . . of that governmental entity." 061R938:2337.

McNair is wrong that the trial courts' definition of "corruptly" was "circular" and inadequate.[44] McN-Br. 36. When Congress amended Sections 215 and 666 in

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[43] Although the appellants argued that they acted out of friendship, none argued that they gave or received something as a "goodwill gift" or "gratuity." McNair's assertion that "the testimony was that the gifts were mere gratuities," McN-Br. 35, is wrong and unsupported by the transcript pages he cites.

[44] Every definition of "corruptly" included in appellants' proposed jury instructions, 061R522:3, 14 (PUGH); 061R545:44-45, 47-48 (Bobby and Danny Rast); 061R606:44 (RAST); 061R609:5-6 (Roland); 544R110:41 (Swann, adopted by Dougherty), was virtually identical to the one given by the court, 061R938:2335-37. McNair proposed no definition for corruptly. Subsequently during the *McNair* trial, PUGH proposed adding to the definition "that an act is done corruptly if it is done with the intent to secure an unlawful benefit either for oneself or for another." 061R615:9. That addition, however, is flawed because, among other reasons, a briber may intend to influence an official *to another's detriment.*

1986, it explained the term "corruptly" almost exactly as did the jury instructions below: "The term 'corruptly' means that the act is done 'voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.'" H.R. Rep. No. 99-335, *supra*, 1986 U.S.C.C.A.N. at 1787 n.24 (quoting 2 E. Devitt & C. Blackman, *Federal Jury Practice and Instructions* § 34.08 (3d ed. 1977)). The Tenth Circuit has defined "corruptly" under Section 215 in a virtually identical fashion. *See United States v. Denny*, 939 F.2d 1449, 1451 (10th Cir. 1991). This is not surprising since corruptly has a long-standing meaning and is "normally associated with wrongful, immoral, depraved, or evil." *Arthur Anderson, LLP v. United States*, 544 U.S. 696, 705, 125 S.Ct. 2129, 2136 (2005).

That Congress also noted that "[t]he *motive* to act corruptly *is ordinarily* a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit or benefit to another," H.R. Rep. 99-335, *supra*, 1986 U.S.C.C.A.N. at 1787 n.24 (quoting Devitt & Blackman) (emphasis added), is irrelevant. First, the donor's motive is immaterial if he possesses the requisite corrupt intent to influence. Second, noting what a motive might *ordinarily* be admits that in any particular case it might be something different – in bribery cases, for example, revenge or deceit. Finally, the juries below were instructed that "corruptly" means dishonestly seeking either an unlawful result or a lawful result through unlawful

means, and that explanation "contain[s] the implicit undertone that the person seeking either of those two results *seeks an* '*improper benefit*.'" E. Tamashasky, *The Lewis Carroll Offense*, 313 J. Legis. 129, 146 (2004) (emphasis added).

Nor did the instructions permit the jury to convict for something less than a bribe – *e.g.*, a legal or even illegal gratuity. PUGH-Br. 98-99. As the Supreme Court explained in *Sun-Diamond*, a gratuity of any kind is not given with intent to influence but, rather, is given merely for or because of official action. 526 U.S. at 404-05, 110 S.Ct. at 1406-07. Indeed, intent "to influence" or "to be influenced" separates a bribe from a gratuity (and also from a friendship gift). *Id.*

Because each jury was told it could convict only for things of value that were corruptly given or received with intent to influence or to be influenced, and because juries are presumed to have followed their instructions, they could have convicted below only for bribery and for no other action. As defense counsel admitted, a gift cannot be both for good will and corrupt. 061R935:1895; *accord* PUGH-Br. 105. *See, e.g.*, *Abbey*, 2009 WL 874487 at *6; *Ford*, 435 F.3d at 211-12. 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 courts' refusal to define friendship or goodwill gifts, or to expressly excise them from conduct otherwise illegal under Section 666, was not error.

In any event, appellants presented their theory of the defense to the juries which were free to decide whether gifts were given or bribes were paid.[45] Under these circumstances, any error in not giving an additional instruction on gifts was harmless because it did not prevent appellants from presenting their defense to the jury. *United States v. Yeager*, 331 F.3d 1216, 1223-24 (11th Cir. 2003).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE JURIES' 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 grounds 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.

[45] *See infra* note 48 and accompanying text.

A. The Evidence Fully Supports The Bribery Convictions

In claiming below that the things of value given or accepted were not bribes, appellants accurately described this as a "one issue" case. 544R243:2190. Given the irrefutable documentary evidence and witness accounts that the things charged in the Indictment were in fact given and accepted, appellants meaningfully disputed only the intent with which they were given and accepted. Likewise, on appeal, their sufficiency challenges focus on intent, and consist essentially of three claims. First, they argue the evidence failed to show intent to engage in a specific *quid pro quo*. *E.g.*, Rasts-Br. 87-93. As explained above, however, while a specific *quid pro quo* may be "*sufficient*" to show the intent element under Section 666, it is not "*necessary*" because it is not an element of the offense. *Gee*, 432 F.3d at 714-15.

Second, appellants claim that proof of intent fails because some government witnesses testified that when they gave or accepted things of value they never intended to receive or give anything in return. PUGH-Br. 80-90; RP-Br. 59-63; Rasts-Br. 104-05. These "denials," however, were not as unequivocal as appellants suggest.[46] In any event, "[i]t goes without saying that matters of intent are for the

[46] For instance, while unable to recall receiving any specific benefit, Grady Pugh testified that "a general benefit to be had for Mr. McNair in giving him envelopes of cash" was "Jefferson County treated us real well." 061R930:566. Grady also believed "there were benefits to [PUGH] for keeping defendant Swann happy." 544R232:1905. He explained that bribed JCESD officials "could make things easier, make changes that would make things more profitable." 545R143:1377. And Chandler, when asked if he ever did anything as a result of

jury to consider." *McCormick*, 500 U.S. at 270, 111 S.Ct. at 1815. And juries may infer specific intent wholly from circumstantial evidence. *United States v. Macko*, 994 F.2d 1526, 1533 (11th Cir.1993). "Weighing the credibility of witnesses . . . is within the province of the jury, and the jury is free to believe or disbelieve any part or all of the testimony of a witness." *United States v. Prince*, 883 F.2d 953, 959 n.3 (11th Cir. 1989). In this case, therefore, the juries were free to believe witnesses who admitted giving or receiving envelopes of cash and other things of value and infer corrupt intent while, at the same time, disbelieving their self-exonerating denials that they never expected to receive or give anything in return.[47] *See United States v. Cruz-Valdez*, 773 F.2d 1541, 1547 n.6 (11th Cir. 1985) (*en banc*) ("The jury was free to believe the inculpatory part of his statement and disbelieve the exculpatory part.").

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the trips PUGH gave him, testified he "didn't think so" and "[n]othing specific," but that "[i]t's hard to say what real influence there was when you're dealing with friends." 061R932:1030-31.

[47] Swann testified and denied having corrupt intent when he accepted things of value. For example, he called the $1,000 in gift certificates Yessick gave him "a very generous gift," but maintained it did not "reward or influence" him. 544R232:1630; *see also* 544R232:1636. Given the opportunity to evaluate Swann's credibility themselves, however, the jurors were "entitled not only to disbelieve his testimony but, in fact, to find that the opposite of his testimony was true." *United States v. Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008); *see United States v. Williams*, 390 F.3d 1319, 1326 (11th Cir. 2004) ("Where some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in [his] own defense, the [d]efendant's testimony, denying guilt, may establish, by itself, elements of the offense.").

Appellants' third argument is a rehash of the argument they unsuccessfully made to the juries: they gave and received the things of value out of friendship. Therefore, the question for the juries was whether these things of value were given and received out of friendship, as appellants claimed, or with a corrupt intent to influence or be influenced, as the government claimed. Appellants made this vividly clear in their closing arguments: "What's this case about? It's about a friend helping a friend and the government saying it's a crime."[48] 544R243:2238.

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[48] *Accord,* 061R937:2210, 2221 (Rasts "adamantly deny . . . that there was any corrupt intent, that there was any bribe, that there was any intent, whatsoever, to influence Chris McNair"; intent is "the fundamental issue"); 061R937:2223, 2226 ("Dougherty is here because his heart is too big. Intent is the central issue . . . . [Dougherty] did all of those things out of the goodness of his heart, and had no expectation of anything perhaps other than a thank you"); 061R938:2246-47 ("What Mr. McNair's heart and mind, what he thought, and I submit to you not one witness has testified to what McNair thought, what he intended."); 544R243:2259 ("the real issue in this case is the the matter of corrupt intent"); 061R937:2221 ("[R]elationship between the McNairs and the Rasts was unique. Not corruptly unique. But unique in the sense that it was one based on respect and friendship."); 061R937:2234 ("Commissioner McNair felt comfortable calling on a friend. . . . [And Dougherty] gave him $50,000."); 544R243:2267 (FWDE provided services out of "admiration and friendship"); 544R232:73 (RAST acted out of "genuine friendship"); 544R243:2190 (PUGH: "it's really going to come down to one issue . . . whether or not . . . Eddie Yessick . . . had the corrupt intent to influence or reward Jack Swann"); 542R131:1641 ("when I asked him what was in your heart, Mr. Yessick, when you did these things [for Barber]? Friendship? He called it fellowship."); 542R131:1654 ("Clarence Barber, why did you do these things? . . . I think he said exclusively out of friendship."); 545R146:63 ("I told you that in the end this case was going to come down to one issue . . whether or not Grady Pugh had the intent to bribe Ron Wilson . . . that is the one and the only issue that you all will have to decide."); *see also* 061R937:2204-05; 544R232:50-51, 75, 87-88; 544R243:2237, 2241.

Thus, here, as in *Medley*, "it was either a [friendship gift] or it was corruption, between which there is a distinct line." 913 F.2d at 1261.

Ample evidence supports the juries' conclusions that the alleged friendship gifts fell on the corruption side of that line. First, there was no evidence that the contractor-appellants gave "gifts" worth hundreds of thousands of dollars to their JCESD "friends" before the sewer rehabilitation. The juries could reasonably conclude that the excessively generous payments made after the sewer work began were actually bribes intended to make sure the contractors profited from the work.

Second, the evidence established a "course of conduct" of goods, services, and cash flowing to JCESD's project engineers, assistant director, and director and on up to the commissioner in charge, with intent to influence a pattern of official actions favorable to the contractor-donors. *Jennings*, 160 F.3d at 1014. In fact, the evidence established "pervasive and entrenched corruption," *Ganim*, 510 F.3d at 147, a classic "'I'll scratch your back if you scratch mine' arrangement." *Jennings*, 160 F.3d at 1014. As Grady Pugh explained on cross-examination by PUGH's counsel, when Grady gave Wilson the "scholarship" Grady "felt like if Ron [Wilson] got a chance to help us and return the favor, he would." 545R143:1153.

The large sums of money on both sides of the bribes indicate a common goal shared by all appellants: to increase each other's wealth through illegal means. *Cf. 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, 221-22 (5th Cir. June 15, 1981) (same). Indeed, rational businessmen would not have continued to provide the massive amounts of goods, services, and cash that the contractors did during the lengthy sewer project unless they expected to receive benefits from the county officials receiving those payments. Roland's comment to Grady that this was "the last time" they had to pay off "that GD McNair" because "he is out of office" now, 061R929:331, and Dawson's acknowledgment that he would not have purchased the audio-video equipment for the studio if McNair was not part of the sewer rehabilitation process, 061R934:1555-56, prove the point.

Third, the extent to which the parties went to conceal their bribes is powerful evidence of their corrupt intent. *E.g.*, *United States v. Hunt*, 521 F.3d 636, 646-47 (6th Cir. 2008); *United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985) ("The defendants' elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing."). Finally, in many instances the bribes were blatantly solicited. Together, these factors totally defeat appellants' claims of innocence.

Jefferson County's $3 billion sewer rehabilitation effort spanned a decade. As Grady Pugh explained, the rehabilitation gave PUGH "an opportunity to do a

tremendous amount of work . . . [that] generated huge profits."[49] 061R930:566. From August 1999 to January 2002 alone, Jefferson County paid PUGH over $178 million, RAST over $100 million, and FWDE over $11 million. 061GX33A-C. Indeed, during that time-frame sewer rehabilitation formed the great bulk of these companies' work. *E.g.*, 061R928:230; 061R931:727; 061R934:1542; 061GX33A-C, 42A.

The bribed JCESD officials impacted the contractors' business with the county on a daily basis and for a period of years, which is why everyone in the chain of approval received bribes. Project engineers, such as Wilson and Ellis, were responsible for approving every pay request submitted by the contractors before sending them to Chandler, including certifying that the work charged for was necessary, done, and done correctly. 545R139:82-83; 545R141:586-87; 545R142:1034. They also approved all field directives, and most extension of time requests. 545R141:688-89.

Barber oversaw the county's twenty-six inspectors. 542R129:1124. Yessick, who had as many as twenty JCESD projects going at one time, testified that when he believed an inspector was being "irrational" he needed to be sure he could "call Clarence" to resolve those situations. 542R128:806-07. Barber also

[49] For example, PUGH's profits jumped from 10% in 1997 to 40-50% in 1999, 2000, and 2001 on its work for JCESD. 544R232:1434-35; 061GX33A, 42A.

was in charge of emergency work and awarded over 1,200 emergency no-bid contracts during the rehabilitation.[50] 542R127:520-22, 557-58, 678-79; 542R129:1123-29.

As director and assistant director of JCESD respectively, Swann and Chandler bore primary responsibility for the rehabilitation effort. 061R929:309-10; 061R932:883-84; 544R232:1604. They approved pay requests and contract modifications, and even personally approved some extensions of time.[51] 061R932:893-96, 919; 544R232:1338, 1618-21. As Grady Pugh explained, keeping Swann happy yielded benefits. 544R232:1905. Both Swann and Chandler were influential in McNair's choices for no-bid engineering contracts. 544R232:1286-88. Swann also negotiated the scope and price of each of those contracts. *Id.*

As the commissioner overseeing the JCESD, McNair was ultimately responsible for every aspect of the sewer rehabilitation effort and, therefore, bore

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[50] Barber, along with Chandler, Wilson, and Ellis, was on the PRC, which effectively limited the sewer project's "big jobs" to three construction companies – PUGH, RAST, and Reynolds. 061R932:925-32; 061R934:1462-63; 061R930:591-92; 061R930:572 (Grady Pugh: "There was a tremendous amount of work and there were only three bidders. So that made it even better.").

[51] Extensions of time were important because they avoided liquidated damages of $1,000 per day. 545R142:1063. Moreover, whenever construction was extended, the consulting engineer, such as FWDE or Dawson, who approved the request before forwarding it to the project engineer, was paid for each additional day of work. 061R932:895.

the greatest fiduciary responsiblity to the people of Jefferson County. Every Wednesday McNair met with Swann and/or Chandler to discuss the consultant contracts, contract awards and modifications, change orders, field directives, and pay requests that needed to be "authorize[d]" by him and/or the commission "in order that [they] could be paid." 061R932:890-92. McNair would then attend a pre-commission meeting each Thursday and set the agenda for the sewer items requiring approval by the full commission at its meeting the following Tuesday. 061R932:889-90.

Because all of the bribery at issue was part of appellants' overall scheme to use the sewer rehabilitation program for their own personal gain, this Court should reject appellants' repeated invitations to view each bribe in isolation. Rather, as explained more fully in Section IV below, every bribe made or received by any particular appellant – whether or not charged – is both relevant to an understanding of the overall scheme, and highly probative of that appellant's intent in giving or receiving the specific thing of value charged in each bribery count. *See* 061R679:11-12 (June 30, 2006 order).

1. The Dougherty And Dawson Bribes. FWDE's and Dougherty's intent to influence McNair and Swann, and McNair's and Swann's intent to be influenced

by them, is well supported.[52] McNair was the person almost wholly responsible for awarding the contracts that paid FWDE $8.1 million from August 1, 1999 through March 2001. 061R932:888; 061GX33C. During that time, FWDE provided Bill Bailey as a full-time construction superintendent for McNair's studio renovation. And rather than treat Bailey's salary as a personal, non-business expense, FWDE hid Bailey's time as company administration or work purportedly performed on a JCESD sewer project. 061R929:170-71, 259-63.

FWDE was even more effective at hiding the $50,000 reward-payment Dougherty made to Word Construction for building McNair's Arkansas house. Indeed, if the bookkeeper had not made copies of the invoice and check and kept them at home because of the suspicious circumstances, the company would have had no record of the transaction at all. *See supra* note 20. The jury, therefore, justifiably could disbelieve appellants' claim that when Dougherty gave McNair things of value he was acting "out of the goodness of his heart, and had no expectation of anything perhaps other than a thank you," 061R937:2226, or that McNair received them innocently.

FWDE similarly supplied a construction superintendent for Swann's home-

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[52] On brief in challenging his bribery convictions, Swann only relies on the *quid pro quo* arguments in the other appellants' briefs. Swn-Br. ii-iii. Consequently, Swann has waived any challenge to the sufficiency of the evidence supporting those convictions (Counts 52-54, 57-58, 60).

remodel. Hendon spent half of every workday at the Swann house for nearly two years, when FWDE's Stanger replaced him for an additional nine months. 544R232:148, 153, 160; 544GX25A-C. Dougherty was fully aware of their work at the Swann home. 544R232:146. FWDE also paid a subcontractor over $28,000 – with checks signed by Dougherty – to frame the addition to Swann's house. 544GX80A-L.

Swann, of course, was very influential in the selection of the engineering contractors, and he also negotiated the terms of those no-bid contracts. 544R232: 1287-88, 1672-73. And when Swann granted the 180-day extension of time on the Vestavia Trunk project, after initially denying the request, FWDE, who supported the request as the consulting engineer, 544GX36C, benefitted by receiving additional consulting fees.

In short, the record fully supports the juries' conclusions that Dougherty's "gifts" were corruptly made and received, with the Dougherty defendants intending to influence and reward McNair and Swann, and the recipients intending to be influenced and rewarded by them.

Finally, McNair's conviction for accepting a bribe from Dawson is similarly well supported. Dawson's firm received millions of dollars in no-bid engineering contracts from McNair, and the vast majority of Dawson's work was on JCESD contracts. 061R931:727; 061R934:1542-56; 061GX33D. That is why McNair

solicited the studio's $16,400 audio-video system from Dawson. In fact, Dawson "was uncomfortable with the whole situation" and would not have agreed if McNair was not part of the sewer rehabilitation process, so he had the store conceal the delivery address on the invoice. 061R934:1543-48.

