16-1795

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA — Appellee

v. — No. 16-1795

MICHAEL A. MAGGIO — Appellant

APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION
Brian S. Miller, *U.S. Chief District Judge*
4:15-CR-00001-BSM-1

APPELLANT'S OPENING BRIEF AND ADDENDUM

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is an appeal from the conviction of Michael A. Maggio for bribery concerning programs receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(B). The charge was filed by Information in the U.S. District Court for the Eastern District of Arkansas on January 9, 2015. [Doc. 2, Add. 1] Maggio pled guilty that same day. [Doc. 4] Thirteen months later he sought to withdraw his guilty plea on the grounds that there was no factual basis for the plea. [Doc. 21, 32 (amended)] The Government responded. [Doc. 31, 34] On February 26, 2016, a hearing was held and there were post-hearing briefs. [Doc. 37-38] On March 10, 2016, the District Court denied Maggio's motions to withdraw his guilty plea. [Doc. 39]

Sentencing was held March 24, 2016, and the court sentenced Maggio to 120 months imprisonment and two years supervised release. Judgment was entered March 28, 2016 [Doc. 45; Add. 4], and the notice of appeal was filed March 30, 2016. [Doc. 47]

This is a legally complex appeal, more so on the plea withdrawal. Appellant thus requests 15 minutes oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES AND RULES:

OTHER SOURCES:

JURISDICTIONAL STATEMENT

Maggio was charged by Information on January 9, 2015 with violating 18 U.S.C. § 666(a)(1)(B), bribery concerning programs receiving federal funds. (Doc. 2; Add. 1] He pled guilty that same day. [Doc. 4] Although he later sought to withdraw his guilty plea, the District Court ultimately denied his motions. [Doc. 39]

Maggio was sentenced March 24, 2016 to 120 months imprisonment, and the judgment was entered March 28, 2016. (Doc. 45; Add. 4]

He timely filed his notice of appeal on March 30, 2016. [Doc. 47]

Appellate jurisdiction exists pursuant to 28 U.S.C. § 1291, which governs appeals from final judgments of the district courts.

This appeal is timely and properly before this Court.

ISSUES PRESENTED FOR REVIEW

I. The appellate waiver in the plea agreement does not bar this jurisdictional claim.

Foster v. Chapman, 136 S.Ct. 11737 (2016)

United States v. Broce, 488 U.S. 563 (1989)

United States v. Afremov, 611 F.3d 970 (8th Cir. 2010)

II. There was no factual basis for Appellant's plea; thus the District Court's denial of the motion to withdraw the guilty plea was an abuse of discretion. Without proof of nexus between bribe and action, a prosecution under 18 U.S.C. § 666(a)(1)(B) either fails or violates the "necessary and proper" clause of U.S. Const., Art. I, § 8, cl. 18.

United States v. Heid, 651 F.d 850 (8th Cir. 2011)

United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009)

McDonnell v. United States, 2016 WL 3461561, 2016 U.S. Lexis 4062 (U.S. June 27, 2016)

III. Appellant's upward departure to a 120 month sentence from a 51-63 mouth Guideline range is unreasonable under the Sentencing Guidelines.

Gall v. United States, 552 U.S. 38 (2007)

United States v. Martinez, 821 F.3d 984 (8th Cir. 2016)

STATEMENT OF THE CASE

A. Overview

This is a state judicial bribery case brought under 18 U.S.C. § 666(a)(1)(B). On January 9, 2015, Appellant Michael A. Maggio, a former Arkansas circuit judge, pled guilty to an information that he granted a remittitur in a civil case in exchange for campaign contributions in a coming election for a position on the Arkansas Court of Appeals.

By early February 2016, over a year later, and after several debriefings, Maggio ultimately reneged on the plea agreement with the government by moving to withdraw the guilty plea alleging actual innocence. The plea agreement he backed out of provided for a Guideline sentence and required cooperation against others. Maggio moved to withdraw, challenging federal jurisdiction to even prosecute him. After a hearing, the District Court denied relief.

Maggio was sentenced to 120 months imprisonment and two years supervised release. The District Court, however, granted release pending appeal because it considered the jurisdictional issue significant.[1]

Maggio contends that there is no federal jurisdiction over his alleged bribery

[1] No illusion here: Maggio understands that prevailing on the bribery count could likely result in prosecution for some other potential offense such as wire or mail fraud. 18 U.S.C. §§ 1341, 1343. Still, he contends there was no quid pro quo to convict him for that, either.

offense because whatever federal funds were received by his judicial district had nothing whatsoever to do with his act in a civil trial that is his alleged bribery; the government can show no nexus.