2. The Rast Bribes. The Rasts and their company's convictions for bribing McNair and Swann, and McNair's and Swann's convictions for accepting those bribes, are similarly well supported.[53] RAST paid nearly $77,000 for materials and subcontractors for McNair's studio.[54] The magnitude of this alleged "gift" alone belies any claim that the Rasts were acting simply out of friendship and had no intention of influencing or rewarding McNair. Seventy-seven thousand dollars is not the equivalent of helping a neighbor by removing a tree stump, fixing a sink hole, or providing top soil, as they strenuously argued to the jury. *See* Rasts-Br. 33-36. Additionally, RAST supplied significant amounts of labor during the studio renovation, including excavating for the footings and constructing its deck and metal steps. 061R928:159-60, 219-20. And RAST hid all of the goods, services, and money it provided to the studio renovation by coding them to JCESD projects.

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[53] RAST alone was convicted on Counts 23 and 24. Having filed no brief in this Court, it has waived any challenge to those convictions.

[54] *See supra* pp. 19-20, 23-25 (Mosley's framing at studio ($53,000) and guard shack ($7,200); carpet ($5,300); security gate ($5,800); and landscaping ($5,500)). Bobby Rast decided to pay Mosley, and Danny delivered some of the checks. *See supra* p. 19.

See supra pp. 20, 25, & note 19.

At the Swann house, RAST crews performed demolition work and poured concrete for the basement, walls, stairs, and elevator pit. 544R232:507-13; *see also* 544R232:140-43, 150-52. RAST also spent more than $28,000 purchasing the necessary concrete and bricks and paying subcontractors to repair the plumbing, paint the house, and install hardwood floors and stairs.[55] As it did with McNair, RAST concealed its work for Swann; in particular, avoiding the use of Swann's name on invoices, delivery tickets, and accounting reports, and coding the work and expenses either to miscellaneous or JCESD projects. *See supra* p. 33.

RAST fully understood the nature of its alleged gifts. After a newspaper article revealed RAST's work on Swann's house, Bobby told his bookkeeper that they "didn't need any document invoices in the files with Jack Swann's or Chris McNair's shipping address on them," causing her to discard such invoices. 061R933:1247-48. Also, prior to that article, RAST had treated its bribes to McNair and Swann as business expenses, deducting them on its tax returns. After the article was published, however, RAST amended several years' returns to eliminate more than $140,000 of those deductions. 061R933:1247-58; 061GX24B-E.

[55] RAST paid $4,400 for concrete, $1,900 for bricks and mortar, $3,500 for hardwood floors, $9,700 for painting, and $8,900 for plumbing. *See supra* pp. 32-33.

Appellants claim that they could not have intended to influence McNair because his authority was purely "ministerial," since he allegedly only ratified what JCESD officials below him had already approved. McN-Br. 13-14; RP-Br. 65. However, given McNair's ultimate authority and responsibility, a jury could rightly infer that McNair became a "rubber-stamp" for the untold number of pay requests, field directives, and contract modifications that crossed his desk *because* of the hundreds of thousands of dollars in goods, services, and cash that he received from the contractor-appellants. "One does not need to live in Chicago to know that [an official's] job description is not a complete measure of clout." *Gee*, 432 F.3d at 715. In fact, because he was responsible for placing sewer items on the commission's weekly agenda, McNair had complete control over every sewer matter requiring commission approval. 061R932:889-92.

Swann also was able to reward the Rast defendants for the goods and services they provided. For example, in 2001 Swann approved three no-bid field directives that paid RAST more than $2 million. 544R232:382-84; 544GX35G. And when RAST notified the JCESD that its tunnel boring machine had become stuck during the Valley Creek Tunnel project, Swann authorized a field directive allowing RAST to remove the machine at an additional cost to JCESD of $2.6 million. 544R232:359-64, 384-85; 544GX35G. Although RAST's contract for the project included a performance bond, Swann decided not to invoke it, and instead

re-bid that portion of the project. 544R232:363-64, 390-92; 544GX35A. RAST's joint venture won the re-bid for an additional $23,827,350, and thus was paid over $50 million for work it was obligated to complete under the original $27.8 million contract. 544R232:381, 387-88; *see supra* pp. 38-39.

The Rasts claim that Swann's decision to re-bid this job was legitimate because RAST could not have anticipated the soil problems it encountered. Rasts-Br. 99. However, prior to the original contract bidding, a geological survey had advised JCESD and the bidders of the "extremely poor rock conditions," yet RAST still used "the wrong machine" for the job. 544GX35D; 544R232:360; *see supra* pp. 38-39.

Finally, the Rast defendants' convictions for bribing Chandler and Ellis are fully supported by the circumstances surrounding those "gifts." First, Chandler asked Bobby Rast for money to attend technical conferences that Ellis was also planning to attend. Instead of giving Chandler a check for $250-$500 as Chandler expected, Bobby gave Chandler an envelope containing $5,000 cash and told Chandler to split it with Ellis. Chandler's initial reluctance to keep such a sum shows it was more than a gift from one friend to another. 061R932:951-54; 061R933:1399-1401.

3. The Pugh Bribes. The bribery convictions involving the Pugh defendants are fully supported by the records.[56] During the sewer rehabilitation, PUGH provided McNair with about $120,000 in goods, services, and cash.[57] That they were given and received with corrupt intent is strongly supported by the fact that McNair expressly solicited the majority of those bribes.[58] For example, McNair asked Roland Pugh to fly McNair's daughter to a Georgia carpet shop and to pay the $4,800 deposit. 061R929:327-28; 061GX3A. McNair also asked Roland to pay $40,000 for the studio's air conditioning system, which he did. 061R929:324, 327. McNair then asked Roland to build him a home in Arkansas. In relating that solicitation to Grady, Roland called McNair "that GD McNair,"

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[56] PUGH, but not Roland, was convicted of bribing McNair (Count 15). On brief, PUGH does not directly challenge that conviction but, instead, adopts Roland's brief in this regard. PUGH-Br. 80 n.4. Because Roland does not challenge the bribery count, since he was not convicted on it, PUGH has waived any challenge to its conviction on Count 15.

[57] *See supra* pp. 21-25, 27-28 (cash-laden envelopes ($50,000), $17,200 handrails, $4,500 steel, $4,800 carpet deposit, and $44,000 Arkansas home construction). PUGH also provided labor for the studio renovation. *See supra* pp. 18-19.

[58] Although under Section 666 the recipient's corrupt intent cannot substitute for the donor's, a donor's knowledge of the recipient's corrupt intent is "strong circumstantial evidence" of the donor's culpable state of mind. *Ford*, 435 F.3d at 213.

saying "surely this is the last time . . . *since he is out of office*" now.[59] 061R929:331 (emphasis added). A reasonable juror could justifiably rely on such language as refuting appellants' claim that things of value were given to and received by McNair merely because "of his long-standing relationships with various co-defendants." McN-Br. 41.

Additionally, like RAST, PUGH concealed its bribes by coding them to JCESD projects. *See, e.g.*, *supra* p. 23. PUGH went even further by charging Jefferson County for some of the materials it contributed to the studio and adding bogus labor and equipment charges. *See infra* pp. 104-05.

Roland was very active in both bribing McNair and concealing the bribes.[60] In addition to directing Grady to fly McNair's daughter to the Georgia carpet shop and pay the deposit, 061R929:327-28, Roland demanded that PUGH's other owners "kick in" cash on bribes and twice had Grady deliver envelopes of cash to McNair. 061R929:311-15, 326-27. And in concealing the $40,000 in cash that he gave McNair for the studio's air conditioning system, Roland wrote out two checks to cash totalling $18,750 and a $10,000 checks to each of his daughters-in-laws and

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[59] As the court explained in *McNair*, evidence of post-retirement gifts to McNair is relevant to intent on pre-retirement bribery charges, despite post-retirement charges being dismissed. 061R679:12-13.

[60] 061R930:598 (Grady Pugh: "Roland made it clear that he was the only one at [PUGH] to have any relationship with Mr. McNair.").

had them cash the checks and hand him the cash. 061R929:324-27; 061GX4F-I. Grady delivered the cash in an envelope. 061R929:327. Roland, Grady, and Yessick also responded to that "GD McNair['s]" request for assistance with his Arkansas home, which eventually resulted in PUGH paying Word Construction $44,000. 061R929:330-32; 061R933:1158-61, 1365-69.

Similarly, during the remodel of Swann's home, Yessick hired and paid a subcontractor $7,400 to install a waterfall and koi pond. 544R232:92-105; 544GX29A-E. Yessick also hired and paid a landscaper $140,000 to landscape and maintain Swann's properties. 544R232:571-75, 587-89; GX30F-Z, AA-DD, FF. At trial, PUGH claimed that this was merely a loan Swann would repay. Yessick's actions belie that claim. He had both subcontractors send their invoices directly to PUGH and not identify Swann by name on their invoices. 544R232:99, 578-80. Yessick had these expenses coded to county jobs. 544R232:101, 104-05, 910-14; 544GX29C, 29E, 30EE. And only after he learned of the government's investigation did Yessick direct his assistant to create invoices to Swann's mother and mother-in-law for the landscaping work – more than two years after he initially hired the landscaper. 544R232:1011-13, 1018-20, 1130-32; 1823-27; 544GX28D-E.

PUGH stood to benefit substantially from favorable treatment by Swann. For example, Swann originally denied PUGH's 120-day extension request on the

Vestavia Trunk Sewer Replacement project because timely completion of the project was "a requirement of the specifications." 544GX36D. However, five days after Yessick hired the landscaper, Swann granted a 180-day extension saving PUGH's joint venture $180,000.[61] 544R232:1338-39, 1353-54; 544GX30F, 36F. Swann also approved the $827,000 Paradise Lake no-bid field directive for PUGH. Rather than originating in the field, as field directives ordinarily did, Paradise Lake originated "from up above," and Swann had it charged to the unrelated Cahaba River project. 544R232:351-54; 544GX31B.

PUGH's conviction for bribing Chandler is also firmly supported by the record. PUGH was very generous with the assistant director over an extended period of time. For example, Yessick took Chandler on an all expense-paid trip to Florida in the PUGH company airplane, and delivered sand to his house at Chandler's request. 061R929:342-43; 061R932:947-48, 951. And that Chandler initially declined Yessick's offer to landscape his backyard shows that Chandler did not believe that "friends" gave each other "gifts" of such magnitude. Indeed, the extensive work PUGH eventually did, depicted in the following photographs, 061GX41A, D, F, H, belies such a claim.

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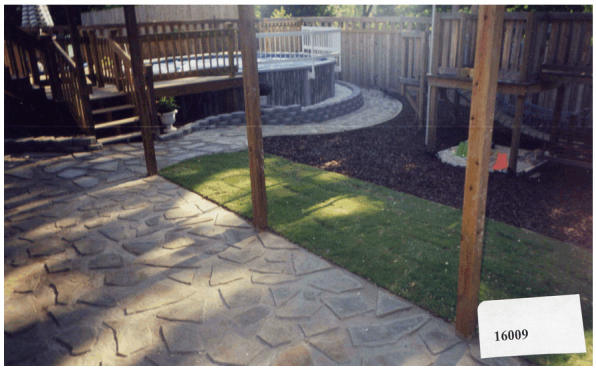
[61] Although PUGH argues that its joint venture partner was responsible for the delay, PUGH-Br. 89, Swann did not distinguish between PUGH and that partner when he expressed his concern – in a letter sent to Yessick and PUGH's joint venture partner – about the "disturbing . . . pattern" of poor decisions and bad management. 544GX36D.



When viewed in this context, including PUGH's bribes to other JCESD officials, the jury reasonably concluded that the trip charged in Count 71 was also a bribe.

PUGH's bribery of Barber, who oversaw all of the JCESD's inspectors and awarded the no-bid emergency work contracts, was extensive. In 1997, 1998, 1999, and 2001, PUGH paid for Barber's annual vacations, but hid the payments in the company's books. 542R127:718-26; 542R129:1087. And PUGH readily agreed to Barber's June 2000 request to buy him a lot for a retirement home.[62] The convoluted nature of the land-transaction and the efforts to conceal it allowed the

[62] Although no loan papers were created, Barber testified he considered it a loan he would pay back after he retired. In fact, Barber paid PUGH back, without interest, after news of the government's investigation was made public and more than a year before he retired. 542R127:779-80; 542R129:1095, 1154-60.

jury to find it a bribe.

First, Yessick contracted for the lot in Roland's name but accrued $45,000 to the Paradise Lake project to pay for it. Then, just prior to closing, PUGH decided instead to give Barber a cashier's check to buy the lot in his own name. The remitter's name was left blank on that check. Finally, Yessick was told to retrieve all evidence that PUGH was ever involved, which required the realtor to fabricate a fictitious house sale to refund the original $1,000 earnest money deposit. *See supra* pp. 42-43.

Moreover, just months before he solicited PUGH for the purchase of the lot, Barber had designated Paradise Lake as an emergency. However, because the cost of the project – $827,000 – greatly exceeded Barber's $50,000 emergency-work approval limit, and because there was no Paradise Lake contract on which to grant a field directive, the work was performed as a field directive on the unrelated multi-million dollar Cahaba River project.[63] PUGH netted a profit of more than $400,000. *See supra* pp. 41-42.

Finally, PUGH's challenge to its conviction for bribing Wilson must also be

[63] The jury could justifiably ignore Barber's testimony that he was not instrumental in awarding the field directive, 542R129:1085-86, since he designated the project an emergency. Moreover, Barber admitted he told the city inspector that he had a contractor lined-up that would finish the work in about 45 days, and shortly thereafter Yessick wrote the inspector that PUGH would be doing the work. 542R129:1138; 542GX45G.

rejected. When Grady Pugh gave Wilson the "scholarship," he specifically expected that Wilson would "return the favor." 545R143:1153. In fact, three days after Wilson faxed Grady information on where to send the check, and the day before Grady sent it, Wilson approved PUGH's request for an extension of time that had been sitting on his desk for four weeks. On the day that PUGH submitted the request it was already subject to $76,000 in liquidated damages, and that amount had grown to over $100,000 by the time Wilson granted it. From these facts, the jury could reasonably conclude, as Grady predicted, that when "Ron [Wilson] . . . got a chance to help us, he would."[64] 545R143:1144.

In sum, substantial evidence supports all of the bribery convictions involving the Pugh bribes.

B. The Evidence Showed Appellants Conspired For The Unlawful Purpose Of Bribing McNair (Count 1) And Swann (Count 51)

Appellants argue their conspiracy convictions should be reversed because the government failed to prove they conspired for an unlawful purpose.[65] When the charge is conspiracy, direct evidence of guilt is not required. *United States v. Vera*,

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[64] The jury also heard evidence of PUGH's bribery of other JCESD officials, such as landscaping Chandler's yard, 545R140:530-38; 545GX41A-H, and giving $70,000-$80,000 in cash to McNair, 545R142:1041-47. *See infra* Section IV.

[65] To the extent appellants challenge their conspiracy convictions based on their specific *quid pro quo* argument, it fails for the reasons stated in the preceding sections.

701 F.2d 1349, 1357 (11th Cir. 1983). Indeed, "because a conspiracy is 'predominantly mental in composition,' circumstantial evidence is frequently resorted to in order to prove its elements." *United States v. Westry*, 524 F.3d 1198, 1212 (11th Cir. 2008) (quoting *United States v. Toler*, 144 F.3d 1423, 1426 (11th Cir. 1998)). A conspiracy can be inferred from a concert of action, *id.*, and a defendant's knowing participation in the conspiracy established through proof of acts in furtherance of the conspiracy, *Vera*, 701 F.2d at 1357.

The government presented ample evidence that appellants conspired to bribe McNair and Swann with, among other things, construction labor and materials in order to secure favorable treatment in the sewer rehabilitation project. In particular, the contractors' construction of the deck for McNair's studio – depicted on page 22 above – shows they were not merely present together at the studio or innocently collaborating on a construction project, but rather had reached an understanding among themselves and with McNair to corruptly give him things of value.

Bobby Rast explained to FWDE's Bill Bailey, who was overseeing the studio's renovation, that RAST "would furnish the labor to build the deck; and Roland Pugh Construction would furnish the materials." 061R928:219-20. This arrangement may have a veneer of legitimate business, *i.e.*, multiple contractors each contributing their expertise to a construction project, but PUGH does not

make the structural steel or custom-fabricated aluminum picket handrails needed for the deck. Instead, with the cooperation of FWDE and RAST, PUGH paid other companies for those materials, had them installed at McNair's studio, and fraudulently billed JCESD for them.

Bailey made a materials list noting "Roland Pugh" at the top and specifying the steel needed for the landing, columns, and stair treads and stringers for the deck. 061R928:165-66; 061GX29C (handwritten list). Between July 19 and August 2, 2000, Besco made three deliveries of the corresponding materials, identifying PUGH and Yessick as the customer, and referencing in one instance the Valley Creek Wastewater Treatment Plant, a JCESD project on which PUGH was working under the supervision of FWDE's David Bechtel, but which was nowhere near the studio.[66] 061R928:203-04; 061GX29D-E, J (delivery tickets), 29G-H, K (invoices to Yessick's attention). According to PUGH's general manager, it was not normal for the company president to sign off on an invoice like this, but

[66] Two of Besco's delivery tickets, which included the materials for the steel stairs, do not include a ship-to address, 061GX29D-E, but the corresponding invoices state, under "ship to," "Valley Treatment Plant" and "Same," 061GX29G-H. These deliveries may have been made to RAST's shop, where the deck's stairs were fabricated. 061R933:1348. The third delivery ticket lists the studio's address as its destination and was signed by Mosley. 061GX29J. At the same time, July 2000, RAST took over paying Mosley, who had been doing studio construction work since late 1999 at McNair's expense. 061R928:112-15, 161-62; 061GX1A-W. Also in July 2000, Roland Pugh informed PUGH's co-owners that they needed to help McNair, and had Grady Pugh deliver an envelope of cash to McNair at the studio. 061R929:313-14; 061GX4A-C.

Yessick personally approved payment to Besco, including its invoice noting shipment to the studio's address, and had the steel treated as a miscellaneous cost on the Valley Creek plant. 061R935:1840-41; 061GX-29A, 29L:6-9.

Again under Yessick's direction, PUGH's general manager prepared Field Directive 78, calling the steel "Added Steel Supports" at the Valley Creek plant, and asked Bechtel to approve a payment request to JCESD for the steel. 061R935:1841-42; 061GX29L:3, 6-9. Even though the request included an invoice with the studio's address, Bechtel approved the field directive and pay request and forwarded PUGH's application for payment to JCESD. 061GX29M:1-2, 5. RAST used some of the steel to fabricate the deck's stairs and, once the structural steel was in place, poured the concrete to form the deck's landing and steps. 061R933:1348.

The three companies also worked together to procure, install, and bill the county for the deck's handrails. Bechtel ordered two sets of aluminum picket handrails from Thompson Fabricating (Thompson), and directed Thompson to bill PUGH. 061R931:797-800, 805; 061GX10C, 10F. Bechtel instructed a Thompson employee to make it look like the work was for a change order for additional work at the Valley Creek plant, and accordingly, the September 2000 invoice for $5,500 sent to PUGH listed a false description ("co 28," or change order number 28, "handrail") and destination ("VALLEY CREEK"). 061R931:800-804, 828-29;

061GX10C.

When Thompson's general manager found out about the false change order, he was angry and told Bechtel they would not hide the expense on the Valley Creek project again. 061R931:810-12, 825-28. But Bechtel told him to bill PUGH directly, so in February 2001 the $11,700 invoice for the second set of handrails went to PUGH. Once again, per Bechtel's instruction, it falsely listed Valley Creek as the destination but referenced "CHRIS MC.", or Chris McNair, as the customer. 061R931:810-12, 822, 829; 061GX10F. PUGH's general manager handwrote the Valley Creek job number ("9806") on both invoices, which PUGH paid in full. 061R931:801-03, 847-49; 061GX10B-F. That general manager also prepared Field Directive 79, charging JCESD $9,995 for "Added Work" related to the handrails: $6,325 ($5,500 plus a "Markup" of $825) for the handrails themselves, $2,235 for 96 hours of labor, and $1,435 for equipment. 061R935:1837; 061GX29L:4-5. He asked Bechtel to approve the pay request, which Bechtel did.[67] 061R935:1837; 061GX29L:1, 29M. And, as Bobby Rast promised, RAST installed the handrails on the studio's deck. 061R933:1348-49.

[67] While PUGH claimed it paid for the handrails by mistake or accident having been deceived by Bechtel, the jury rejected that claim, convicting the company on Count 15 related to the handrails. There was abundant evidence of PUGH's contributions toward the studio's construction belying any claim of mistake or accident, including PUGH's general manager agreeing that "it appears [Yessick] was also part of the deceit involved" in the steel purchase. 061R935:1843.

Similarly, the contractors conspired with each other and with Swann to remodel Swann's home in exchange for favorable treatment in the sewer rehabilitation project. Beginning in 1998, Dougherty sent FWDE superintendent Hendon to spend half of every day at the Swann home supervising the remodeling project and ensuring that subcontractors had the necessary equipment and materials. 544R232:148, 160. Hendon was supervising when Bobby Rast sent a RAST construction crew to demolish the back of the house and a carport, 544R232:139-40, 507-09; 544GX25C, excavate the expanded basement, 544R232:141-42, and pour footings, foundation walls, a retaining wall, and storm shelter, 544R232:143, 150, 510-13. RAST ordered the concrete for the Swann remodel from Sherman International. 544R232:512; 544GX81C. Sherman International's delivery tickets directed delivery to Swann's address but identified it as the "Rast Residence." 544GX81C-D. RAST's payments to Sherman International were coded to "miscellaneous completed jobs" in RAST's accounting system. 544GX81B; 544R232:703-04, 706-09.

After RAST poured the new foundation, FWDE hired Dudley Davis to frame the addition. 544R232:144-46. Pat Dougherty, Bobby Rast, and Danny Rast all visited the site to observe the work of their crews, and Hendon testified that he personally spoke with Bobby and Danny Rast about the work that RAST crews were performing at Swann's house. 544R232:146-47.

Hendon was still supervising work at the Swann home in June 2000, when PUGH's Yessick hired Aquatic Gardens to install a koi pond on Swann's property, providing Danny Rast's name as a point of contact. 544R232:94-98; 544GX29F. Aquatic Gardens billed PUGH directly, and Yessick told the owner that he "didn't want any referral or reference to the Swann residence on any invoicing." 544R232:99. Also in 2000, Nila Swann hired Don's Carpet One to install hardwood floors and stairs. 544R232:265. She told the salesperson to send all invoices to RAST because "they would be paying for it." 544R232:268. In one invoice sent to RAST, Don's Carpet One charged $3,535 for hardwood stair treads, directing the invoice to the attention of Bill Bailey, an FWDE employee. 544GX82D.

Appellants claim that this evidence establishes only that they conspired for a lawful construction project. McN-Br. 46-48; FWDE-Br. 17-22; Rasts-Br. 115-18. Their extensive efforts to hide the labor and materials they provided McNair and Swann – in some cases falsely billing Jefferson County for the work – refutes any contention that they were engaged in innocent construction work. *Hunt*, 521 F.3d at 646-47; *Dial*, 757 F.2d at 170.

PUGH's cash payments to McNair also cannot be reconciled with an innocent construction project. When McNair's studio renovation project began, Roland Pugh told PUGH's other three owners that they had to "kick in" money to

McNair because he was building a studio, and Grady Pugh gave $1,500 in cash to his father's secretary. 061R929:311-13. Later, Roland again collected money from PUGH's owners in proportion to their ownership interests, and Grady delivered an envelope of cash to McNair at his studio. 061R929:313-14, 316; 061R930:601-05; 061GX4A-C. And when McNair asked Roland to pay for the studio's $40,000 air conditioning system, Roland gathered the funds by writing checks to his daughters-in-law and to cash. 061R929:324-27; 061GX4F-4I. Once again, Grady delivered an envelope of cash to McNair this time at his house. 061R929:326-27. All this cash in envelopes is totally inconsistent with legitimate business behavior.

In sum, the juries' conclusions that appellants were not collaborating on innocent construction projects but conspiring for the illegal purpose of bribing Swann and McNair is reasonable and should not be disturbed on appeal.

C. The Evidence Established The Conspiratorial Agreements Charged In Counts 75 and 78

PUGH argues that its convictions for conspiracy to commit bribery on Count 75 (Wilson scholarship) and Count 78 (land and vacations for Barber) should be reversed because the government failed to prove a conspiracy. PUGH-Br. 110-15. Analogizing contractors who pay bribes and corrupt public officials who sell their honesty and integrity to drug users and dealers, PUGH claims that at most the evidence established a "relationship between a seller and buyer [that] . . . is

insufficient to sustain a conspiracy conviction." PUGH-Br. 112. PUGH's novel claim is contrary to both the law and the facts.[68]

An agreement between a buyer and seller for the purchase of illegal drugs for personal consumption cannot, by itself, support a conviction for conspiracy to distribute the drugs because such a buy-sell agreement does not evidence a joint criminal objective of distributing the drugs. *United States v. Dekle*, 165 F.3d 826, 829-30 (11th Cir. 1999).[69] A "'buy-sell transaction is simply not probative of an agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction.'" *United States v. Mercer*, 165 F.3d 1331, 1335 (11th Cir. 1999) (citation omitted).

This line of cases, which all deal with the "'sale of some commodity'" for personal use, *Dekle*, 165 F.3d at 829 (citation omitted), does not apply to bribery because bribery does not involve the sale of a personal-use commodity. Rather, a bribe under Section 666 is a payment made with the corrupt purpose of influencing a public official so the official will act favorably when opportunities arise. *Jennings*, 160 F.3d at 1014. Because those future favorable actions "'undermine

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[68] Convictions for conspiracy to commit bribery are routinely obtained and affirmed. *See infra* Section VIII (citing cases).

[69] PUGH mischaracterizes the conspiracy charged in *Dekle* as "an illegal conspiracy to exchange drugs for sex." PUGH-Br. 113. Dekle was convicted on "one count of conspiracy to distribute controlled substances." 165 F.3d at 828.

[the] employee's fiduciary duty,'" H. R. Rep. No. 99-335, 1986 U.S.C.C.A.N. at 1786 (citation omitted), bribery contemplates "'a criminal objective beyond that already being accomplished by the [bribe payment].'" *Mercer*, 165 F.3d at 1335 (citation omitted). Indeed, in a bribery conspiracy, the conspirators share the common goal of increasing their personal wealth illegally. *United States v. Tilton*, 610 F.2d 302, 307 (5th Cir. 1980); *accord United States v. Hess*, 691 F.2d 984, 988 & n.2 (11th Cir. 1982); 545R143:1377 (JCESD employees "that wanted to help [PUGH] could make things easier, make changes that would make things more profitable"). This sort of continuing relationship and common goal is lacking when a drug addict is simply making purchases to satisfy an addiction.

PUGH's related claim, that the evidence showed nothing more than the giving and receiving of the scholarship (Wilson) and the land and hotel accommodations (Barber), with PUGH intending nothing in return, PUGH-Br. 114-15, simply repeats arguments that were unsuccessfully made to the juries. Indeed, the juries also convicted PUGH of bribing Barber (Counts 83-86), and Wilson of soliciting and receiving a bribe from PUGH (Count 76). Those convictions required the juries to find that PUGH intended to influence Barber and Wilson with those payments, and that Barber and Wilson intended to be influenced by them as well. Under these circumstances, the evidence fully supports the juries' guilty verdicts on Counts 75 and 78.

D. The Evidence Supports The General Verdict On Count 1

Roland Pugh argues that the general verdict of guilty on the conspiracy count (Count 1) "cannot stand" because the "evidence was insufficient as a matter of law" for two of the three bases of conviction. RP-Br. 101. His argument misstates the law and ignores the evidence.

Roland contends that the instructions allowed the jury to convict on the conspiracy count if it unanimously agreed on one of three possible bases of conviction: "(1) that Roland Pugh conspired with McNair to pay a bribe, (2) that Roland Pugh conspired with McNair to receive a bribe, or (3) that Roland Pugh conspired with Grady Pugh, Yessick, or the other defendants to pay a bribe." *Id.* But he fails to contend that the evidence did not establish the third basis, *i.e.*, that Roland conspired with Grady, Yessick, and others. That failure derails his argument that the evidence does not establish a conspiratorial agreement between Roland and McNair but, rather, a mere series of buy-sell transactions akin to purchases of illegal drugs for personal use. *Id.* at 101-04 (citing *Mercer*, 165 F.3d at 1332; *Dekle*, 165 F.3d at 831.

Whether or not Roland's characterization of his dealings with McNair is correct, the guilty verdict must be affirmed. A general verdict should not be set aside "because one of the possible bases of conviction was . . . merely unsupported by sufficient evidence." *Griffin v. United States*, 502 U.S. 46, 56, 112 S.Ct. 466,

472 (1991). "'It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance – remote, it seems to us – that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.'" *Id.* at 59-60, 112 S.Ct. at 474 (citation omitted); *accord Clark v. Crosby*, 335 F.3d 1303, 1309-10 (11th Cir. 2003). *United States v. Pendergraft*, 297 F.3d 1198, 1210 (11th Cir. 2002), upon which Roland relies, RP-Br. 104-05, is fully consistent with this rule because this Court reversed due to legal error, not inadequate proof.

Finally, "evidence . . . insufficient as a matter of law," RP-Br. 101, is not legal error for purposes of the general verdict rule. *Griffin* specifically held that "the term 'legal error' means a mistake about the law, as opposed to a mistake concerning the weight or factual import of the evidence."[70] 502 U.S. at 59, 112 S.Ct. at 474.

In any event, the evidence supports the first and second bases as well. As explained in the preceding section, *supra* pp. 108-10, the drug transaction cases do not apply to bribery. And here the evidence establishes that Roland and McNair

[70] Roland's argument is plainly one of sufficiency – whether the evidence established a conspiratorial agreement between him and McNair or mere buy-sell transactions. And the drug cases he cites all turn on sufficiency, not mistakes about the law. *See Mercer*, 165 F.3d at 1332; *Dekle*, 165 F.3d at 831; *United States v. Beasley*, 2 F.3d 1551, 1561 (11th Cir. 1993).

agreed to give and receive bribes for their mutual enrichment at the expense of Jefferson County.[71] *See, e.g.*, *supra* pp. 107-08.

E. Substantial Evidence Supports The Convictions For Honest Services Mail Fraud And The Jury Was Properly Instructed

1. Swann, Yessick, And PUGH Engaged In A Scheme To Deprive Jefferson County Of Swann's Honest Services

Swann, Yessick, and PUGH's convictions for honest services mail fraud (Counts 90-100) should be affirmed because the evidence showed defendants "intentionally participated in a scheme or artifice to deprive the persons or entity to which the defendant owed a fiduciary duty of the intangible right of honest services, and used the United States mails to carry out that scheme or artifice." *United States v. Browne*, 505 F.3d 1229, 1265 (11th Cir. 2007); 18 U.S.C. § 1346. When a political official "makes his decision based on his own personal interests—as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest—the official has defrauded the public of his honest services." *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997). Swann does not contest that such a scheme would meet the definition of honest services fraud. Swn-Br. 47.

Swann received approximately $100,000 in landscaping and lawn

[71] There is also ample evidence of Roland conspiring with Grady and Yessick to bribe McNair. *See, e.g., infra* pp. 121-22.

maintenance from a company that he had the power to favor in the sewer rehabilitation program. He argues, however, that "there was no bribe." *Id.* at 48. The jury found otherwise, and its decision should not be disturbed "unless no trier of fact could have found guilt beyond a reasonable doubt." *United States v. Lyons*, 53 F.3d 1198, 1202 (11th Cir. 1995).

In the summer of 2000, after Swann told Yessick he had overspent in remodeling his house, Yessick hired Guthrie Landscaping to landscape Swann's two properties. 544R232:571-75, 1828-29. By December 2001, PUGH had paid Guthrie more than $93,000, including $1,200 a month in 2001 for lawn maintenance. 544R232:587-88; 544GX30FF. In January 2002, Yessick asked Guthrie to stop submitting invoices to PUGH, and instead, advanced Guthrie $47,000 for three years of landscaping and maintenance. 544R232:589-91; 544GX30DD. In total, PUGH paid approximately $140,000 to Guthrie for landscaping work for the Swanns. 544R232:650-51; 544GX30FF.

Although Swann contends now that none of this was "done in secrecy," Swn-Br. 48, the evidence shows PUGH and Swann took elaborate steps to conceal any record of the services provided to Swann. Guthrie mailed his invoices to PUGH and, at Yessick's request, identified the work by job number only. 544R232:578-80; 544GX30G, I, K, M, Q, S, U, W, Y, AA. Yessick directed PUGH's controller to accrue the expense to the Metro Park Roadway, a county job.

544R232:909-14, 968-69. Guthrie's invoices were never found in PUGH's files. 544R232:1447-48.

After Swann and Yessick learned of the government investigation, 544R232:1130-32, 1823, 1826-27, Guthrie was abruptly asked to stop working at the Swann house, even though there was a balance remaining on his advance. 544R232:591, 594-95. In August and September 2002, approximately two years after hiring Guthrie, Yessick directed his assistant to create invoices to Swann's mother and mother-in-law for landscaping, tree removal, and "remodeling work." 544R232:1011-13, 1018-20; 544GX28D-E. The Swanns then took out home equity loans in the names of their mothers, 544GX28M-N, and wrote two checks to PUGH totaling approximately $59,000 on joint accounts they held with their mothers, 544GX28C. Yessick gave these checks directly to PUGH's controller, telling her they were partial payment for the landscaping he had previously directed her to accrue to miscellaneous income and "to write off [the] $46,000" that remained. 544R232:1421-23; 1418-19.

Swann contends, without any citation to the trial record, that PUGH merely located the landscaping contractor and that he always intended to reimburse PUGH for payments to Guthrie. Swn-Br. 48. To the extent that any testimony suggested such an arrangement, it was considered and rejected by the jury. *See United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999) (jury has "exclusive province" to

determine the credibility of witnesses). Moreover, that PUGH and Swann concealed the landscaping arrangement is powerful evidence from which the jury could conclude that Swann accepted these services, not as a loan, but as a bribe. *See Hunt*, 521 F.3d at 646-47; *Dial*, 757 F.2d at 170.

Swann's claim that he was unable to assist PUGH in any way also ignores the evidence. Five days after Yessick hired Guthrie to landscape Swann's two properties, Swann granted PUGH's joint venture a 180-day extension on the Vestavia Trunk project. 544R232:1338-39; 544GX30F, 36F. That extension saved PUGH's joint venture $180,000 in liquidated damages. 544R232:1353-54. Two months earlier, Swann had denied a 120-day extension request on the same project noting that timely completion of the project was "a requirement of the specifications." 544GX36D. In 2000, Swann also initiated a $827,417.75 field directive for PUGH's Paradise Lake project and had it charged to the unrelated Cahaba River Project. 544R232:352-54; 544GX31B:23.

Because the evidence showed that Swann gave favorable treatment to PUGH in return for thousands of dollars in landscaping, thereby depriving the citizens of Jefferson County of his honest services on their behalf, the jury's verdict is fully supported by the evidence.[72]

[72] Swann cites two cases in which courts have found fraudulent conduct that is not within the scope of the honest services mail fraud statute, Swn-Br. 50, neither of which is relevant here. In *United States v. Bloom*, 149 F.3d 649 (7th

2. The Jury Was Properly Instructed

The district court properly refused to give a good faith instruction here because the jury was instructed on specific intent to defraud, and a finding of such intent necessarily excludes a finding of good faith. *United States v. Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States v. Martinelli*, 454 F.3d 1300, 1315-16 (11th Cir. 2006) (finding good faith instruction unnecessary where court instructed on "knowing" aspect of fraud charge). Swann's attempt to avoid this precedent by citing out-of-circuit or overruled authority, Swn-Br. 52, is unavailing.[73]

The court instructed the jury that, in order to convict the defendants of honest

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Cir. 1998), the court held that a part-time Chicago alderman who, while engaged in the *private* practice of law, encouraged a client to place an illegal bid in a tax scavenger sale could not be charged with honest services mail fraud because the scheme did not involve the use of his public position for personal gain. In *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), the court reversed the defendant's conviction because the jury instructions allowed the jury to convict without finding intent to deprive the public of honest services. Here, the jury was properly instructed on the intent requirement, *see infra* pp. 117-18, and the evidence of fraudulent intent is overwhelming.

[73] Swann cites *United States v. Haddock*, 956 F.2d 1534, 1547 n.11 (10th Cir. 1992), in which the Tenth Circuit acknowledges that its rule is the minority view, and *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981), which has been overruled, *see United States v. Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986). The only case Swann cites from this Court is wholly irrelevant as it concerns a district court's refusal to allow a defendant to present a good faith defense to the jury. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984). Swann presented his defense to the jury. 544R243:2182-85.

services mail fraud, it must find beyond a reasonable doubt that the defendants "knowingly devised or participated in a scheme to fraudulently deprive the public of an intangible right of honest services" and "did so willfully with intent to defraud." 544R243:2320-21. The court went on to define "intent to defraud" as "to act knowingly and with the specific intent to deceive someone." 544R243:2321. Finally, the court instructed that "[w]hat must be proved beyond a reasonable doubt is that the defendant[,] with the specific intent to defraud[,] knowingly devised, intended to devise or participated in a scheme to defraud . . . ." 544R243:2322. Thus by convicting Swann of these charges, the jury found that Swann acted "knowingly and with the specific intent to deceive someone" – implicitly rejecting any defense of good faith. On this record an additional good faith instruction would have been superfluous.[74]

III. THERE WAS NO MATERIAL VARIANCE FROM THE INDICTMENT

Several appellants claim that, at most, the evidence proves multiple conspiracies and that they were prejudiced by this variance. The juries'

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[74] Swann argues that a good faith instruction should have been given here because it was given for the mail fraud charges in Case No. 06-084 (consolidated with 05-544 for trial). The instructions for those unrelated counts are irrelevant because the jury was properly instructed regarding counts 90-100. The 06-084 charges concerned an entirely different scheme to defraud, which the court found warranted different instructions. 544R243:2096-99. Swann's suggestion that the acquittal on the 06-084 charges is attributable to that good faith instruction, Swn-Br. 51, is speculation.

conclusions that appellants participated in two over-arching conspiracies to bribe McNair (Count 1) and Swann (Count 51), rather than several smaller conspiracies, are supported by the records and should not be disturbed.