Contrary to his guilty plea, moreover, he now disputes that there was any quid pro quo for his action as a state trial judge in granting a remittitur in exchange for a campaign contribution to support of his race for a seat on the Arkansas Court of Appeals.[2] The remittitur, accepted by the plaintiffs in lieu of a new trial, was legally proper because the verdict could only have been based on passion or prejudice.[3]

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[2] That begs the question: If Maggio were really bribed, why did he not grant a new trial instead of an appropriate remittitur leaving the judgment at $1 million? Everybody except the federal government now realizes that the remittitur was legally proper. *See* note 3, *infra.*

[3] At sentencing, the District Court recounted (3/24/16 Tr. 7:10-24) the deposition testimony on remittitur in the nursing home case, *Perkins v. Greenbrier Care Center,* 23CV-12-125 (Faulkner Circuit Court) in the sentencing memorandum. In *Perkins,* retired federal Judge James M. Moody was called as an expert on the remittitur. [Doc. 42 (sentencing memo) at 25-26, Ex. 5 (Moody deposition)] Moody found it legally proper because the verdict could only be based on passion or prejudice, and the District Court agreed in the sentencing findings. The *Perkins* plaintiffs, moreover, had accepted the remittitur and not a new trial on August 12, 2013 in their Plaintiffs' Notice of Acceptance of Suggestion of Remittitur.

As to remittitur in Arkansas, *see* DAVID NEWBERN ET AL., CIVIL PRACTICE AND PROCEDURE § 32:3 (5th ed. 2010), specifically *id.* at 696:

> The court's power with respect to remittitur is inherent, applies to compensatory and punitive damages, and may be exercised sua sponte as well as in response to a motion for new trial. Remittitur is appropriate when the amount of compensatory damages cannot be sustained by the evidence, "shocks the conscience of the court or demonstrates that jurors were motived by passion or prejudice." (footnotes omitted)

Maggio submits this is now a fact beyond dispute. Thus, he was charged and convicted with bribery for taking a campaign contribution from a person with a pending case where his action as a trial judge was legally required and there was no quid pro quo. How can this be a crime?

B. Introduction

Maggio was a Circuit Court judge in the Twentieth Judicial District of Arkansas: Faulkner, Van Buren, and Searcy Counties, 2001-14. He was one of five Circuit Judges in that district, holding Second Division. His docket included civil, criminal, and some domestic relations cases, but no juvenile or drug court.[4] He had taken hundreds, perhaps a thousand, guilty pleas from criminal defendants in his court over the 13 years he was a circuit judge.[5]

In 2014, because of personal musings on a Louisiana State University blog, www.tigerdroppings.com, and his race for the Arkansas Court of Appeals, Maggio found himself the subject of concurrent investigations by the Arkansas Judicial Discipline and Disability Commission and the Arkansas Ethics Commission and then ultimately an FBI investigation for judicial bribery, the subject of this case.

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[4] Ark. Const., Amemd. 80, § 6(B) (judges may sit in subject matter divisions); Ark.S.Ct. Admin. Order No. 14 (same; all circuit administrative case distribution plans subject to approval by Supreme Court).

[5] That did not mean that it was easy for him being a defendant on the other side of the bench going through a guilty plea. *See* Part D at 9-10, *infra*.

On March 24, 2014, Maggio was suspended as a Circuit Judge by the Chief Justice of the Arkansas Supreme Court. After a recommendation with agreed sanction, Maggio was removed from office September 11, 2014.[6] *Judicial Discipline & Disability Comm'n v. Maggio,* 2014 Ark. 366, 440 S.W.3d 333 (2014). This judicial bribery case was brought to the Judicial Discipline and Disability Commission, but it had not concluded. It was mooted by his removal. *Id.,* 2014 Ark. 366, at *3 n.1, 440 S.W.3d at 334 n.1.

C. FBI's investigation, plea negotiations, and Maggio's guilty plea to bribery occurring 2013-14

As for the FBI's investigation, after they marshaled their evidence, Maggio was interviewed with counsel in 2014 and ultimately agreed to a negotiated disposition with a guilty plea to federal bribery. He waived indictment and was charged by information on January 9, 2015. 4:15-cr-00001 BSM (E.D.Ark.).

1. Factual basis for the guilty plea

The factual basis for the guilty plea, agreed to by Maggio in the plea colloquy, is recounted at length by the AUSA at the plea, 1/9/15 Tr. 17:3–22:13. We just summarize it here:

A wrongful death case [*i.e.,* the *Perkins* case] was filed against a nursing

[6] Maggio hoped to stay on until December 31, 2014, the end of his term. The Arkansas Supreme Court, however, removed him immediately on receipt of the recommendation.

home operated by Company A in Faulkner County in 2012. The principal of Company A was Individual A. The lawsuit alleged that agents of Company A mistreated the elderly decedent in its care, and she died as a result, even though she was only there two days.