A. The Evidence Established A Single Conspiracy To Bribe McNair And A Single Conspiracy To Bribe Swann

This Court has held that even "the arguable existence of multiple conspiracies does not constitute a material variance from the indictment if, viewing the evidence in the light most favorable to the Government, a reasonable trier of fact could have found that a single conspiracy existed beyond a reasonable doubt." *United States v. Moore*, 525 F.3d 1033, 1042 (11th Cir. 2008). Where, as here, a jury has found a single conspiracy, the conviction should be affirmed "if supported by substantial evidence." *Id.* To determine whether the jury could have found a single conspiracy, this Court considers whether there was a common goal, the nature of the scheme, and the overlap of participants. *United States v. Calderon*, 127 F.3d 1314, 1327 (11th Cir. 1997) "Separate transactions are not necessarily separate conspiracies, so long as the conspirators act in concert to further a common goal." *United States v. Chandler*, 388 F.3d 796, 811 (11th Cir. 2004) (emphasis omitted). And a "common goal" is defined broadly as a "similar" or "substantially the same" goal. *Moore*, 525 F.3d at 1042 (quoting *Calderon*, 127 F.3d at 1327).

The common goal here was to give McNair and Swann hundreds of thousands of dollars of construction labor and materials and other items of value with the intent to secure favorable treatment in the sewer rehabilitation project. The nature of the scheme was consistent throughout the two conspiracies. The contractors worked side by side, hiring and supervising subcontractors, ordering and paying for materials, and providing their own labor to complete large-scale renovation projects for McNair and Swann.

That RAST and PUGH also competed with each other for construction contracts during this period does not negate the evidence of a conspiracy between them. *See United States v. Westry*, 524 F.3d 1198, 1213 (11th Cir. 2008) ("The existence of healthy competition [among co-conspiring cocaine dealers] does not negate the ultimate object of all participants: supplying the consumers' demands in and around the property."). Indeed, appellants presented this very argument to the *Swann* jury, which rejected it. 544R243:2176, 2259.

Appellants' attempt to cast this evidence in the framework of a "hub and spoke" or "rimless wheel" conspiracy is misguided. Swn-Br. 30-33; RP-Br. 84-92. The relevant question "is not whether the conspiracy resembled a functional wheel or an unbroken length of chain but 'what is the nature of the agreement.'" *United States v. Brito*, 721 F.2d 743, 747 (11th Cir. 1983) (citation omitted); *see also United States v. Perez*, 489 F.2d 51, 59 n.11 (5th Cir. 1974) ("Conspiracies are as

complex as the versatility of human nature and federal prosecution against them is not to be measured by spokes, hubs, wheels, rims, chains, or any one or all of today's galaxy of mechanical molecular or atomic forms."). Indeed, the government need not prove that each defendant had direct contact with each co-conspirator, *United States v. Guerra*, 293 F.3d 1279, 1285 (11th Cir. 2002), or was involved in all aspects of the scheme, *United States v. Meester*, 762 F.2d 867, 880 (11th Cir. 1985) ("A single conspiracy does not become many simply . . . because some members performed only a single function"). "Knowledge of a conspiracy's 'essential features and broad scope, though not of its exact limits,' is sufficient evidence to convict one of a single conspiracy." *United States v. Knowles*, 66 F.3d 1146, 1155 (11th Cir. 1995) (citation omitted).

Roland Pugh argues that the evidence fails to establish he joined a single conspiracy to bribe McNair because no evidence linked him to the RAST and FWDE defendants. Even if that were true, such evidence is not required. "[A] defendant's guilt can be established if his or her contact extends to only a few or even one of the co-conspirators so long as the agreement, with its concomitant knowledge of the general scope and purpose of the conspiracy and the defendant's intent to participate in achieving its illegal ends, is proven beyond a reasonable doubt." *United States v. Toler*, 144 F.3d 1423, 1428 (11th Cir. 1998). Roland concedes that the evidence linked him to co-conspirators Grady, Yessick, and

McNair, RP-Br. 87-88, and ample evidence demonstrates that he understood the essential object of the conspiracy to bribe McNair.

For example, Roland solicited cash from Grady, Andy Pugh, and Yessick to give to McNair, 061R929:311, and directed Grady to fly McNair's daughter and FWDE's Bailey on the PUGH company airplane to Georgia to pick out carpet for the studio, 061R929:327-28; 061R928:163; 061R930:635-37; 061GX3A. After McNair retired, Roland complained to his son about McNair's demand for help building a retirement home, saying that "surely this is the last time we'll have to do anything for him since he's out of office."[75] 061R929:330-31.

This case is easily distinguished from those cited by Roland, RP-Br. 85-86, in which the alleged co-conspirators were completely unaware of each other and, in one case, ignorant of the very nature of the scheme. *See Chandler*, 388 F.3d at 806-807 (evidence showed conspirators charged with recruiting people to redeem stolen game tickets were unaware of each other or that the winning tickets had been

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[75] The jury found the evidence sufficient to establish Roland joined the single conspiracy to bribe McNair, since it convicted Roland after being instructed:

> If you find, however, that there was no single plan or conspiracy, but only different conspiracies and plans that came into existence at different times between different defendants, you must acquit the defendants of Count 1.

061R938:2330.

stolen); *United States v. Ellis*, 709 F.2d 688, 690 (11th Cir. 1983) (finding no overall conspiracy because there was not a "shred of evidence from which an inference may be drawn that either appellant was aware that the others were accepting bribes"). More analogous is the recent case of *United States v. Lezcano*, in which defendants conspired to defraud insurance companies through a series of staged auto accidents. No. 07-10964, 2008 WL 4605918 (11th Cir. Oct. 17, 2008). This Court rejected the defendant's argument that the evidence established multiple conspiracies, stating that "although all of the participants may not have known each other and had different purposes – it is of no moment because the co-conspirators were in the scheme for a common purpose, to defraud insurance companies by staging accidents." *Id.* at *5.

Substantial evidence supports the juries' findings of a single conspiracy to bribe McNair and a single conspiracy to bribe Swann. Accordingly, there was no material variance from the indictment.

B. Appellants Suffered No Prejudice From Any Alleged Variance

Even if there were a material variance, it would only constitute reversible error if appellants' substantial rights were actually prejudiced. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946); *United States v. Edouard*, 485 F.3d 1324, 1347 (11th Cir. 2007). Here, appellants claim that they were prejudiced because the jury likely transferred evidence from one conspiracy to another. That

claim is not supported by the record.

The charged conspiracies to bribe McNair and Swann, involving nine and eight defendants respectively, were not so complicated that the jury was unable to consider the evidence against each defendant individually. *See United States v. Caporale*, 806 F.2d 1487, 1501 (11th Cir. 1986) (finding case involving eleven defendants and two possible conspiracies "not so complex by definition that the jury will be unable to segregate the evidence properly"); *United States v. Jenkins*, 779 F.2d 606, 617 (11th Cir. 1986) (holding variance non-prejudicial where indictment charged one conspiracy even if proof showed two conspiracies involving eight defendants). Moreover, the district courts repeatedly instructed the juries regarding evidence admitted only with respect to particular defendants. *See infra* pp. 134-35. These extensive instructions further minimized the likelihood that the jury improperly transferred evidence from one defendant to another.[76] Finally, the juries' split verdicts, *see infra* pp. 138-39, demonstrate their ability to segregate the evidence against each defendant. *United States v. Coy*, 19 F.3d 629, 635 (11th Cir. 1994) (split verdict "demonstrates the absence of confusion and

[76] In fact, much of the evidence about which appellants complain would have been properly presented even in the severed trial proposed by appellants. For example, in the alternative trial proposed by Roland Pugh – of only the PUGH defendants and McNair, RP-Br. 94 – evidence of RAST and FWDE's bribery of McNair would have been admitted to show McNair's corrupt intent in receiving bribes, subject to the same limiting instructions given here. *See infra* Section IV.

improper transfers of evidence"); *Caporale*, 806 F.2d at 1501; *United States v. Rodriguez*, 765 F.2d 1546, 1553 (11th Cir. 1985).

Roland argues that he was prejudiced by the single conspiracy charge because there was no evidence anyone in the "Pugh spoke" acted in furtherance of the conspiracy within the statute of limitations, *i.e.*, after August 2000. RP-Br. 95-98. Even if the conspiracy charge were limited to the "Pugh spoke," there was evidence that Yessick was involved in paying for the materials – steel and handrails – used on McNair's deck within the limitations period. *See* 061R935:1835-43. Indeed, PUGH – the company Roland founded and majority-owned – was convicted of aiding and abetting the installation of the deck handrails by purchasing them in October 2000 and March 2001 (Count 15), 061R631, based in part on testimony that FWDE's Bailey and Bobby Rast understood that PUGH intended to pay for the deck's materials and that PUGH, in fact, paid. 061R928:165-66, 203-04; 061GX29C; 061GX10B-F. The evidence also showed that Grady delivered an envelope of cash to McNair around Christmas 2000, at Roland's direction and in response to McNair's request to Roland that PUGH pay for his $40,000 air conditioning system. *See supra* pp. 24-25. Although the jury acquitted Roland of that bribe, there is no way to know whether, as Roland argues, the jury found no evidence of Roland's involvement, or whether it acquitted for other reasons, such as leniency, compromise or mistake. *See United States v.*

Powell, 469 U.S. 57, 65, 105 S.Ct. 471, 476 (1984).

Accordingly, even if the evidence of conspiracy presented to the jury did vary from the indictment, no remedy is appropriate because appellants cannot demonstrate that they suffered any prejudice.

C. No Jury Instruction Regarding Multiple Conspiracies Was Warranted

Swann also complains that the district court refused to instruct the jury on multiple conspiracies. Swn-Br. 36. A district court's refusal to give a requested instruction is reviewed for abuse of discretion and only constitutes reversible error if it "substantially impaired the defendant's ability to present an effective defense." *United States v. Richardson*, 532 F.3d 1279, 1289 (11th Cir. 2008) (internal quotations omitted). To succeed, therefore, Swann must show that "the evidence of multiple conspiracies was so strong that the jury would probably have acquitted [the defendant] of the conspiracy charges had it been given the tendered instruction." *Calderon*, 127 F.3d at 1330.

As set forth above, the evidence established a single conspiracy to bribe Swann with construction labor and materials to garner favorable treatment in the sewer rehabilitation program. Moreover, the district court's instructions adequately informed the jury of the law. The district court specifically described the nature of the conspiracy as alleged in the Indictment:

The purpose of the plan as alleged by the government in the

> indictment was for defendant Swann to corruptly solicit and accept things of value with intent of being influenced and rewarded for supporting the interest of defendants Yessick, Pugh, Bobby Rast, Danny Rast, Rast Construction, Dougherty and Dougherty Engineering in connection with the Jefferson County Environmental Services Department, sewer construction contracting program, in violation of Title 18 of the United States Code, Section 666(a)(1).

544R243:2304-05. The court also advised the jury it could not convict unless it found that each defendant, "knowing the unlawful purpose of the plan[,] willfully joined in it." 544R243:2304. This Court has previously found that instructions advising the jury to consider the conspiracy charged in the indictment are sufficient. *Richardson*, 532 F.3d at 1291-92; *Calderon*, 127 F.3d at 1329-30. The court's instructions adequately advised the jury of the governing law, and the court did not abuse its discretion in refusing to give a more specific instruction regarding multiple conspiracies.

IV. EVIDENCE OF OTHER BRIBES WAS PROPERLY ADMITTED AND DID NOT RESULT IN UNDUE OR SPILLOVER PREJUDICE

Appellants' complaints about the admission of evidence of other bribes[77] are meritless because that evidence was intrinsic to the charged offenses and otherwise admissible under Federal Rule of Evidence 404(b), the court's instructions to the jury eliminated any risk of undue or spillover prejudice, and the juries' split verdicts

[77] FWDE-Br. 29-32; Rasts-Br. 118-25; McN-Br. 48-64; Swn-Br. 37-44. Roland Pugh and PUGH, however, do not make nor adopt any arguments regarding admission of "other act" evidence.

signal that they sorted the evidence properly and did not convict based on character or guilt by association. This Court gives "considerable" deference to the district court on evidentiary issues and reviews a decision to admit Rule 404(b) evidence only for "clear abuse of discretion." *United States v. Brown*, 415 F.3d 1257, 1264-65 (11th Cir. 2005); *United States v. Lindsey*, 482 F.3d 1285, 1294 (11th Cir. 2007).

A. The Contractors' Bribes To Other JCESD Officials Were Inextricably Intertwined With The Charges In *McNair* And *Swann*

Appellants' bribery scheme was originally charged in the same indictment, and notwithstanding the severance of the case for trial, the bribery of each individual formed part of an overall plan to secure favorable treatment from the JCESD. Evidence of criminal activity other than the crime charged is not extrinsic under Rule 404(b) if it is inextricably intertwined with evidence of the charged offense. *E.g.*, *United States v. Wright*, 392 F.3d 1269, 1276 (11th Cir. 2004); *United States v. Gomez*, 927 F.2d 1530, 1535 (11th Cir. 1991). 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; forms an integral part of the crime; arises out of the same transaction or series of transactions; or is necessary to complete the story of the crime. *E.g.*, *Wright*, 392 F.3d at 1276; *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007).

The contractors bribed employees at each level of the JCESD hierarchy with

the power to award contracts, negotiate and approve contract modifications, authorize payments, and grant extensions, field directives, and emergency work. The contractors bribed at each level because, as appellants themselves acknowledge, *see*, *e.g.*, RP-Brief 63-66, the decisions involved multiple layers of review. 061R932:889-96, 913-16, 919-24; 544R232:393-96, 1339-40, 1672-73. Evidence concerning all of these bribes was, therefore, necessary to understand the overall bribery scheme *and* complete the story of the bribes to particular employees.

In *McNair*, for example, evidence of payments to other JCESD employees was necessary to provide a fair picture of the bribery of McNair, who approved (or recommended approval of) payment requests and contract modifications first recommended or negotiated at lower levels by JCESD's director, assistant director and engineers and by private engineers like FWDE's Dougherty and Bechtel or Dawson. Similarly in *Swann*, Swann's role in approving his subordinates' recommendations and, when necessary, passing them on to McNair for approval or submission to the commission, cannot be fully understood without knowledge that both his subordinates – Chandler, Ellis, Barber, and Wilson – and his supervisor – McNair – were also receiving bribes. Thus, the bribery of other JCESD employees shown in *McNair* and *Swann* was part of the "chain of events explaining the context, motive[,] and set-up of the crime" and, therefore, evidence of such bribery was properly admitted. *Edouard*, 485 F.3d at 1344 (citation omitted).

Without citing any legal support, appellants argue that if this evidence were intertwined with the charged offenses, the case could not have been severed. Rasts-Br. 120-22; McN-Br. 50. But the standards for severance and intrinsic evidence are different.[78] *Compare United States v. Blankenship*, 382 F.3d 1110, 1125 (11th Cir. 2004) (severance appropriate where charge against one defendant "while somehow related to the other defendants or their overall criminal scheme, is significantly different from those of other defendants"), *with Edouard*, 485 F.3d at 1344. Rejecting the argument that severance negated the relevance of evidence related to the severed counts, Judge Propst opined:

> But that doesn't have anything to do with whether or not something is or is not relevant evidence to some other situation. That's like saying, they indicted them for a bank robbery thing but you can't show that they spent some of the cash over here in another deal or something.

061R948:65. Accordingly, the evidence was properly admitted as intrinsic evidence.

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[78] The Rasts' supposition that, because the district court severed the case, it "must have found that the jury would be unable to consider the evidence separately as it pertained to individual defendants" is speculation unsupported by the record. Rasts-Br. 121. Judge Propst, who severed these cases, stated in a later telephone conference that "perhaps some of [these cases] didn't even call for severance, but I leaned toward trying to avoid as much confusion as I could." 061R600:15; *see also* 061R948:25-26 (Cases were severed because it would be "cumbersome to try" them together, but "[t]hat doesn't necessarily mean that evidentiarily, they're not related."). In that same conference, Judge Propst ruled that evidence of other bribes was relevant and that jury instructions would prevent improper use of that evidence. 061R600:11-12 ("I'm going to assume that if I tell them three or four times, they'll understand it.").

B. The Contractors' Other Bribes Were Admissible Under Rule 404(b) As Evidence Of Intent, Plan, And *Modus Operandi*

Even if this evidence is viewed as extrinsic, it was still properly admitted under Rule 404(b) to show the contractor's intent, plan, and *modus operandi*. 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 States v. LeCroy,* 441 F.3d 914, 926 (11th Cir. 2006); *United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir. 1992).

The testimony and exhibits readily establish the extrinsic acts, *i.e.*, that the contractors gave things of value to other JCESD employees in a position to act in the contractors' favor. Appellants' arguments that the evidence, nevertheless, fails to show their intent in giving those things, FWDE-Br. 29-31; Rasts-Br. 123, fails to appreciate the standard of proof. The evidence is sufficient for this purpose if a jury could find by a preponderance that the defendants made the other bribes. *Edouard*, 485 F.3d at 1344. The jury could reasonably conclude that the thousands of dollars given by the contractors to various JCESD employees in goods, services, and cash were not gifts, but bribes.

Intent was a key issue in this case both because the government was required to prove that appellants had acted "corruptly," and because, as Judge Propst recognized, "[a]ll [defendants] made intent the main issue." 061R679:11. *See supra* note 48. Evidence that appellants also gave things of value to other JCESD employees who could recommend, authorize, or approve their contracts, change orders, and payments is highly probative of their intent. *See Edouard*, 485 F.3d at 1345 (extrinsic evidence is relevant "where the state of mind required for the charged and extrinsic offenses is the same"). As Judge Propst explained in a pre-trial order:

> While the jury might conceivably find that the defendant felt such a strong sense of friendship with McNair that they would give him substantial gifts or make him substantial loans, the fact that they gave alleged 'gifts' or made 'loans' to others involved with the same or similar projects, would certainly be relevant to the issues of 'motive' and 'intent.' It could also bear on 'plan' . . . [and i]f the projects are the same or similar, they may well be a part of the same 'series of transactions.' . . . [W]hat might arguably be a 'gift' to one person becomes less likely a gift if the 'gifts' are widespread to others involved with the same or similar projects.

061R580:1-2. Similarly in *Swann*, Judge Coogler found that this sort of probative evidence of intent is "exactly what 404(b) testimony is here for." 544R232:113-14; *see also* 061R679:12 (Judge Propst: "The offenses were similar and temporally close. The 404(b) evidence was clearly appropriate to meet the government's requirement to prove intent.").

Moreover, where as here, the evidence is of similar conduct during the same time period, it has "heightened" probative value, *United States v. Jones*, 913 F.2d 1552, 1566 (11th Cir. 1990), that is not outweighed by potential prejudicial effect. *United States v. Beechum*, 582 F.2d 898, 916 n.21 (5th Cir. 1978) (*en banc*) ("Where the intent issue is so clearly delineated, evidence relevant to that issue is not lightly excluded.").

The other bribe evidence was also admissible under Rule 404(b) to show the contractors' plan or *modus operandi* of bribing officials by providing them with work on their homes or businesses and working together to do so. For example, in *Swann*, the evidence showed that Luke Cobb was sent by RAST to pour a concrete foundation for McNair's studio, just as he had done for the expansion of Swann's home, 544R232:510, 520-21, and that PUGH had provided Chandler with landscaping, just as it did for Swann, 544R232:1291-96. Similarly in *McNair*, evidence showed that, just as FWDE's Bailey was supervising and RAST and PUGH were providing labor and materials for McNair's studio expansion, FWDE's Stanger was supervising and using a RAST credit card to purchase materials for Swann's home renovation. 061R933:1354-56.

The court's limiting instructions at the time the evidence was admitted, throughout the trials, and during the final jury charges eliminated any risk of undue or spillover prejudice. *Edouard*, 485 F.3d at 1346. In *McNair*, for example, after

testimony of Dougherty's contributions to Swann's remodel, the court instructed (in part):

> This evidence is being allowed for the limited purpose, with respect to Mr. Dougherty, as to what Mr. Dougherty's intent may have been at the time that he may have made payments, or contributions, or gifts, to Mr. McNair. Not that Mr. McNair is charged with receiving anything in connection with Mr. Swann's house.
>
> But the evidence is allowed for the purpose of your considering that if Mr. Dougherty was making some sort of payments, or contributions, or gifts, on behalf of Mr. McNair; and if he was also making some sort of gifts, or payments, or contributions on behalf of Mr. Swann, you can consider that combination with regard to your determination, which will be a necessary determination for you to make, as to what Mr. Dougherty and his company's intent was, and the nature of that intent, whether it be corrupt or otherwise, at the time he made gifts, or contributions, or payments, on behalf of Mr. McNair.

061R928:177. The court gave similar instructions limiting against whom and how the evidence could be used and requiring separate consideration for each defendant when comparable evidence was admitted. 061R929:252-54; 061R930:558-562; 061R931:779-80; 061R932:944-45; 061R938:2321-22.

Likewise, in *Swann*, before the government offered testimony regarding Dougherty's bribery of McNair, Judge Coogler instructed the jury:

> [T]here is some evidence that the government is going to be offering, it will be offered and admitted for the limited purposes of evaluating the mental state of the individuals and entities that are involved in this case and the conduct that's about to be testified to. It is not, however, offered to show that the individuals that are about to be the subject of the testimony acted in any way in this case and under the charges of this indictment, but only to evaluate their mental state as to any conduct

> you find that they did in fact carry out under the allegations of this indictment. It's further not offered for any purpose in evaluating the mental state of the other defendants that aren't involved in the conduct that you are about to hear about. You wouldn't evaluate their mental state in any case based upon this testimony or whether they did anything in this case.

544R232:1375. *See also*, *e.g.*, 544R232:156-57, 867-68, 950-51, 977, 1289-90, 1871-72. No one objected to this instruction. Moreover, appellants frequently declined the district court's offer to provide additional limiting instructions.[79]

Appellants' arguments that these instructions were inadequate are frivolous. McNair contends the presumption that jurors follow their instructions does not apply, likening his case to *United States v. Colombo*, 909 F.2d 711 (2d Cir. 1990). McN-Br. 56-57. But *Colombo* involved evidence that robbers, who the defendant had allegedly tipped-off about his client's stash of gold bars and cocaine, raped and sodomized the client's wife when they did not find the stash. 909 F.2d at 712. Despite a jury instruction to consider that evidence "only as background for the surrounding events," the court concluded the erroneous admission was not harmless because linking the defendant to rape and sodomy "does more than tarnish his character before the jury; it brands him as the kind of reprehensible person who would 'sic' his criminal confederates on an innocent victim." *Id.* at 715. In

[79] *See*, *e.g.*, 544R232:208 ("COURT: . . . Does anyone want me to give that limiting instruction again with regard to this? MR. MCKNIGHT: Not at this time. MR. WISE: No, sir."); *see also* 544R232:190-91, 216, 520, 1394, 1399-1400.

contrast, the properly admitted other act evidence here does not present a remotely similar risk and did not "[b]y its very shocking nature . . . become[] the centerpiece of the trial." *Id.* Rather, the evidence of other bribes was comparable to the charged offenses and provides no basis to negate the presumption that the jurors followed their instructions.

Swann contends – for the first time on appeal – that the limiting instructions were not specific enough because they did not always identify by name the party against whom the evidence was being offered. Where, as here, the court's instructions accurately reflect the law, this Court gives "wide discretion as to the style and wording employed." *United States v. Starke*, 62 F.3d 1374, 1380 (11th Cir. 1995). Moreover, at several times during trial, the district court specifically offered to name defendants against whom the evidence was not being offered and appellants – including Swann – declined:

> COURT: I have asked y'all that every single time we have given a limiting instruction if you want me to use specific names and I have been told no up to this point. . . . I want you to know I am willing to sit here and tell you the names. I think it would be appropriate, but you are asking me not to; is that right?
> [SWANN'S COUNSEL]: Yes, sir.

544R232:951-52. Since Swann rejected the court's offer to provide a more specific instruction, he has waived any claim of error with respect to the instruction that was given. *United States v. Olano*, 507 U.S. 725, 732-33, 113 S.Ct. 1770, 1777 (1993).

But even assuming he can make his belated objection, the instructions that were given included a correct statement of the law; accordingly, there was no plain error. *Starke*, 62 F.3d at 1380.

Lastly, there is no indication that any of the appellants' convictions were prejudicially influenced by Rule 404(b) evidence. McNair's conclusory assertion that admission of 404(b) evidence against his co-defendants "significantly altered his trial strategy regarding the extent and manner in which he could argue and present evidence that he received these goods and services as gifts without corrupt intent," McN-Br. 56, does not establish prejudice. The evidence did not limit his ability to argue and present evidence on his intent because his intent in receiving the gifts was not dependent on co-defendants' intents in giving them. *See supra* p. 63. Moreover, as he acknowledges, there was no "evidence that McNair knew about, condoned, arranged, or otherwise sanctioned any of the transactions constituting 404(b) evidence against the Co-Defendants," McN-Br. 53-54 (emphasis removed), so there is every reason to conclude the jury only used the 404(b) evidence in the limited way permitted by the court's instructions. What constrained (or rather foiled) McNair's strategy of arguing he had no corrupt intent was the ample evidence that he solicited and received over $100,000 in cash, services, and materials from the Pugh, Rast, and Dougherty defendants, as well as Dawson, as charged in Counts 2-12.

Nor was the Rule 404(b) evidence inflammatory.[80] *United States v. Prosperi*, 201 F.3d 1335, 1346 (11th Cir. 2000); *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999) (404(b) evidence is not unfairly prejudicial where "the evidence did not involve conduct more inflammatory than the charged crime, and the district court gave a careful limiting instruction"). Indeed, the split verdicts returned in both *McNair* and *Swann* are a powerful "signal that the jur[ies were] able to sift through the evidence properly." *Prosperi*, 201 F.3d at 1346. In *McNair*, for example, the jury convicted Bobby Rast and his company but acquitted his brother Danny Rast on Count 21 ($5,300 carpet installation), and it convicted Yessick and PUGH for providing Chandler the Pelican Beach condo rental (Count 71) but acquitted them of giving Chandler the Bienville Plantation trip (Count 70). 061R629-33.[81] The *Swann* jury convicted Swann on conspiracy, six bribery counts,

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[80] McNair points to Appendix A, his listing of "404(b) EVIDENCE," arguing he suffered spillover prejudice due to the volume of 404(b) evidence. McN-Br. 52-53. But many of the items listed are direct evidence of the bribery charges against McNair, *e.g.*, items 36 and 43 (landscaping, Count 8), 38 (security gate, Count 6), 40 (Mosley construction work, Count 5), 42 (carpet installation, Count 7), 54 (Rast fabrication and installation of studio's stairs and deck, Counts 9 and 10); and portions of the government's closing argument (items 75-78) and jury charge (items 68-83, 79-83). In any event, voluminous evidence against co-defendants does not equal inflammatory evidence or spillover prejudice, especially when that evidence is readily separable and the jury was given adequate instructions. *Cf. United States v. Schlei*, 122 F.3d 944, 984 (11th Cir. 1997).

[81] *See also* 061R630 (RAST convicted for giving cash to Chandler and Ellis (Counts 72 and 87) but acquitted on charges it gave cash to Creel (Count 89)).

and eleven fraud counts, but acquitted him on one bribery count and seventeen fraud counts. 544R126; *see supra* note 8. It also convicted Bobby Rast and RAST on conspiracy and two out of three bribery counts, but acquitted Danny Rast on all four charges. 544R129-31. These mixed verdicts refute any contention that the juries must have "muddle[d] the facts and lump[ed] together conduct" and found guilt "simply by association." Rasts-Br. 125; McN-Br. 49-50.

C. Cash Deposit Evidence Was Properly Admitted, And Any Error Was Harmless

Appellants also complain about the admission of, and the government's "untimely notice" of intent to use, evidence showing that from November 1999 to March 2001 McNair received a large amount of cash from an unidentified source other than his studio business, and deposited it into the studio's construction account, 061R930:612-35; 061GX5A-Z, 6A-Z, 7A-G. McN-Br. 58-64; Rasts-Br. 118-19. These deposits correspond to the overt acts alleged in Count 50, which charged McNair, engineering firm USI, and its officers with conspiring to commit bribery.[82] 061R293:31-35; *see* Statement of Related Case, *supra* p. ii.

The district court rejected the argument that the timing of the notice of this evidence warranted exclusion. 061R605:1-2. Rule 404(b) requires reasonable

[82] Pursuant to his plea agreement, McNair later pleaded guilty to another bribery conspiracy between him and the USI defendants (Count 32) in exchange for dismissal of Count 50 and several bribery counts (Counts 33-37). 543R157:1-2.

notice of the government's intent to use 404(b) evidence in advance of trial (or during trial for good cause), but the rule imposes no specific time limits, and what constitutes reasonable pretrial notice depends on the circumstances of each case. *United States v. Perez-Tosta*, 36 F.3d 1552, 1560-61 (11th Cir. 1994). Appellants knew about these bank deposits long before trial: they were alleged in the Indictment, appellants had access to the bank records after indictment, and appellants received copies of the records weeks before trial. 061R948:59; 061R949:175-76. The government specifically told appellants of its intent to use the deposits to show McNair's intent shortly before *voir dire*, two days before opening statements, and a full week before the evidence was offered. McNair has "point[ed] to no specific actions he might [have] take[n] given more preparation time," *Perez-Tosta*, 36 F.3d at 1562, and instead primarily focuses, as he did in the district court, on how the allegedly late notice could have affected the later and separate trial of Count 50. McN-Br. 61, 63-64.

Moreover, preparation was not burdensome or elusive because the deposits were made by him and his daughter. And because the court made clear that the government could not submit evidence showing the cash came from USI's officers, 061R948:69-70, the burden of reviewing the bank records corresponding to the officers' withdrawals was lifted. Thus, the district court correctly found that appellants were "well aware of the situation and the potential" the evidence would

be offered and their "suggestions of prejudice are significantly overstated." 061R605:2. The district court did not abuse its discretion in refusing to exclude based on the notice's timing. *See Perez-Tosta*, 36 F.3d at 1560-61 (no abuse of discretion to rule reasonable a 404(b) notice given immediately before *voir dire* and six days before witness called).

Appellants also argue that the evidence was inadmissible regardless of notice. But the contractor-appellants have no basis to complain because the court protected them from any spillover prejudice by instructing the jury to consider the cash deposit evidence solely with regard to McNair's intent and that the evidence "was not applicable to any other defendant." 061R679:3; 061R931:723-25 ("there's no evidence that any of those amounts were given by any of these defendants . . . [and] the only reason that that evidence has been admitted is for whatever significance you may attach to it with regard to the intent of Mr. McNair"); 061R937:2080.

McNair's complaint also fails because the cash deposits were properly admitted under Rule 404(b) "as evidence of McNair's corrupt intent," 061R679:3, *i.e.*, that he acted corruptly with the intent to be influenced in connection with JCESD business and planned to fund his studio expansion through bribes. As Judge Propst explained:

> The defendants have suggested that the significance of numerous cash deposits and cash payments are irrelevant. By way of analogy, the court notes the significance which has been given to cash in drug

> trafficking cases. The court cannot imagine repeated cash related evidence in such cases being excluded. It is doubtful that such "cash" evidence would be considered as "character" or "conformity" evidence in a drug case.

061R605:2; *see also* 061R679:3-7; 061R948:65-70 (Judge Propst: "I think it creates some inference if he's had four hundred something thousand dollars in cash deposits in a particular period of time, that every bit of it does not have to be designated to some particular person or firm."); *cf. United States v. Lattimore*, 902 F.2d 902, 903 (11th Cir. 1990) ("Where the charged crime involves pecuniary gain and the Government presents other evidence of the defendant's guilt, evidence of the sudden acquisition of money by the defendant . . . is admissible, even if the Government does not trace the source of the new wealth.").

The court also protected McNair from any undue prejudice by instructing the jury the evidence was admitted only to help determine whether the charged bribes "were or were not made with a corrupt intent, but for no other reason." 061R931:725. And the mixed verdict rebuts the argument that the cash deposits unduly prejudiced and inflamed the jury. In fact, the jury acquitted McNair on the most similar charge, Count 4, alleging receipt of $30,000 in cash from the Pugh defendants, 061R634,[83] signaling it properly sorted the evidence, *Prosperi*, 201 F.3d at 1346, and that cash deposits did not materially prejudice "McNair's right to a fair

[83] The jury likewise acquitted on related Counts 13 and 14, alleging the Pugh defendants gave McNair $30,000.

trial," McN-Br. at 62.

Indeed, if McNair is correct that "the jury could not have reasonably inferred corrupt intent from the circumstances of these deposits," McN-Br. 62, then their admission had no effect because the court limited consideration of this evidence to McNair's intent, 061R931:723-25; 061R937:2080-81. Thus, given the ample evidence that McNair received cash, services, and materials totaling hundreds of thousands of dollars from specific contractors – PUGH, RAST, FWDE, and Dawson Engineering – doing hundreds of millions in business with the McNair-supervised JCESD, any error in the admission of the unexplained cash deposits was harmless because it "had no substantial influence on the jury's verdict" and "other convincing evidence supports the verdict." *United States v. Gunn*, 369 F.3d 1229, 1236 (11th Cir. 2004).

V. THE DISTRICT COURT PROPERLY DENIED SWANN'S SEVERANCE MOTION

For similar reasons, Swann's contention that the risk of prejudicial spillover was so great the district court should have severed the case against him for trial, Swn-Br. 37-44, fails. A district court's denial of severance is reviewed for abuse of discretion and this Court is "reluctant to reverse [that decision], particularly in conspiracy cases, as generally persons who are charged together should also be tried together." *United States v. Knowles*, 66 F.3d 1146, 1158 (11th Cir. 1995) (internal

quotations omitted). To prevail, Swann bears the "heavy burden of demonstrating compelling prejudice" from the joint trial. *United States v. Browne*, 505 F.3d 1229, 1268 (11th Cir. 2007) (internal quotations omitted). It is not enough for Swann to show that acquittal would have been more likely if he had been tried separately; severance is appropriate only if the prejudice is "clearly beyond the curative powers of [cautionary] instructions." *United States v. Baker*, 432 F.3d 1189, 1236-37 (11th Cir. 2005).

Swann complains that he was prejudiced by the evidence of his co-defendants' other crimes, Swn-Br. 37-44; however, a defendant does not suffer compelling prejudice simply because much of the trial evidence applies only to his co-defendants. "The mere fact that there may be an 'enormous disparity in the evidence admissible against him compared to the other defendants' is not a sufficient basis for reversal." *Schlei*, 122 F.3d at 984; *accord United States v. Cross*, 928 F.2d 1030, 1039 n.21 (11th Cir. 1991). Rather, Swann must show that the jury was unable to make an individualized determination of his guilt or innocence. *United States v. Saget*, 991 F.2d 702, 707 (11th Cir. 1993). Here, the district court instructed the jury:

> [T]he case of each defendant should be considered separately and individually. The fact that you may find one or more defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other defendant. I caution you, members of the jury, that you are here to determine from the evidence

> in this case whether each defendant is guilty or not guilty. Each defendant is on trial only for the specific offenses or offense charged against such defendant in the indictment.

544R243:2327. This Court has held such instructions are sufficient to prevent prejudice, and the jury's split verdict here, *see supra* pp. 138-39, demonstrates that it was able to make the individual assessments of guilt required by the court's instructions, *Cross*, 928 F.2d at 1039. *See also United States v. Smith*, 918 F.2d 1551, 1560 (11th Cir. 1990). Accordingly, the district court did not abuse its discretion in denying Swann's severance motion.

VI. COUNT 75 WAS NOT TIME BARRED

PUGH claims the five-year statute of limitations, 18 U.S.C. § 3282, precluded its conviction on Count 75, the Wilson "scholarship" conspiracy. PUGH-Br. 106-10. PUGH's claim fails because the conspiracy's objects were not achieved until June 2000, well within the limitations period.

The scholarship conspiracy was charged in the original indictment filed February 7, 2005. 061R1 (Count 3). One of the objects of the conspiracy was to enrich Wilson by $4,500, and Wilson and PUGH "did agree to conceal the existence of their scheme by making the payment to the University of Alabama at Birmingham ('UAB') in the form of a bogus scholarship for Defendant WILSON's son," Justin. 061R1:16. PUGH acknowledges that Grady Pugh mailed a $4,500 check to UAB for the benefit of Justin on August 24, 1999. PUGH-Br. 106. PUGH

is wrong, however, that this mailing was the last overt act in furtherance of the conspiracy.