In early 2013, Maggio was contemplating a run for an open seat on the Arkansas Court of Appeals. Some wanted "pro-business, conservative" judges, and Maggio was contacted about that by Individual B. That person was gathering campaign funds from Individual A, the owner of *Perkins* defendant Company A. The AUSA's recitation of the factual basis for the plea, 1/9/15 Tr. 18:4–19:24:

> Also in or about early 2013, Individual B and others asked Maggio to consider running as a candidate for the Arkansas Court of Appeals. In or about May 2013, Maggio and Individual B met with others to discuss Maggio's campaign for the Court of Appeals. During the meeting, Maggio was told that he would need to raise more than $100,000 to run a successful campaign. Individual B told Maggio that Maggio would be responsible for smaller donations from friends and family, totaling approximately 25,000 to $50,000, and Individual B would be responsible for covering the difference by raising funds from "industry types" including, among other entities, nursing homes. On or about May 16th, 2013, at approximately 10:33 a.m., Individual B sent Maggio a text message stating, quote, I have a LR lunch today with the nursing home folks. The topic will be judicial races. You are at the top of the list, end quote.
>
> On or about June 27, 2013, Maggio formally announced his candidacy for the Arkansas Court of Appeals for the nonpartisan general election to be held May 20, 2014. On or about June 29, 2013, at approximately 8:15 a.m., Individual B sent Maggio a text message stating in part, quote, Well your first 50K is on the way, end quote. Maggio understood that this $50,000 included financial support from Individual A.

> Between on or about June 29th, 2013, and on or about July 8, 2013, Individual B communicated to Maggio stating, in essence: Win, lose, or draw, you have Individual A's support, end quote, referring to Maggio's decision on the motion for new trial or remittitur. Maggio understood that the purpose of this was message was not to reassure Maggio that he had Individual A's support regardless of any decision on the remittitur, but rather Individual B was reminding Maggio to make a favorable ruling to Individual A and Company A because of Individual A's financial support of Maggio's campaign. At another time, Individual B reminded Maggio that he would receive campaign financial support if he made the, quote, tough calls, end quote, while on the bench. Maggio understood that Individual B was advising Maggio that, in exchange for Maggio's ruling in favor of Company A and Individual A, Individual A would provide campaign donations to Maggio. On or about July 8th, 2013, during the early afternoon, Maggio held a hearing on Company A's pending post-verdict motions, including the motion for remittitur. On or about July 10th, 2013, Maggio signed an order denying Company A's motion for a new trial, but granting Company A's motion for remittitur. Maggio reduced the judgment against Company A from 5.2 million to $1 million.

Further, *id.* at 20:14–21:1:

> While Maggio told others that he needed to stay away from the nursing home industry while raising money because of the pending case, in fact Maggio was aware prior to granting the remittitur that Individual B had obtained a specific commitment from Individual A to contribute to Maggio's campaign for the Arkansas Court of Appeals, and that Individual B had done so outside of the authorized time frame.
>
> Maggio granted the remittitur in part because Maggio wanted to retain Individual A's financial support of his campaign for the Court of Appeals. Maggio accepted Individual A's financial support of his campaign for the Arkansas Court of Appeals intending to be influenced and induced to remit the judgment against Company A.

Maggio also agreed that, at someone else's suggestion, he deleted text messages relating to some of the campaign contributions or the wrongful death case. *Id.*

at 21:23–22:5.[7]

The government then turned to federal jurisdictional facts: "Maggio further stipulates that the United States would show that in calendar years 2013 and 2014, the State of Arkansas, Twentieth Judicial District, received over $10,000 in federal funding." *Id.* at 22:6-9. That is it – there is no reference to any nexus between the federal funding and the bribe; under the government's authority, they submit that nexus isn't required.

As to the Sentencing Guidelines, the parties stipulated to a non-binding Guideline sentence. *Id.* at 22:14-17. There was a plea addendum providing for cooperation and testimony, if necessary, that could have reduced his sentence under U.S.S.G. § 5K1.1 or Fed.R.Crim.P. 35. [Doc. 5, unsealed by Doc. 30]

Finally, all this was alleged to be a violation of 18 U.S.C. § 666(a)(1)(B).

2. The District Court accepts the plea, finding it voluntary

> THE COURT: ... Mr. Maggio, did you listen to the statements given by the U.S. Attorney?
> THE DEFENDANT: Yes, sir.
> THE COURT: Were her statements accurate?
> THE DEFENDANT: Yes, sir.
> THE COURT: And do you understand the nature of the charge against you and the maximum penalty you face?
> THE DEFENDANT: Yes, sir.
> THE COURT: And how do you plead to the information?

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[7] This relates to an obstruction of justice sentencing enhancement under U.S.S.G. § 3C1.1. PSR ¶ 26.

THE DEFENDANT: Guilty.

THE COURT: And did you, in fact, commit the offense as charged?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And, Ms. Rogers [former defense counsel], do you know of any reason why I should not accept the guilty plea?

MS. ROGERS: No, Your Honor.

THE COURT: All right. I find that the offense as charged in Count 1 of the information was committed by the defendant, Michael A. Maggio. I also find that Mr. Maggio is entering this plea voluntarily with full knowledge of the facts, his rights, and the possible consequences. And for those reasons, I accept the guilty plea.[8]

1/9/15 Tr. 22:18–23:15 (bracketed material and footnote added)

D. Maggio's misgivings over the plea and a hearing over defense counsel seeking to be relieved

Within two weeks of entering the plea, as revealed at the February 2, 2016 in camera hearing [Doc. 15], Maggio began having serious disagreements with defense counsel about conduct of the case and his plea. Maggio concluded that he committed no crime, and he felt badgered into the guilty plea by his defense lawyers. But, he still attempted to go through with his cooperation. He'd been debriefed and polygraphed by the government within two weeks of the plea, but he refused to talk to his lawyers about it. They reviewed the polygraph and additional matters with the FBI and U.S. Attorney, but Maggio wouldn't meet with them. Defense counsel

[8] Maggio surrendered his law license after the plea on March 20, 2015. *In re Maggio,* 2015 Ark. 169 (2015).

sought to be relieved for lack of communication. [Doc. 13-14 (sealed motion and response)]

On February 2, 2016, the District Court held an in camera hearing on former defense counsel's motion to be relieved, and counsel guardedly, to protect attorney-client privilege, told the court of the communication problems. Appellant addressed the court and agreed that there was an impasse because the attorney-client relationship became acrimonious and coercive even before the plea. 2/2/16 Tr. 6:25–7:9.

A sealed part of the hearing was held where Appellant aired his grievances against counsel alone to the District Court. Back on the record, the District Judge felt he could recount it for the government and defense lawyers, *id.* at 11:18–12:12:

> And what he also said was that he talked to counsel about going to trial and that he thought that was in his best interest, but there was a certain amount of -- I don't want to say pressure or coercion, but push to get him to plead, and that when he's tried to talk to counsel about things, essentially what he gets in response is always a negative response about how much time he's going to get. Generally that's what he said.
>
> Now, so we have somebody who really wanted to go to trial, ultimately took a plea thinking that it was in his best interest because the other case [Individuals A or B or both[9]] would go to trial first, that the people he gave information on would go to trial first, that information would be used to get him a better sentence deal, and here we are on the eve of sentencing and none of that has happened. And, essentially -- he didn't say it like this – but he is staring in the eyes, based on

[9] Neither has been charged with anything. One would think that for a successful bribe to occur, there must be a briber and a bribee. The briber and the middleman remain uncharged.

> his discussions with counsel, at a bunch of prison time that that was not the deal. And as he stands here right now, he still has never received in his hands a copy of a plea agreement that dictates out what his deal is. That's what he says. (bracketed material and footnote added)

The government disagreed that, as a lawyer and former judge, he could be intimidated into a plea. *Id.* at 15:16-21:

> But in terms of whether he has seen the plea agreement and whether he felt pressured, we can't say what he felt, but he is a former judge and an attorney, and I think the idea that that -- a person with that kind of background would walk into court and be intimidated and not make an intelligent and voluntary decision is unlikely.[10]

The District Court clarified for the government that Maggio said to the Court that his being a former trial judge didn't make it any easier for him – being the defendant under the stress to take the plea deal was a really bad, new experience for him; *id.* at 16:21–17:9:

> THE COURT: The only point I was trying to make was, you talk about -- the government made the point that Mr. Maggio is a former judge, lawyer, familiar with this whole process, and so he shouldn't be intimidated coming into the courtroom. And I was just trying to make -- convey so it's on the record what he told me, that he -- due to the stress of all of this, he might not have been as clear-thinking; not as far as knowing what he did and all of that, but just in, you know, being a little more nervous than what he normally would be if he were doing this as a living.
>
> And I would imagine, I can come in here every day and do this job and it's easy for me, but if I were on the other side, it would be a little hard for me. It wouldn't be quite as easy. And that's the point he

[10] This was reiterated at the plea withdrawal hearing, that time the government called it "absurd." 2/26/16 Tr. 22:1-13.

was trying to make.

The motion to withdraw was denied and sentencing was left set for February 26th.

With all due respect, counsel's friends and worthy adversaries in the USAO have never been criminal defense lawyers. Unless you're standing in the dock with your head spinning as to why your life and law license are ending all around you because you feel coerced into a plea by your own criminal defense lawyer and you feel helpless because the federal government came down on you and you can't do anything about it, it's not absurd at all. Indeed, Maggio's response is quite normal.