A conspiracy is presumed to continue until its objects are achieved or it is abandoned. *Grunewald v. United States,* 353 U.S. 391, 397, 77 S.Ct. 963, 970 (1957) (bribery); *United States v. Dynalectric Co.,* 859 F.2d 1559, 1564 (11th Cir. 1988). Moreover, "to determine the objectives of any given conspiracy, the court must look to the conspiratorial agreement." *Dynalectric,* 859 F.2d at 1564.

Here, Wilson specifically told Grady to send UAB a $4,500 check "with a letter stating that the money should be credited to Justin Romel Wilson's student account." 545R142:1059; 545GX5A. Grady complied. 545GX5C. Thus, an objective of the conspiracy was to enrich Wilson in the form of payments that would directly reduce Wilson's cost of educating his son. While UAB credited Justin's account in August 1999, it disbursed the money to him in four equal payments: in September and December 1999, and March and June 2000. 545R141:777; 545GX5F-G. Thus the objects of the conspiracy were not achieved until Wilson's expenses for his son's schooling were reduced by $1,125 in March and $1,125 in June 2000. Those two disbursements were within the limitations period.[84]

PUGH claims that the disbursements to Justin were not overt acts by any of

[84] In fact, had Justin withdrawn from school prior to the final disbursement, UAB would have asked PUGH whether it should refund the remaining balance to PUGH. 545R142:802-03.

the co-conspirators. But "[t]he function of the overt act requirement . . . is simply to manifest 'that the conspiracy is at work,' and is neither a project still resting in the minds of the conspirators nor a fully completed operation no longer in existence." *Yates v. United States*, 354 U.S. 298, 334, 77 S.Ct. 1064, 1085 (1957) (citation omitted). Rejecting PUGH's claim, the district court explained that "Wilson's 'accepting a thing of value,' was met only when the 'scholarship' money actually benefitted Wilson through the payment of his son's educational expenses," and that "[i]f the son had withdrawn early, no benefit would have been conferred on Wilson, even if UAB did not refund the money to [PUGH]." 545R57:5. Thus, Wilson kept the conspiracy a going concern into June 2000 until he "received the full economic benefits anticipated" by his bribery scheme. *United States v. Anderson*, 326 F.3d 1319, 1328 (11th Cir. 2003) (Section 371 conspiracy)*; accord United States v. Loe*, 248 F.3d 449, 456 (5th Cir. 2001) (receipt of fraudulently procured money "was an object, and not merely a collateral result, of the conspiracy.").[85] As the district court further explained, if PUGH were correct, corrupt officials could "use deferred trusts

[85] Relying on cases holding that a conspiracy to violate civil rights ends when the victim dies, PUGH claims the "scholarship" conspiracy ended when Wilson retired in November 1999. PUGH-Br. 110. PUGH is wrong. If, for example, PUGH and Wilson agreed that Wilson would grant PUGH's 175-day time extension on the Village East 3 contract in exchange for PUGH reducing Wilson's educational expenses by $4,500, as the jury was free to conclude, *see supra* pp. 100-01, the fact that Wilson retired after granting the extension in no-way affected the parties ability to complete that agreement after Wilson retired.

and payments to avoid the reach of § 666 entirely." 545R57:5.

VII. COUNT 15 CHARGES A SINGLE OFFENSE

PUGH argues that Count 15 is duplicitous, PUGH-Br. 115-18, citing *Schlei*, 122 F.3d at 977, because "it charges two or more 'separate and distinct' offenses." PUGH did not raise this objection in the district court prior to trial as required by Federal Rule of Criminal Procedure 12(b), (e).[86] Accordingly, it is precluded from doing so now. *See United States v. Rivera*, 77 F.3d 1348, 1352 n.4 (11th Cir. 1996).

In any event, the duplicity challenge is premised on an incorrect understanding of Count 15. That count charged that PUGH "corruptly offered, gave, and agreed to give to . . . McNair . . . [i]nstallation of hand railings with a total approximate value of $17,200 . . . with intent to influence and reward an agent of Jefferson County . . . in [v]iolation of" 18 U.S.C. §§ 666(a)(2), 2 (aiding and abetting). Redacted Indictment, 061R623:14-15. Thus, Count 15 alleges a single thing of value was given to McNair: the installation.

That PUGH "purchased two sets of handrails for McNair's studio," one in October 2000 and another in March 2001, PUGH-Br. 115, is irrelevant. As the court properly instructed the jury, if a defendant aided or abetted another person in the commission of a crime, then the law holds that defendant responsible for the

[86] PUGH may have made a strategic decision not to object because it anticipated arguing to the jury, as it ultimately did, that it may have purchased handrails, but it did not install them. 061R936:1977-79; 061R937:2160-61.

conduct. 061R938:2323-24; *see United States v. Walser*, 3 F.3d 380, 388 (11th Cir. 1993). The charged offense was installation of those handrails, and PUGH aided and abetted that offense by providing the handrails that RAST installed.[87] Accordingly, Count 15 was not duplicitous.

VIII. WHARTON'S RULE DOES NOT PRECLUDE CONVICTIONS FOR CONSPIRING TO COMMIT SECTION 666 BRIBERY

McNair claims Wharton's Rule[88] precludes his convictions for conspiring to violate 18 U.S.C. § 666 (Counts 1 and 32).[89] McN-Br. 64-71. Wharton's Rule "first emerged at the time when the contours of conspiracy were in the process of active formulation," and applied to offenses like "adultery, incest, bigamy, [and] duelling . . . characterized by the general congruence of the agreement and the completed substantive offense." *Iannelli v. United States*, 420 U.S. 770, 781-82, 95 S.Ct.

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[87] As previously described, *see supra* pp. 102-05, PUGH provided the materials used to build the deck at McNair's studio, including the handrails, while RAST provided the labor, including installation of those handrails. 061R928:219-20; 061R933:1348; 061R931:801-03; 061GX10B, 10D.

[88] "'An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.'" *Iannelli v. United States*, 420 U.S. 770, 773 n.5, 95 S.Ct. 1284, 1288 n.5 (1974) (*quoting* 1 R. Anderson, Wharton's Criminal Law and Procedure § 89, 191 (1957)).

[89] Each time McNair argued Wharton's Rule – 543R51:1-2; 061R641:17-19; 061R644:7-8; 061R662 – he contended the conspiracy charges failed to state an offense, an issue which this Court reviews *de novo* with all factual allegations viewed in the light most favorable to the government. *United States v. deVegter*, 198 F.3d 1324, 1326-27 (11th Cir. 1999).

1284, 1291-92 (1974). In modern times, it is treated as a concept, not a rule, and cannot be "extended beyond the logic that supports it." *Id.* at 786, 95 S.Ct. at 1294. Every federal court, including this one, that has considered the issue in modern times has concluded that Wharton's Rule does not preclude a conspiracy to violate Section 666.[90]

First, Wharton's Rule applies only "where it is impossible under any circumstances to commit the substantive offense without cooperative action." *Iannelli*, 420 U.S. at 774 n.8, 95 S.Ct. at 1288 n.8 (citation omitted). Thus, where the substantive offense defined in the relevant statute could be committed without the "active, or culpable, participation" of one of the parties, *United States v. Previte*, 648 F.2d 73, 76 (1st Cir. 1981), an agreement among them to commit the offense can be prosecuted as a conspiracy. *Iannelli*, 420 U.S. at 780, 95 S.Ct. at 1291. As the courts below correctly concluded, a violation of Section 666 does not require the culpable participation of two persons:

> [T]he offense of receiving with the intent to be influenced . . . is a separate offense from giving to influence. . . . In each instance, the crux is the intent of (1) the receiver and/or (2) the giver. One could be guilty and the other not. The required intents are different. . . . Neither

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[90] *United States v. Evans*, 344 F.3d 1131, 1133 & n.2 (11th Cir. 2003) (no reversible error with conspiracy conviction whose objects included bribery and gratuity, where appellant argued it "possibly violat[ed] Wharton's Rule"); *United States v. Hines*, 541 F.3d 833, 838 (8th Cir. 2008) (Wharton's Rule does not preclude conspiracy to violate Section 666(a)(1)(B)); *United States v. Bornman*, __ F.3d __, No. 07-3447, 2009 WL 567072 at *6 (3d Cir. Mar. 6, 2009) (same).

crime requires that both agree to its commission.

061R679:8-9; *see also* 543R85:2-3.[91] Thus, Wharton's Rule does not apply to a conspiracy to violate Section 666.

Second, Wharton's Rule applies only where "[t]he parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large." *Iannelli*, 420 U.S. at 782-83, 95 S.Ct. at 1292 (footnote omitted). Thus, the rule cannot preclude appellants' conspiracy convictions because the "purpose of § 666, to protect the integrity of federal funds, indicates that 'the immediate consequences' of the behavior it proscribes rest on society at large," in this case, on the federal fisc and the people of Jefferson County. *Hines*, 541 F.3d at 838; *accord Bornman*, 2009 WL 567072 at *6; *see also Finazzo*, 704 F.2d at 306; *Previte*, 648 F.2d at 79.

Additionally, assuming that bribery requires the culpable participation of two

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[91] *Accord United States v. Finazzo*, 704 F.2d 300, 306 (6th Cir. 1983) (bribery of federal official not subject to Wharton's Rule because "concerted activity is not required to convict"); *Previte*, 648 F.2d at 77-79 (rule inapplicable to gratuity statute because offense did not require "culpable participation of two persons for its violation" but "allows conviction in this instance of only one of the two persons involved"); *United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974); *Ex parte O'Leary*, 56 F.2d 515, 516 (7th Cir. 1931) (rule inapplicable to bribery statute because offense "only applies to the recipient [of the bribe] under one section, and only applies to the giver under the other").

people, Wharton's Rule does not apply in this case because "the conspiracy involve[d] the cooperation of a greater number of persons than is required for commission of the substantive offense." *Iannelli*, 420 U.S. at 775, 95 S.Ct. at 1289; *Curtis v. United States*, 546 F.2d 1188, 1190 (5th Cir. 1977). For example, the Second Circuit held that Wharton's Rule did not prevent a public official's convictions for receiving bribes in violation of 18 U.S.C. § 201(c) (1970) and conspiring with two employees of the bribing company to receive those bribes, because the "agreement involved more participants than were necessary for the commission of the substantive offense." *United States v. Benter*, 457 F.2d 1174, 1178 (2d Cir. 1972). Like the bribed official in *Benter*, McNair was convicted of conspiracies involving multiple bribers. 061R293:6-7, 22-23 (Count 1: the Pugh, Rast, and Dougherty defendants; Count 32: Singh, Key, and USI).

Moreover, Wharton's Rule "has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary," and as an "aid to the determination of legislative intent, it must defer to a discernible legislative judgment." *Iannelli*, 420 U.S. at 782, 786, 95 S.Ct. at 1292, 1294. "Congress' failure to foreclose [conspiracy] liability in the face of several factors suggesting its existence," including bribery cases imposing such liability and *Iannelli*'s "plain . . . reluctance to find Wharton's Rule applicable to crimes outside its narrow traditional range," is itself "evidence of an intent to allow simultaneous

conspiracy liability." *Previte*, 648 F.2d at 79 n.6.

The two antiquated cases McNair relies on, *United States v. Sager*, 49 F.2d 725 (2d Cir. 1931), and *United States v. Dietrich*, 126 F. 664 (C.C.D. Neb. 1904), McN-Br. 68-69, rest on the mistaken premise that one person cannot commit bribery. They cannot be squared with *Iannelli*'s understanding of Wharton's Rule's place in modern federal jurisprudence.[92] Even in their era they were rejected,[93] and today they are not good law.[94]

Lastly, McNair is also wrong that the "agrees to accept" language in Section 666(a)(1)(B) makes Wharton's Rule applicable. Section 666(a)(1)(B) or 666(a)(2) can still be unilaterally violated notwithstanding that language. Moreover, such "agreement" language has been included in numerous bribery statutes, but has never been held to signify congressional intent to merge conspiracy and the substantive offense or to eliminate Section 371 liability. As a Senate committee observed while approving proposed revisions to 18 U.S.C. § 201 that included "agrees to accept" language:

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[92] The three cases cited on page 70 of McNair's brief are likewise out of sync with *Iannelli* and the other federal decisions cited above and, in any event, decide questions of state law and are thus irrelevant to the federal question here.

[93] *Ex parte O'Leary*, 56 F.2d at 515-16.

[94] *Benter*, 457 F.2d at 1178 (refusing to apply *Sager*); *United States v. Cogan*, 266 F.Supp. 374, 378 (S.D.N.Y. 1967) (*Sager* does not "state the current law"); *see also supra* notes 90-91.

> The offense of bribery is, of course, separate from that of conspiracy . . . and the Committee intends that – as under current law – a person may be convicted and sentenced . . . for both conspiracy . . . to commit bribery and the substantive offense itself.

S. Rep. No. 97-307,[95] at 429 (1981) (citing *United States v. Rosner*, 352 F.Supp. 915, 923-24 (S.D.N.Y. 1972), *aff'd and remanded for resentencing*, 485 F.2d 1213 (2d Cir. 1973) (permitting convictions for bribery (Section 201) and conspiracy to commit bribery (Section 371)); *see also Finazzo*, 704 F.2d at 304 ("The language of . . . section 371 . . . and that of the bribery statute (section 201), authorize punishment for each violation and do not place limitations on cumulative punishment for violation of other sections by a single transaction"). Thus, for fifty years, federal courts have uniformly concluded that Wharton's Rule does not preclude conspiracies to violate statutes with comparable "agrees to accept" language.[96]

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[95] When Congress enacted Section 666 in 1984, its authors specifically cited this report and noted that their legislation derived from the 1981 proposal, which had also included a federal funds bribery offense. S. Rep. No. 98-225, at 369 & n.1, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510 & n.1.

[96] *See supra* notes 90-91; *United States v. Foster*, 566 F.2d 1045, 1047-48 (6th Cir. 1977) (Wharton's Rule inapplicable to conspiracy to violate 18 U.S.C. § 215, which prohibits bank employees from receiving or agreeing to receive things from anyone for procuring a loan); *Benter*, 457 F.2d at 1178 (conspiracy to violate 18 U.S.C. § 201(c) (1970), which prohibited receiving or agreeing to receive); *Previte*, 648 F.2d at 78-79 (conspiracy to violate 18 U.S.C. § 201(g) (1976), which prohibited receiving or agreeing to receive things for or because of any official act); *Finazzo*, 704 F.2d at 304 (same); *United States v. McCord*, 33 F.3d 1434, 1439-40 n.2 (5th Cir. 1994) (questioning rule's application to conspiracy to violate

IX. THERE WAS NO PROSECUTORIAL MISCONDUCT

Relying primarily on inconsistencies between Grady Pugh's trial testimony and notes taken by the prosecutor during plea discussions with Grady, Roland Pugh argues that Grady's trial testimony was false and that the prosecutor was guilty of misconduct. RP-Br. 27-50. Notwithstanding the hyperbole in Roland's brief, the jury was fully aware of the alleged inconsistencies and nevertheless convicted Roland on the conspiracy count. Roland has adduced no credible evidence that "the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony," or that any such testimony "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *United States v. Dickerson*, 248 F.3d 1036, 1041 (11th Cir. 2001) (internal quotation marks and citations omitted).

Roland's argument focuses on Grady's testimony that he flew to Georgia for McNair's carpet before he delivered cash to McNair at his studio and later at his home, which Roland claims differs from Grady's proffer to the prosecutor during plea negotiations.[97] On June 17 and 21, 2005, more than nine months before trial,

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18 U.S.C. § 1954, which prohibits employees of benefit plans from receiving or agreeing to receive things with the intent to be influenced with respect to plan administration).

[97] The order of events mattered because bribes by Roland before the carpet flight were outside the statute of limitations. The order did not impact the conspiracy conviction, however, because an overt act in furtherance of that

the prosecutor met with Grady to obtain a proffer as part of plea negotiations pursuant to Federal Rule of Criminal Procedure 11. Also present at these meetings were at least one FBI agent, and counsel for both Grady (Mr. Spina) and PUGH (Mr. Brown). 061R929:351. Following his normal practice during plea negotiations, the prosecutor told the FBI agent not to take notes because nothing Grady said during plea negotiations could be used at his trial or sentencing. 061R644-Ex.B:5-6, 20; 061R488-Attachment 1:26-27, 29; *see* Fed. R. Evid. 410; U.S.S.G. § 1B1.8. However, all three attorneys took notes.

The prosecutor's notes consist of a series of bullet points with no questions and answers and nothing to indicate that the prosecutor was trying to establish a time line during the interviews. However, the notes contain four passages that can be interpreted to suggest timing. Specifically, after identifying Grady's delivery to McNair's house, the June 17th notes read: "The next time that Roland asked Grady to deliver an envelope of money it was to McNair was at McNair Studio." 061R488-Attachment 1:26-27. The rest are in the June 21st notes: 1) "Grady delivered the second envelope of cash to McNair at the studio"; 2) Bill Bailey was there when Grady delivered the cash to the studio, and "'Best I recall' this was the first time Grady met Bill Bailey"; and 3) after that passage, "Months later, Grady

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conspiracy occurred within five years of Roland's indictment regardless of whether the bribes were payed before or after the Georgia flight. *See United States v. Arias*, 431 F.3d 1327, 1340 (11th Cir. 2005).

flew to Georgia for the carpet." *Id.* at 30.

The prosecutor's notes do not establish that the time line given at trial was false, let alone that the prosecutor knew it was false, or that Grady fabricated Roland's role in the conspiracy. Indeed, the notes did not purport to be a verbatim account of what Grady disclosed during the proffer sessions. They were never adopted or even checked by the witness. Nevertheless, they were disclosed to defense counsel months prior to trial and used by Mr. Brown to cross-examine Grady who, at Mr. Brown's request, read the notes and confirmed for the jury that they contain each of the four relevant passages. 061R930:448-54. Ultimately, the jury convicted Roland and the other appellants on the conspiracy count, but acquitted Roland and his company on the substantive counts related to the cash bribes. There is, of course, no way to determine why the jury acquitted on those counts since a jury can acquit for any one of a number of reasons including "mistake, compromise, or lenity." *United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471, 476 (1984).

Under these circumstances, the cases Roland cites are irrelevant. Most involve some potentially impeaching fact that the prosecutor knew but had not disclosed to the jury or to defense counsel. *See Napue v. Illinois*, 360 U.S. 264, 365-67, 70 S.Ct. 1173, 1175-76 (1959); *Giglio v. United States*, 405 U.S. 150, 151-52, 92 S.Ct. 763, 764-65 (1972); *United States v. Barham*, 595 F.2d 231, 241 (5th

Cir. 1979); *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 (11th Cir. 1988). In two others, the prosecution disclosed to defense counsel promises to its witnesses, who denied the promises during their testimony. Government counsel not only failed to correct testimony known to be false but also adopted and capitalized on that testimony during summation.[98] *DeMarco v. United States*, 928 F.2d 1074, 1075-77 (11th Cir. 1991); *United States v. Sanfilippo*, 564 F. 2d 176, 177-79 (5th Cir. 1977). Lastly, in *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995), there was no "false testimony," but the prosecutor made factual representations to the judge and jury, which he subsequently discovered were false, a discovery he did not share with the judge, jury, or defense counsel.