E. Maggio's motion to withdraw the plea

Maggio obtained other counsel, and on February 12, 2016 he moved to withdraw the guilty plea alleging there was (a) no factual basis for the plea, (b) there was no federal jurisdiction over his actions under § 666(a)(1)(B), and (c) ineffective assistance of counsel. [Doc. 21] The government responded February 19, 2016. [Doc. 31] As it does in any ineffectiveness allegation, the government moved for an order declaring the attorney-client privilege waived. [Doc. 22] Former defense counsel moved a third time to be relieved. [Doc. 23] The court granted the government's privilege motion and the third motion to be relieved. [Doc. 24] Maggio amended his motion to withdraw on February 22d to remove the ineffective assistance claim. [Doc. 32]

A hearing was held on February 26th. Defense counsel argued that the stipulation didn't cover nexus because, yes, the Twentieth Judicial District received funds, but it had nothing to do with Maggio or his actions and that Maggio didn't understand that was what he was pleading to (2/26/16 Tr. 8:14–14:3) despite the stipulation. *Id.* at 20:12–21:23.

The District Court entered an order on March 10th, denying Maggio's motion to withdraw his guilty plea and his amended motion to withdraw his guilty plea and dismiss the information. [Doc. 39]

F. Sentencing

On March 21, 2016, Maggio filed a sentencing memorandum and motion for downward departure asking for a sentence below the advisory guideline range and for consideration of probation. [Doc. 42] The government filed its sentencing memorandum on March 22, 2016, seeking the statutory maximum of 120 months imprisonment. [Doc. 43]

Sentencing was held on March 24, 2016, and the District Court departed upward. Maggio was sentenced to 120 months imprisonment and two years supervised release even though his Guideline range was 51-63 months.[11] [Doc. 44]

The judgment was entered March 28th [Doc. 45], and the notice of appeal

[11] And that is without acceptance of responsibility and with a 2 level obstruction enhancement for deleting text messages.

was filed March 30th. [Doc. 47] Maggio was permitted to proceed in forma pauperis on appeal. [Doc. 48] Current counsel was appointed by this Court.

Waiver of the jurisdictional claim is Point I, and the bribery statute issues are Point II, and the sentencing issue is Point III.

SUMMARY OF THE ARGUMENT

I. The appellate waiver in the plea agreement does not bar this jurisdictional claim. In a plea agreement, the ability to appeal almost everything is waived, except an above Guideline sentence and a § 2255 for ineffective assistance or prosecutorial misconduct.

Federal jurisdiction, however, is never waivable, no matter what the plea agreement says or doesn't say about it. It can be raised anytime and for the first time in any court, even on appeal, and even in the U.S. Supreme Court.

Lack of jurisdiction must appear on the face of the charging document for the jurisdictional argument to succeed. This case satisfies this requirement because the face of the information never alleges any nexus between federal funds and the alleged bribe; it can't because none exists. Yes, the Judicial District Maggio held his judicial position in received funds for other things, but it had nothing at all to do with the conduct of a civil trial, but that's not enough to make a federal program bribe without a nexus. This is addressed in Point II.

II. There was no factual basis for Appellant's plea. The District Court's denial of the motion to withdraw the guilty plea was thus an abuse of discretion. Without proof of nexus between bribe and action, a prosecution under 18 U.S.C. § 666(a)(1)(B) either fails or violates the "necessary and proper" clause of U.S. Const., Art. I, § 8, cl. 18.

Fed. R. Crim. P. 11 requires a lack of a factual basis as a ground for withdrawing a guilty plea. And here, there was no factual basis for Maggio's guilty plea of violating § 666(a)(1)(B). First, Maggio was not shown to be an agent of the State of Arkansas for purposes of the statute. Second, the government cannot prove that a campaign contribution is a bribe. Third, this case involved remittitur of a civil judgment, and, by all accounts, that remittitur was perfectly and legally justified under the law and facts. Fourth, Maggio's remittitur ruling was not "in connection with any business, transaction, or series of transactions" of any State, local or county government or any agency. Fifth, all the remaining factors weighed in favor of permitting Maggio to withdraw his guilty plea. Maggio is pleading actual innocence.

The government relies on *United States v. Hines* which Maggio submits is distinguishable on these facts. Instead, and more on point, is the Fifth Circuit's *United States v. Whitfield* and two district court cases requiring nexus which should be followed instead. Moreover, *Hines* is now constitutionally suspect under *McDonnell* and the necessary and proper clause.

Finally, as applied to the facts of this case, 18 U.S.C. § 666(a)(1)(B) is inapplicable and reliance on the statute without any nexus between the federal money and the act violates the "necessary and proper" clause of the U.S. Constitution.

III. Appellant's upward departure to a 120 month sentence from a Guideline sentence of 51-63 months is unreasonable under the Sentencing Guidelines. Maggio had his status as an elected official counted twice, making the sentence substantively unreasonable.

ARGUMENT

I.

The appellate waiver in the plea agreement does not bar this jurisdictional claim.

A. Standard of review

A plea of guilty admits to the facts leading to federal jurisdiction, but not jurisdiction itself. Jurisdiction is a question of law always open to examination in any court, including on appeal or even certiorari. The government always has the burden of proving jurisdiction. *United States v. Afremov,* 611 F.3d 970, 975 (8th Cir. 2010).

B. The waivers in the plea agreement

In the Eastern District of Arkansas, and indeed probably all federal districts now, appellate and post-conviction waivers are included in the plea agreement. Here, the plea agreement is Doc. 4 at 3–4, and the waiver provision is ¶ 4. It never mentions jurisdiction, and it does permit appeals of above-Guideline sentences (¶ 4(A)(1) which is our Point III).

> 4. **WAIVERS**: The defendant acknowledges that he has been advised of and fully understands the nature of the charges to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law. The defendant further understands that by entering into this Agreement and Addendum, the defendant is waiving certain constitutional rights, including, without limitation, the following:

> A. The right to appeal or collaterally attack, to the full extent of the law, the conviction and sentence imposed, including any forfeiture or restitution order, as follows:
>
> (1) the defendant waives the right to appeal the conviction and sentence directly under Title 28, United States Code, Section 1291 and/or Title 18, United States Code, Section § 3742(a), including any issues that relate to the establishment of the Guideline range, except that the defendant reserves the right to appeal claims of prosecutorial misconduct and the defendant reserves the right to appeal the sentence if the sentence imposed is above the Guideline range that is established at sentencing;
>
> (2) the defendant expressly acknowledges and agrees that the United States reserves its right to appeal the defendant's sentence ...;
>
> (3) the defendant waives the right to collaterally attack the conviction and sentence pursuant to Title 28, United States Code, Section 2255, except for claims based on ineffective assistance of counsel or prosecutorial misconduct; ....[12]

C. Federal jurisdiction is non-waivable, no matter what the plea agreement says or doesn't say about it

Federal jurisdiction is non-waivable, no matter what the plea agreement says or doesn't say about it.

The court "'ha[s] an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.' *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514 (2006)." *Foster v. Chatman,* 136 S.Ct. 1737, 1745 (2016) (§ 2254 habeas); *United States v. Corrick,* 298 U.S. 435, 440 (1936) (injunction). *See United States v. Griffin,* 303 U.S. 226, 229 (1938) (non-criminal tax case). "A 'lack of federal jurisdiction cannot be waived or be overcome

[12] B-F: Waiver of trial rights. A(4-5) & G are inapplicable.

by an agreement of the parties.' *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934)." *Wellness Int'l Network, Ltd. v. Sharif,* 135 S.Ct. 1932, 1955 (2016).

Thus, lack federal jurisdiction is always open to question at any time, even on collateral attack. *See United States v. Broce,* 488 U.S. 563, 569 (1989).[13]

This Court is in accord. *United States v. Afremov,* 611 F.3d 970, 975 (8th Cir. 2010):

> We start our discussion by reaffirming our adherence to two principles that should be beyond all doubt: namely, that federal courts are courts of limited jurisdiction, and that parties may not enlarge that jurisdiction by waiver or consent. *See, e.g., Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.,* 551 F.3d 812, 816 (8th Cir. 2009). It follows that challenges to federal subject matter jurisdiction may be raised at any time, even for the first time on appeal. *See, e.g., 4:20 Commc'ns, Inc. v. Paradigm Co.,* 336 F.3d 775, 778 (8th Cir. 2003). Indeed, if Afremov had not challenged the district court's jurisdiction in his supplemental memorandum to the district court, we would have examined the jurisdictional issue on our own initiative. *See, e.g., United States v. Meyer,* 439 F.3d 855, 858 (8th Cir. 2006) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." (alteration in original) (quoting *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998))).
>
> With those fundamentals in mind, we proceed to review de novo the question whether the district court had subject matter jurisdiction. *See id.* at 859. The burden of establishing that a cause lies within the limited jurisdiction of the federal courts is on the party asserting jurisdiction: in this instance, the burden is on Lanterman. *See Ark. Blue*

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[13] *See United States v. Scruggs*, 2011 WL 1832769, *14 (N.D. Miss. May 13, 2011), discussed *infra,* making a successful collateral attack in post-conviction proceedings on the lack of nexus as a lack of jurisdiction.

> *Cross & Blue Shield,* 551 F.3d at 816 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)).

Maggio may thus raise it after his guilty plea.

D. Lack of jurisdiction must appear on the face of the charging document for Appellant's jurisdictional argument to succeed

"[I]t is well settled 'in order for a defendant who has pleaded guilty to sustain a challenge to the district court's jurisdiction, he must establish that the face of the indictment failed to charge a federal offense.' *Mack v. United States,* 853 F.2d 585, 586 (8th Cir. 1988) (citation omitted)." *United States v. Pemberton,* 405 F.3d 656, 659 (8th Cir. 2005). *Accord: United States v. Parkhurst,* 24 Fed. Appx. 631, 632 (8th Cir. 2001) (per curiam). *Mack* also holds, 853 F.2d at 586:

> A guilty plea admits factual allegations in the indictment that form the basis for federal jurisdiction. *United States v. Mathews,* 833 F.2d 161, 164 (9th Cir. 1987); *see also Hayle,* 815 F.2d at 882 (guilty plea waives contention that government would be unable to prove that funds embezzled were monies of the United States).