In contrast, the prosecutor here gave defense counsel his notes – the contents of which represent all he knew about Grady's prior statements and thus all the potentially impeaching facts – and the notes' contents were in turn disclosed to the jury. Mr. Brown or other defense counsel could have, but did not, call the FBI agent as a witness to ask about his recollection of Grady's statements. Nor did they seek or offer testimony, an affidavit, or the notes from Mr. Brown or Mr. Spina, who were both present during the proffer sessions and might have been able to

[98] In the prosecutor's closing here, the prosecutor did not adopt, capitalize, or even reference the disputed testimony regarding the order of bribes, any statements made or not made at the proffer sessions, or note-taking at those sessions.

support Roland's arguments, if there were any merit to them.[99]

Grady testified he had a "clear recollection" of what he had said during the discussions. 061R929:419-20. He reviewed the notes on defense counsel's instruction and explained that the notes were "not laid out in the order that things happened," that he did not "recall saying it in that order," and, "[d]espite what it says, it's not true." 061R930:450, 454, 452. Even if the notes accurately reflect what Grady had said in June 2005, they do not establish that his earlier statements were correct and his trial testimony false. *Cf. Hays v. Alabama*, 85 F.3d 1492, 1499 (11th Cir. 1996) (no due process violation where "there has been no showing that [the witness'] later, rather than earlier, testimony was false"). As this Court has repeatedly recognized, prior statements inconsistent with a government witness' testimony do not establish prosecutorial misconduct:

> [D]ue process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements.

United States v. Brown, 634 F.2d 819, 827 (5th Cir. Jan. 19, 1981); *United States v. Gibbs*, 662 F.2d 728, 730 (11th Cir. 1981) (same); *United States v. Sutherland*, 656 F.2d 1181, 1203 (5th Cir. Sept. 25, 1981) (same); *United States v. Michael*, 17 F.3d

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[99] Mr. Brown represented PUGH, which was under the control of Roland, 061R929:308-09, during the proffer session and at trial.

1383, 1385 (11th Cir. 1994) (conflicting statements do "not amount to a showing that the government knowingly presented false testimony.").

Here, the prosecutor believed, with good reason, the timeline Grady gave at trial. The documentary evidence is consistent with that timeline. 061GX3A (May 24, 2000 PUGH check to carpet store); 061GX4A-C (July 18-19, 2000: $9000 in checks to cash); 061GX4F-I (December 15-22, 2000: $38,750 in Roland Pugh checks to daughters-in-law and cash). Moreover, Grady's testimony that the carpet trip preceded the cash drop off at the studio is corroborated by Bill Bailey's testimony that he flew with Grady to pick out carpet and saw him "again" at the studio, where they "talked about airplanes for a second" before Bailey asked Grady "if he was here to help Chris McNair again," to which Grady answered yes. 061R928:164.

Unable to show the timeline testimony was false or that the prosecutor believed it was false, Roland focuses on Grady's denial of having provided a different order during plea discussions. This argument again assumes that the notes accurately represent the timeline, if any, that Grady provided in June 2005, but there is no evidence that they do so. It also assumes that the timeline matters to the conspiracy count, which it does not.

In any event, any inconsistency between Grady's trial testimony and the prosecutor's notes does not undermine confidence in the verdict because the jury

was fully aware of the relevant portions of the notes. On cross examination, Mr. Brown showed Grady the prosecutor's notes, read him the specific passages at issue, and had Grady confirm that is what the notes say. 061R930:448-54. Finally, in his closing argument, defense counsel argued that Grady lied, that his envelope deliveries were outside the statute of limitations, and that the notes' passages, which Mr. Brown recited again for the jury, supported this argument. 061R937:2154-55.

Nor did the government "thwart[] defense counsel's attempt" to "correct [Grady's] false testimony." RP-Br. 27. There was no false testimony to correct. In any event, the prosecutor disclosed his notes, and the allegedly inconsistent parts were twice recited to the jury. 061R930:450-54; 061R937:2154-55. The prosecutor's refusal to stipulate "that Grady Pugh had made the prior statements as recorded in the prosecuting attorney's notes," RP-Br. 41, and its objection to defense counsel's effort to call the prosecutor as a witness, were fully justified and could not have affected the verdict. A stipulation was unnecessary because Grady's testimony already established that the prosecutor's notes of the proffer contained the relevant passages. The prosecutor had no independent recollection of what had been said during those proffers. And, as Judge Propst said to defense counsel, "whatever you'd be calling [the prosecutor] for doesn't amount to a hill of beans." 061R935:1670. Finally, while the prosecutor did make objections during counsel's lengthy cross examination, RP-Br. 38-40, those objections were not frivolous and, in

any event, were overruled.

Thus, the jury in this case, unlike those in the cases cited by Roland, was not "laboring under a Government-sanctioned false impression of material evidence," *Barham*, 595 F.2d at 242, but rather possessed all the relevant information on the witness' prior statements. Whatever the jurors' doubts about Grady's recall of the timeline, if any, the guilty verdict demonstrates that they believed his testimony linking Roland to the conspiracy. That credibility determination should be respected.

Roland's secondary argument that the prosecutor "caused Grady Pugh to testify falsely that the FBI agents had taken notes," RP-Br. 36, is equally without merit. Specifically, Roland relies on this exchange between the prosecutor and Grady:

> Q: And when you signed that plea agreement, Mr. Pugh, had you already met with us on two occasions at the FBI office?
> A: Yes, sir.
> Q: And when you met with the FBI and myself, was your lawyer there?
> A: Yes, sir.
> Q: And was the company lawyer there?
> A: Yes, sir.
> Q: And was everybody taking notes?
> A: Yes, sir.

061R929:351. Since the two prior questions referred to Grady's and PUGH's lawyers, one plausible interpretation of the last question is that the prosecutor was

asking whether the defense lawyers took notes. There is no dispute that both did. Even assuming that the prosecutor was referring to literally everyone at the proffer sessions, Grady later explained that it "looked to me like everybody was taking notes." 061R929:367-68. And he admitted that the prosecutor "could have" told the agent not to take notes during these two interviews, but he could not remember. 061R929:368-70. While the prosecutor knew he had instructed the agent not to take notes, as he routinely does for plea discussions, he had no reason to doubt Grady's testimony about who Grady believed was taking notes and no reason to question Grady's failure to recall the prosecutor's note-taking instructions to the FBI. 061R929:367-71.

If Roland really wanted to inform the jury about what the FBI agent heard and did, he could have called the agent. His claim that testimony concerning the prosecutor's instructions to the FBI agent would have "discredit[ed] the Government's investigation" and "undermine[d] the reliability of the entire prosecution" by "giv[ing] the jury the impression that the Government intentionally failed to document Grady Pugh's prior statement and then pressured him to change his testimony with an offer of a shorter prison sentence," RP-Br. 38, 40, is unfounded, if not absurd. As the jury knew, the prosecutor took the very notes at issue and turned them over to defense counsel, and Grady's lawyer and Mr. Brown, PUGH's lawyer, were present, taking notes, and presumably documenting his

statements themselves. 061R929:368, 371; 061R930:448-54.

Finally, Grady was subject to extensive impeachment on the charges, plea negotiations, and plea agreement, including admission of the final agreement and two earlier proposals. 061R929:372-77, 384, 402-10, 421-30, 438-39; 061R930:507-08, 515-26, 538-41. Moreover, his credibility was attacked in many other ways including (1) his bribing of an Atlanta official and his attempt to minimize it by lying and blaming a subordinate, 061R929:385-98; 061R930:497-98, 537-38; (2) his violation of conditions of release by flying his airplane and his effort to conceal it, 061R929:398-401; 061R930:504-05; (3) his grand jury testimony, 061R929:429-33, 061R930:456-72; (4) his stormy relationship with his father and desire to control the company, 061R930:499-500; 061R935:1692-93; (5) his distrust of Yessick, 061R929:363-64; (6) his unsuccessful negotiation with his father to obtain severance pay from PUGH, 061R930:509-12; and (7) his efforts to get PUGH to buy back his stock, 061R930:513-15. Despite this all-out attack on his credibility, the jury believed Grady's testimony about Roland's part in the conspiracy. Any "revelation" about note taking "would not have been especially significant" and "pale[s] into total insignificance as impeachment when considered against the backdrop of all the other impeaching evidence the jury had before it." *United States v. Antone*, 603 F.2d 566, 570-71 (5th Cir. 1979) (internal quotation marks and citations omitted).

Accordingly, the district court "did not abuse its discretion in denying [appellants'] motion[s] for a new trial [061R637:3-4; 061R644:19-24] based on [Grady's] allegedly perjured testimony," *Dickerson*, 248 F.3d at 1051. *See* 061R680 (June 30, 2006 order).

X. THE SENTENCES WERE PROCEDURALLY AND SUBSTANTIVELY REASONABLE

In reviewing sentences, this Court ensures that the district court committed no significant procedural error, such as improperly calculating the guidelines range, and then reviews the reasonableness of the sentence for an abuse of discretion. *United States v. Livesay*, 525 F.3d 1081, 1091 (11th Cir. 2008). The sentencing court's findings of fact are reviewed for clear error. *United States v. Bernadine*, 73 F.3d 1078, 1079 (11th Cir. 1996). The "deferential clearly erroneous standard" applies with "full force" even where the findings are based on a review of trial records, documentary evidence, and inferences from other facts. *Spaziano v. Singletary*, 36 F.3d 1028, 1032 (11th Cir. 1994). And "'[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Id.* (citation omitted).

A. PUGH's $19.6 Million Fine Was Supported By The Evidence

1. The Trial Records And Reasonable Inferences Therefrom Fully Justify The Court's Pecuniary-Gain Finding

The district court fined PUGH $19.4 million, the minimum sentencing guidelines fine. The guidelines calculation depended in part on the court's finding, as recommended by the PSR, that the defendant's pecuniary gain from the offense included its profits on JCESD contracts during the bribery scheme, specifically $43,985,869. 061R982:12, 14. PUGH challenges that finding and claims it had no notice of or opportunity to rebut it. PUGH-Br. 51-70.

The record fully supports the pecuniary-gain finding. Observing that "this is a case in which a number of public officials working for Jefferson County put their offices up for sale," the court recounted the numerous and substantial bribes PUGH paid to McNair ($93,729), Swann ($149,102), Chandler ($16,610), Barber ($52,402), and Wilson ($4,500). 061R982:5-7. The "bribe scheme began when McNair began asking for payments" and "was intended and operated successfully to avoid what might happen if the bribes were not made." 061R982:9, 71-72. In response to the county officials' "solicitations and expectations" and knowing "others were doing it," PUGH made the payments to keep "McNair and other people happy" and avoid losing its current and future contracts and the associated profits. *Id.* Thus, "the Probation Office got it right when it determined the gain based upon

the profits from Pugh Construction's contracts with the County." 061R982:10.

Notwithstanding what PUGH suggests in this Court, PUGH-Br. 54, its counsel correctly observed during sentencing that "[t]he evidence is that Mr. McNair solicited." 061R982:70. McNair asked Roland to "pay for his [$40,000] air conditioning system," 061R929:324, to provide a flight to a Georgia carpet store and the deposit for the carpet, to give cash for the studio renovation, and to build his Arkansas retirement house. *See supra* pp. 22-27; 061R929:324, 327. And PUGH gave McNair everything he requested.

PUGH was also quick to respond when Wilson complained in 1999 about college expenses for his son. 545R142:1053-54. The complaint was no mere observation about high tuition since FWDE was already paying Wilson's son's tuition and fees for the 1999-2000 school year. 545R141:782-83; 545R142:1060; 545GX2A, C. Apparently recognizing a request for a bribe when he heard it, Grady responded that PUGH might be able to help with a scholarship. 545R142:1053-55; *see also* 061R930:344-45 (Creel asked PUGH for flight on company plane); 542R127:728 (Barber asked Yessick if PUGH "would buy a piece of property for him.").

While Swann and Chandler's statements to PUGH might have been more subtle, they suggest a similar expectation of bribes – an expectation PUGH quickly met. For example, after Swann told Yessick about overspending on remodeling his

house, Yessick said he would send a PUGH crew over there to plant some grass. When that was not enough to "please" Ms. Swann, Yessick hired a professional landscaper, which PUGH eventually paid $140,680. 544R232:1828; 542R128:863-64; 544R232:650-51; 544GX30FF. Likewise, when Chandler told Yessick he needed landscaping, Yessick immediately offered to help out, and Chandler eventually accepted. 061R932:941-42; *see also* 061R932:951-55 (Chandler asked PUGH for load of sand and Rasts to pay expenses on European trip).

During sentencing, PUGH's counsel explained their client paid officials "in essence, to get the calls returned," 061R1008:247-48; 061R1009:483, or to have "a friend to come out and mitigate a dispute," 061R1008:251. Recognizing "such de minimis help was not the gain intended or the gain actually realized by the bribes," 061R982:9, the court was more persuaded by another argument advanced by PUGH's attorney:

> [L]et me explain to [the court] why I think the contractors make such payments to public officials.
>
> * * *
>
> [T]he best testimony that I heard about that was from Mr. William Dawson. Mr. Dawson was an engineer, independent, who was doing work for Jefferson County. . . . Mr. McNair invited him to come by the studio. And when he got there, Mr. McNair said, Mr. Dawson I've never asked you for anything before, but what I would like is for you to buy me an audio-visual equipment, some sort of a projector or something of that nature, and he had a book. And he said this is the model and this is what I would like to have. Well, Mr. Dawson didn't want to do that. And he went home and he thought about it and finally he did it. And he did it because he was afraid of what Chris McNair

> would do to him if he didn't.
>
> So when these people come and put the touch on a contractor or someone, I think it's the fear of the unknown.

061R1009:481-82.

The court made essentially the same inference, concluding that PUGH made the payments to protect contracts it feared losing if it did not pay. PUGH was best positioned to determine if McNair and his subordinates could threaten its contracts or payment on those contracts through the use (or misuse) of their positions. Regardless of any supposed limits on McNair's "official powers," PUGH's payment of bribes shows that it believed that McNair and the others could jeopardize the company's opportunity to obtain and maintain JCESD work. *Cf. Gee*, 432 F.3d at 715 ("One does not need to live in Chicago to know that [an official's] job description is not a complete measure of clout."). Roland's own words that the Arkansas house was "the last time" PUGH would have to pay McNair off because "he is out of office" now, 061R929:330-31, firmly supports that conclusion.

There is no inconsistency between the court's findings and testimony that the bribed county officials could give "'preferential treatment' in rerouting lines and the like." PUGH-Br. 56. In addition to retaining its contracts and getting new ones, PUGH's bribes also produced these secondary benefits. As the factfinder at sentencing, the court could weigh testimony about the witnesses' conduct and their

self-exonerating explanations for that conduct differently.[100] Indeed, as the district court recognized, Grady Pugh "had an incentive to not acknowledge that the bribes led to any gain" because his sentence could be affected by any gain the conspirators realized, regardless of his plea agreement. 061R1008:249-50. Substantial evidence supports the district court's finding that PUGH profited substantially from the bribes it paid.

2. PUGH Had Notice And Opportunity To Rebut Evidence Concerning Pecuniary Gain From The Offense

PUGH was not deprived of notice or the "'opportunity to rebut factors that might enhance a sentence.'" PUGH-Br. 67 (quoting *United States v. Castellanos*, 904 F.2d 1490, 1495 (11th Cir. 1990)). The critical sentence-enhancing factor for the fine was the "pecuniary gain to the organization from the offense."[101] U.S.S.G. § 8C2.4(a)(2) (2001). On May 11, 2007, long before the sentencing hearings, the court focused the parties on this factor by ordering them to "submit briefs, with appropriate record and legal support" addressing "[w]hat was the nature and amount of pecuniary gain to Roland Pugh Construction, if any, as a result of the offenses?"

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[100] As the factfinders at the trials, the juries considered this testimony and found the things were in fact corruptly provided to influence McNair and other JCESD employees.

[101] Although the pecuniary-gain finding yielded a minimum guidelines fine of $61,580,216, PUGH's inability to pay reduced that amount to $21 million and its shareholders' fine further reduced it to the $19.4 million imposed. 061R982:41, 62-63.

061R916:1. Afterwards, the Probation Office, fully aware of PUGH's arguments that there was no gain, concluded "that the pecuniary gain attributable to Pugh Construction was $47,921,033.20 – its reported profits between 1999 and 2002." 061R991:2 (citing PSR, ¶ 141). As the court explained in overruling PUGH's due process objection, the PSR and the court's own statements at the hearings on May 29 and October 24, 2007 made clear that the court was considering PUGH's pecuniary gain as the basis for determining its fine and expressly invited PUGH to address the issue. *Id.* at 5-7.

In fact, on the first day of the two-day evidentiary hearing, the court specifically told PUGH that, regardless of the government making "what they think their best argument is," the "target you're given is also the pre-sentence report," *i.e.*, whether the company's profits constitute the pecuniary gain. 061R1008:261. Thus, PUGH's lawyers knew that, while they "may have to fend off arguments by the government in response to that same pre-sentence report[, they] walked in that courtroom knowing that probation had determined that there was a $47 million-gain attributable to [their] client due to the bribe scheme." 542R182:12.

That PUGH's counsel, rather than the government, first suggested solicitation and fear is immaterial. 061R1009:481-82. The sentencing "[g]uidelines do not reduce district court judges to mere automatons . . . who must accept as canon all that . . . is presented to them regarding a defendant's involvement in the crime

charged or conduct relevant thereto." *Bernardine*, 73 F.3d at 1080 (citation omitted). Rather, judges must exercise "the critical fact-finding function that has always been inherent in the sentencing process," *id.*, because, even in *Booker*'s wake, they are obliged to correctly calculate the guidelines sentence, *United States v. DeVegter*, 439 F.3d 1299, 1303 (11th Cir. 2006).

PUGH's contention that the district court prevented PUGH from presenting witnesses and from going beyond the issue of whether the PRC was corrupted, PUGH-Br. 69, is incorrect. A sentencing court has "discretion . . . to determine the kinds and form of information it will consider." *United States v. Giltner*, 889 F.2d 1004, 1008-09 (11th Cir. 1989). The court's reliance on the trial testimony of Grady Pugh and other witnesses was "entirely proper," *Castellanos*, 904 F.2d at 1496, especially when PUGH repeatedly directed the court to that testimony at sentencing, 061R1009:287-88, 400, 418.