E. The face of the information and lack of nexus between federal funds and the alleged bribe

Appellant waived indictment on January 9, 2015 [Doc. 1], and he was charged by information. [Doc. 2] The allegations of the Information are as follows [Doc. 2 at 1-2]:

¶ 1: Appellant was a circuit judge, "an agent of the State of Arkansas and the Twentieth Judicial District, and he presided over criminal, civil, domestic relations,

and probate cases in Faulkner, Van Buren, and Searcy counties."

¶ 2: Appellant announced June 27, 2013 he was running for the Arkansas Court of Appeals for the nonpartisan election to be held May 20, 2014.

¶ 3: Individual A was a stockholder of numerous nursing homes, and he "owned Company A, a nursing home located in Faulkner County."

¶ 4: Individual B was a lobbyist and political fundraiser assisting Appellant's campaign for the Court of Appeals.

¶ 6: In both 2013 and 2014, the Twentieth Judicial District received over $10,000 in federal funds from the U.S. Government for programs for "grants, subsidies, loans, guarantees, ... and other forms of assistance."

¶ 7: From February 2013 until mid-2014 Maggio was a circuit judge in the Twentieth Judicial District and he

> did knowingly and corruptly solicit and demand for his own benefit and the benefit of others, and accept and agree to accept, a thing of value from Individual A—that is, campaign contributions—provided to through … Individual B, for MAGGIO and his campaign intending to be influenced and rewarded in connection with a business, transaction, and series of transactions of the … Twentieth Judicial District, Second Division, that involved $5,000 or more.
>
> All in violation of Title 18, United States Code, Section 666(a)(1)(B).

Nothing in the information alleges any nexus between the alleged bribe and the receipt of federal funds or any federal program by the Twentieth Judicial District. Yes, the Twentieth Judicial District received federal funds, presumably for

juvenile or drug court. Maggio's presiding over a civil wrongful death trial had nothing whatsoever to do with federal funds. Here, the alleged bribe was to influence the outcome of a wrongful death case as a quid pro quo for campaign contributions, something Appellant now vigorously disputes, despite the guilty plea to the facts that occurred January 9, 2015. Moreover, the remittitur was legally required, a fact that the District Court recognized at sentencing. 3/24/16 Tr. 7:10-24. *See* notes 2-3, *supra,* page 2.

The government's jurisdictional hook here is mere receipt of the funds by the Twentieth Judicial District, and precedent from this court clearly supports it: *United States v. Hines,* 541 F.3d 833, 835-86 (8th Cir. 2008), where St. Louis County deputy sheriffs took "tips" or payments. "The payments were made to facilitate the deputies' timely and cooperative performance of their duties, which included scheduling the evictions and providing the color of authority at the eviction site." *Id.* at 835. The deputies' job apparently wasn't remotely funded by or related to federal funds received by St. Louis County.

Under the government's theory, every person working for the court is subject to the federal bribery statute: the judge, the court reporter, and the trial court assistant [aka case coordinator]. Maybe the bailiff, too? The bailiff is actually a county employee working under the Sheriff, but is the bailiff an agent of the State of Arkansas for purposes of § 666(a)(1)(B) when he or she effectuates the court's

orders, manages the flow of prisoners in and out of court,[14] manages the jury, aids in keeping the court secure, and helps keep order in court? What does a legally proper remittitur after a civil jury trial, between a personal representative of a deceased person and the nursing home where she died, have to do with federal funds received by the circuit court for drug or juvenile court? Maggio was not responsible for juvenile or drug court, and he never saw anything in his court having to do with federal funds. There is no nexus.

F. Proceedings and arguments below

Defendant agreed to be charged by information and pled guilty on January 9, 2015. [Docs. 1 (waiver), 2 (information), 3 (minute entry), 4 (plea agreement), 5 (plea addendum)]

Sentencing was originally set for July 24, 2015 [Doc. 9], and it was passed by agreement a couple of times: first to November 20, 2015 [Doc. 11], and then to February 26, 2016. [Doc. 12]

On February 5, 2016, Maggio had a new attorney substitute for the two involved in the initial plea negotiations and the guilty plea. [Doc. 17]

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[14] *Compare* the scene in the movie "The Lincoln Lawyer" (Lionsgate 2011) mentioning a cash Christmas gift to bailiffs for daily consideration in getting ready access to prisoners in holding cells before court starts. (This is something apparently not in the book; MICHAEL CONNELLY, THE LINCOLN LAWYER ch. 2-3 (Little Brown 2005).) Under the government's theory, that is bailiff bribery under *United States v. Hines, supra.*