The proffer process did not prevent PUGH from presenting its witnesses' testimony. During the second day of the evidentiary hearing to avoid wasting time, the court instructed the parties to proffer what their witnesses' testimony would be, and if a proffer were disputed, the witness would be called. 061R1009:299-301. Thus, when PUGH disputed a government proffer, that government witness was called to testify. 061R1009:344-46, 367-68. The same procedure applied to defense proffers, and PUGH "in the spirit of what we are trying to accomplish" proceeded by

proffer without objection. 061R1009:399-400. Its proffers, however, mostly rehashed the witnesses' trial testimony and drew no objection from the government. 061R1009:399-416. And those proffers went beyond the corruption of the PRC, demonstrating that there was no court-imposed limit to that topic.[102]

B. The Law And Evidence Fully Support McNair's Restitution Obligation

While McNair was ordered to pay restitution in both *McNair* and the 05-543 case (Count 32), 061R956; 543R196, he cannot challenge on appeal the restitution order in 05-543 because in his plea agreement he waived the right to appeal his sentence and the manner in which it was determined.[103] 543R157:9-11;

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[102] *See*, *e.g.*, 061R1009:400 ("[Chandler] would testify that he was not influenced in any way in his capacity with [JCESD] as result of the [bribes] he received from Pugh Construction . . . [they] had no influence on his decision on the Product Review Committee, no influence in his decision as to pay requests, field directives or changes in the contracts."); 061R1009:408 ("[Wilson] would also testify . . . not only on the Product Review Committee but even in his role as an engineer or whatever his role is, he never did anything for Pugh Construction as a result of the scholarship . . . ."); 061R1009:409 ("[Ellis] would testify that that money had no influence over him in any way in his decisions on the Product Review Committee or in Jefferson County."); 061R1009:416 ("[Grady Pugh] would say . . . he did not intend to influence Ron Wilson's decision making on the Product Review Committee or his decision as an officer of Jefferson County.").

[103] The plea agreement limited his right to appeal the Count 32 conviction to the issue discussed in Section VIII above. 543R157:1-2. Presumably to argue the restitution order is appealable in toto despite this limitation, McNair complains the court "made no distinction between restitution ordered in the 05-61 case and any restitution ordered in the 05-543 case," McN-Br. 72. Because that complaint was not made below, the court had no opportunity to address it, so the argument is waived.

543R240:17-18 (knowing and voluntary waiver at plea colloquy); *see United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008). And thus, so long as his conviction on Count 32 is upheld, his challenge to the restitution order under *McNair* cannot affect his restitution obligations.

In any event, the sentencing court's order requiring McNair to pay $851,927 in restitution to the Jefferson County Commission is fully justified. Under 18 U.S.C. § 3663A(a)(1), restitution was mandatory in the full amount of the victim's loss.[104]

McNair's primary argument on appeal – and his only argument in the district court – is that there is no evidence connecting his receipt of $851,927 in bribes to

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[104] At sentencing, the district court did not specify the statutory basis for restitution, but paragraph 172 of the revised Presentence Report stated restitution was "[p]ursuant to 18 U.S.C. § 3663A(a)(1)," the mandatory restitution provision. 061R953:¶172. While McNair objected to paragraph 172, specifically the calculation of bribes accepted and the "testimony" of a witness at a co-defendant's sentencing, 061R924:8, he never disputed the applicability of Section 3663A(a)(1). McNair inexplicably proceeds on appeal, however, as if restitution were imposed pursuant to 18 U.S.C. § 3663(a)(1)(A), the discretionary restitution provision. McN-Br. 71. Even assuming that provision applies, restitution was authorized and warranted. Under Section 3663(a)(1)(A) a court must "consider" the amount of the victim's loss resulting from the offense and the financial circumstances of the defendant, but once a court decides to order restitution, it must do so "in the full amount of each victim's losses . . . without consideration of the economic circumstances of the defendant." 18 U.S.C. §§ 3663(d), 3664(f)(1); *see United States v. Day*, 418 F.3d 746, 756 (7th Cir. 2005). The district court did just that: it considered the county's loss resulting from the offense and the defendant's financial circumstances, 061R987:14-23, 68, and ordered restitution in the full amount of the loss.

the county's loss.[105] McN-Br. 71-75. But the district court considered the trial evidence, in particular testimony that paying off McNair was how the contractors did business. 061R987:17-18. And it made reasonable inferences therefrom, finding that the county commission suffered a loss of $851,927:

> [C]ommon sense seems to me that, in any business, it doesn't intentionally go into business for the purpose of losing money; that the evidence in all of these cases clearly shows that there was a great deal of profit to be earned from these sewer contracts. And it seems to me, commonsensically, that if you pay a certain amount of money as bribe money, whether it's cash or for services performed, you're going to add that back into the contracts or the bills submitted to the Jefferson County Commission which pays the bills, in the first instance.
>
> It is how they do business. Stated more clearly, it is a cost of business, a direct cost of business that it paid and made up for, at some point, by the Jefferson County Commission directly.

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[105] McNair claims that he stipulated "to the amount of alleged bribes he received as $851,927, solely for the purposes of sentencing guidelines calculations," and that he "objected both to this amount and its calculation as forming the proper basis for any restitution." McN-Br. 73. In fact, as McNair's counsel made clear at sentencing, the *amount* of bribes received was not disputed at sentencing for any purpose, only its relation to the county's loss was:

> [We] don't have a dispute for our purposes here today with that number [$851,927] as the number of benefits received by Mr. McNair.
>
> * * *
>
> I want to be clear that we would stipulate to the fact that that's the benefit received by Mr. McNair, but don't stipulate to the fact that the benefit received by Mr. McNair is the proper basis on which restitution is equitable.

061R987:19-20.

061R987:18.

While recognizing that construction contracts were awarded through a bidding process, the court found that "the benefit to the bribe payors did not necessarily accrue in the awarding of those contracts in the first instance, but, rather, the benefit accrued during the performance phase of the work that they were engaged to perform through change orders, through agreements to additional payments due to change orders, and things of that nature." 061R987:22. Thus, "[a]t some point, any direct cost of business is going to be added back by the bribe payors in the bills, the padded bills, that are submitted to the Jefferson County Commission," and "therefore, the Jefferson County Commission . . . which paid those bids, is an identifiable victim." *Id.*; *see supra* pp. 104-05 (county billed for steel and hand railing installed at McNair studio). Moreover, $624,440 of the $851,927 came from engineering firms that were selected by McNair for no-bid contracts. 543R165:Attachment 3.

The court's inferences and reasoning are sound. Businessmen make investments expecting a return, and they only continue to invest, as they did with the bribes in this case, when there is a return. *See supra* p. 85. While McNair might prefer a more exacting showing of the amount of loss, the court can rely on an approximation of the actual loss in ordering restitution. *United States v. Futrell*, 209 F.3d 1286, 1292 (11th Cir. 2000). And the approximation here errs, if at all, by

underestimating the loss because usually the benefit exceeds the bribe. *See DeVegter*, 439 F.3d at 1303.

McNair's remaining arguments on restitution are raised for the first time on appeal and accordingly have been waived and can be reviewed only for plain error. *United States v. Garey*, 546 F.3d 1359, 1363 (11th Cir. 2008). Relying on *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), and *United States v. Holland*, 380 F. Supp. 2d 1264, 1274 (N.D. Ala. 2005), McNair contends that a restitution order requires a jury determination by proof beyond a reasonable doubt of the victim's loss. McN-Br. 77-79. The government's burden, however, is to prove the loss to the court by a preponderance of the evidence. 18 U.S.C. § 3664(e); *Futrell*, 209 F.3d at 1290. The cited cases do not help McNair because "*Booker* does not apply to restitution orders," *United States v. Williams*, 445 F.3d 1302, 1310-11 (11th Cir. 2006), and *Holland* depends on the erroneous premise that it does, 380 F. Supp. 2d at 1271.

McNair also contends that the court's reliance on "testimony" at Dougherty's sentencing by Theo Lawson, Jefferson County's attorney, violated the Confrontation Clause and the Federal Rules of Evidence. McN-Br. 73, 79. But that clause and those rules do not apply at sentencing. *United States v. Cantellano*, 430 F.3d 1142,

1146 (11th Cir. 2005); Fed. R. Evid. 1101(d)(3).[106] In any event, all Lawson said at the prior sentencing was that the county wanted restitution in the amount of the bribes. 061R962:72, 84. The district court sentencing McNair did not mention Lawson, let alone rely on his statement as an evidentiary basis for restitution.

McNair also complains that no "distinction [was made] between losses allegedly sustained by the victims traceable to counts of conviction as contrasted with any claimed losses traceable to dismissed counts in both cases." McN-Br. 72. He had the opportunity but chose not to dispute the total amount of bribes on this basis. *See supra* note 105. Moreover, a court can appropriately order restitution based on conduct related to the offense where the offense involves, as it does here, a "scheme, conspiracy, or pattern of criminal activity." 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2); *see United States v. Valladares*, 544 F.3d 1257, 1269-70 (11th Cir. 2008).

McNair further complains that the district court did not consider his inability

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[106] These same reasons require rejection of McNair's contention that the restitution statute is "unconstitutional because to comply with the [Mandatory Victim's Restitution Act] while protecting the defendant's Sixth Amendment rights of confrontation would impose an absurd burden on the victims, the defendant, the prosecution, and the courts." McN-Br. 76-77. Although he cites a quartet of district court decisions, McN-Br. 76, McNair never identifies what part of them he relies on, why they apply to him, or how he is similarly situated to the defendants in those as-applied constitutional challenges. In any event, those decisions appear to be inconsistent with subsequent decisions of this Court. *E.g.*, *Williams*, 445 F.3d at 1310-11. And McNair has not shown how the restitution statute imposes an "absurd burden" or is otherwise unworkable in this case.

to pay restitution as required by the restitution statute. McN-Br. 80-81. Under Section 3663A, however, restitution is mandatory in the full amount of the loss, and the court need not consider McNair's ability to pay except in setting the payment schedule. *Futrell*, 209 F.3d at 1292.[107]

Finally, McNair claims an "unwarranted sentencing disparity" because Judge Propst did not order Roland Pugh to pay restitution. McN-Br. 81-82. Judge Propst's action, however, cannot preclude Judge Smith's. *See Peirre v. Rivkind*, 825 F.2d 1501, 1505 (11th Cir. 1987); *cf. United States v. Regueiro*, 240 F.3d 1321, 1325-26 (11th Cir. 2001) ("Disparity between the sentences imposed on codefendants is generally not an appropriate basis for relief on appeal."). Moreover, the outlier is Roland's sentence; most of the other appellants, like McNair, were ordered to pay Jefferson County restitution. *See supra* pp. 9-10.

C. Swann's Sentencing Was Procedurally And Substantively Sound

At Swann's sentencing, Judge Coogler increased the base offense level of 10 for bribery by 2 levels because Swann's offense involved multiple bribes, and by 22

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[107] Even assuming the discretionary restitution provision applies, it remains the defendant's burden to demonstrate financial circumstances. 18 U.S.C. § 3664(e). Despite a 1300-page sentencing memorandum, including exhibits, 543R178; 061R947, and extensive argument at sentencing, 061R987:47-60, McNair's counsel not once urged the court to forego ordering restitution based on his client's financial circumstances. In any event, the district court stated that it had reviewed those circumstances and was relying on them in imposing no fine. 061R987:68.

more levels because the net benefit to the bribe payers exceeded $20 million. 544R229:173:75; U.S.S.G. § 2C1.1 (2003 ed.). The court then calculated an advisory imprisonment range of 151 to 188 months and a fine range of $17,500 to $40,000,002. 544R229:175-76. The court found unbelievable Swann's statement of not understanding the remodeling work was intended to influence him, and that Swann had "not indicated any remorse whatsoever." 544R229:223. The court also considered that the bribery affected many people. 544R229:224. Nevertheless, it imposed a below-guidelines prison sentence of 102 months to give Swann credit for his positive "history and . . . character." 544R229:224, 226.

1. The Court Properly Calculated the Guidelines Range

The offense level for bribery is calculated by using the greater of the value of the bribe payment or the benefit received in return. U.S.S.G. § 2C1.1(b)(2)(A). Swann argues that the district court erred in using the benefit approach to calculate Swann's offense level, because he contends the government did not establish a connection between each individual bribe and a particular contract or other benefit to the briber. Swn-Br. 56-57. Swann cites no authority suggesting that such a specific connection is required at sentencing. To the contrary, "[t]he threshold for the causation inquiry for § 2C1.1 calculations is relatively low." *United States v. Kinter*, 235 F.3d 192, 198 (4th Cir. 2000). For example, the defendant in *Kinter* conspired with his son-in-law to influence the award of computer maintenance

contracts in exchange for bribes from a bidding company. 235 F.3d at 193-94. Kinter was sentenced based not only on the initial contract directly influenced, but also on thirty other contracts that flowed from the company getting its "foot in the door." *Id.* at 198.

Here, the court found the evidence was "absolutely clear that there is at least 20 million dollars that was benefit." 544R229:173-74. The court cited as support Swann's decision not to invoke the performance bond against RAST when its machine became stuck, to grant a $2.6 million change order, and to rebid the job for an additional $23,827,350. 544R229:174-75; *see supra* pp. 38-39. The court found that a preponderance of the evidence established that Swann's decision regarding the Valley Creek project "was a direct result of that influence of [RAST's] bribes." 544R229:174. The court also pointed to Swann's granting PUGH's joint venture a 180-day extension just days after Yessick hired a landscaper for Swann's property, saving the joint venture $180,000 in liquidated damages. 544-R229:174; *see supra* pp. 37-38.

Even if the Court concludes that the district court erred in calculating Swann's offense level, remand is unnecessary because any error "did not affect the district court's selection of the sentence imposed." *Williams v. United States*, 503 U.S. 193, 203, 112 S.Ct. 1112, 1120-21 (1992). Here, the sentencing judge stated explicitly that he believed the sentence of 102 months was reasonable under the

Section 3553(a) factors, even if his calculation of the offense level was incorrect, because he would have "var[ied] upward" from the lower range urged by Swann based on "other factors in 18 USC Section 3553 that I am charged with the responsibility of weighing." 544R229:227. Accordingly, because "the district court impose[d] a reasonable sentence and state[d] that it would impose the same sentence irrespective of any sentencing calculation errors, this Court [should uphold the sentence]." *United States v. Dean*, 517 F.3d 1224, 1232 (11th Cir. 2008); *accord United States v. Keene*, 470 F.3d 1347 (11th Cir. 2006). Swann has not explained why such an upward variance would be an abuse of discretion and, as discussed below, the court's consideration of the Section 3553(a) factors is unobjectionable.

2. The District Court Properly Considered The Section 3553 Factors

Swann mistakenly argues that the Sentencing Guidelines accounted for his official position in the offense level calculation. Swn-Br. 60-61. Section 2C1.1 of the 2003 Sentencing Guidelines, which applies to bribery convictions, makes no distinction between payers and recipients of bribes.[108] Moreover, the court's consideration of this fact is appropriate under Section 3553(a), which specifically directs sentencing courts to consider the "characteristics of the defendant." 18

[108] Swann contends that the higher base offense level in Section 2C1.1 as compared to Section 2B1.1 reflects Congress' consideration of the characteristic of the offender. Swn-Br. 60. Section 2B1.1, however, applies to larceny, embezzlement and other theft and is, therefore, irrelevant.

U.S.C. § 3553(a)(1). *See, e.g.*, *United States v. McClung*, 483 F.3d 273, 277 (4th Cir. 2007); *United States v. Hart*, 70 F.3d 854, 861 (6th Cir. 1995).

Although Swann complains that the court considered his lack of remorse as a factor at sentencing, Swn-Br. 61, this Court routinely affirms sentences in which lack of remorse is considered under Section 3553(a). *See, e.g.*, *United States v. Long*, No. 06-13332, 2008 WL 4997057 at **14 (11th Cir. Nov. 25, 2008); *United States v. Knight*, No. 06-12421, 2007 WL 30041 at **4 (11th Cir. Jan. 5, 2007); *see also United States v. Cruzado-Laureano*, 527 F.3d 231, 236 (1st Cir. 2008); *United States v. Cole*, No. 07-4623, 2008 WL 4643361 at **2 (2d Cir. Oct. 21, 2008).

As did McNair, Swann complains of an unwarranted disparity between his sentence and the sentences imposed on several co-defendants. Swn-Br. 61-62. But, as discussed above, Swann cannot establish that his sentence would have been different had the court used the amount of the bribes in calculating his guideline range. Swann also attempts to benefit from an error made during the Dougherty defendants' sentencings, where the court mistakenly used an earlier version of the guidelines, resulting in a lower guidelines calculation. Swn-Br. 62. Because sentencing under the federal guidelines must begin with proper calculation of the guidelines range, *United States v. Valladares*, 544 F.3d 1257, 1265 (11th Cir. 2008), a prior mistake in sentencing cannot justify invalidating Swann's sentence. *Cf. Regueiro*, 240 F.3d at 1325-26.

3. The District Court Did Not Err In Imposing A Fine On Swann

Swann's argument that the district court erred in imposing a $250,000 fine, Swn-Br. 63-65, is similarly unavailing. The guidelines direct the court to "impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). The district court's determination that Swann is able to pay a fine is reviewed only for clear error. *United States v. Gonzalez*, 541 F.3d 1250, 1255 (11th Cir. 2008). Swann contends that a fine was unwarranted because the probation officer concluded Swann could not pay both a fine and restitution; however, he has misread the presentence report. The probation officer concluded that Swann could either pay a fine or make a lump-sum payment toward restitution *immediately* after sentencing with his liquid assets. The probation officer did not make a determination about Swann's future ability to pay either a fine or further restitution on an installment basis. 544R182:¶159. Indeed, the district court expressly considered that any fine imposed might not be paid immediately but, nevertheless, concluded that it was warranted. 544R229:226-27.

Swann also argues that the district court failed to make specific findings to support the amount of the fine imposed. Although the guidelines outline several factors for the court to consider when determining the amount of the fine, this Court does not require specific findings regarding those factors. *Gonzalez*, 541 F.3d at

1256; *United States v. Lombardo*, 35 F.3d 526, 530 (11th Cir. 1994). In this case, Swann's counsel argued for a reduced fine at sentencing, *see*, *e.g.*, 544R229:219-20, and the record makes clear that the district court considered the relevant factors. *See*, *e.g.*, 544R229:225. Swann fails to explain why the factors set forth in the guidelines or Section 3553 require a different fine. Because the record contains sufficient information regarding the factors, the district court's fine determination should not be disturbed. *Lombardo*, 35 F.3d at 530.

CONCLUSION

For the reasons stated, the judgments of the district court should be affirmed.

Respectfully submitted.

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Certificate of Compliance With Fed. R. App. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 43,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B), and thus is within the 44,000 word limitation set by this Court's order of March 27, 2009.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Version 10 in 14-point Times New Roman style.

Dated: April 10, 2009

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James J. Fredricks

CERTIFICATE OF SERVICE

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