On February 12th, Maggio filed a Motion to Withdraw Plea of Guilty and to Dismiss Information on the ground the information did not allege a violation of § 666 because there was no nexus[15] between the federal funds and the alleged bribe and his official actions as a judge. [Doc. 21, 3-10][16] On February 23d, the court continued the sentencing. [Doc. 33] On March 10th, sentencing was reset for March 26th. [Doc. 40]

On February 26th, the district court held a hearing on the motion to withdraw the plea. Maggio relied on *United States v. Whitfield,* 590 F.3d 325 (5th Cir. 2009), a state judge bribery case where no nexus was found, and some district court cases. The government relied on *United States v. Hines,* 541 F.3d 833, 836 (8th Cir. 2008), pointing out that *Whitfield* is a minority holding at best, and even if it applies, *Hines* is right on point.

Post-hearing briefs were filed, and the District Court was troubled; 2/26/16 Tr. 5:8-11: "When I first read [the motion], my first thought was, okay, he pled

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[15] Our word here and likely the preferred word, not the word in the motion. The District Court and AUSA referred to it as a "link" or "connection" at the February 26th hearing. 2/26/16 Tr. 5:14, 11:3, 18:16. The government's primary authority, *United States v. Hines,* 541 F.3d at 835-36 [Doc. 31, at 3, 7-8], uses both "nexus" and "connection."

"Nexus" appears in *Sabri v. United States,* 541 U.S. 600, 604 (2005), but was not used in *Salinas v. United States,* 522 U.S. 52 (1997).

[16] Appellant originally included an ineffective assistance claim in the motion, but he later withdrew that claim. [Doc. 32]

guilty, but can I send a man to prison for pleading guilty to a law that he can't be charged with anyway?" (bracketed material added)[17]

Appellant's post-hearing brief was filed March 1st, and he repeated the *Whitfield* argument, and asserted that there was no factual basis for the plea and application of § 666. First, Appellant wasn't an "agent" of the State of Arkansas as to the federal funds and had nothing whatsoever to do with the Twentieth Judicial District's receipt of federal funds. [Doc. 37 at 2-3] Second, the action he was criminally charged for was a remittitur in a civil case that wasn't something of value in connection with the business of the State of Arkansas. [Doc. 37 at 4-5]

The government pointed out that the agency argument was new. [Doc. 38 at 1-2] Actually, it could as easily be said that it isn't. It was stated differently in the final brief, and it's really simply an argument that Appellant couldn't have been convicted on the merits because he didn't do anything that had anything to do with the Twentieth Judicial District's federal funds, agent or not. Maggio's plea of guilty admits to the *facts* leading to federal jurisdiction, albeit not jurisdiction itself.

The charging document shows no nexus between the alleged bribe and the federal funds. That's the crux of Point II, so we turn to the merits of the application of § 666(a)(1)(B) to this case.

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[17] The District Court had enough pause over the *Whitfield, Frega, Scruggs* line of cases to grant release pending appeal. [Doc. 64]

II.

There was no factual basis for Appellant's plea; thus the District Court's denial of the motion to withdraw the guilty plea was an abuse of discretion. Without proof of nexus between bribe and action, a prosecution under 18 U.S.C. § 666(a)(1)(B) either fails or violates the "necessary and proper" clause of U.S. Const., Art. I, § 8, cl. 18.

A. Standard of Review

"We review the district court's decision not to allow the withdrawal of a guilty plea for an abuse of discretion." *United States v. Heid*, 651 F.3d 850, 854 (8th Cir. 2011).

B. Lack of a factual basis is a ground for withdrawing a guilty plea pursuant to Rule 11.

Fed. R. Crim. P. 11(d)(2)(B) provides that a defendant may withdraw a plea of guilty after the court accepts the plea, but before sentencing if "the defendant can show a fair and just reason for requesting the withdrawal." Although the defendant bears the burden of showing a "fair and just" reason, this Court has noted it is "a liberal standard." *United States v. Osei*, 679 F.3d 742, 746 (8th Cir. 2011). Further, before the district court grants a request to withdraw a plea, the court must also consider the following: "whether the defendant asserts his innocence of the charge; the length of time between the guilty plea and the motion to withdraw it, and

whether the government will be prejudiced if the court grants the motion." *United States v. Norvell*, 729 F.3d 788, 792 (8th Cir. 2013) (internal citations omitted).

Rule 11(b)(3) provides that "before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." The purpose of the rule is "to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Heid*, 651 F.3d at 854 (citing *McCarthy v. United States*, 349 U.S. 459, 467 (1969)). For a guilty plea to be supported by an adequate factual basis, the record must contain "sufficient evidence at the time of the plea upon which a court may reasonably determine that the defendant likely committed the offense." *Norvell*, 729 F.3d at 794 (internal citations omitted). The court may consider the following evidence in the record to determine whether there is an adequate factual basis for a plea: (1) facts taken from the prosecutor's summarization of the plea agreement, (2) the plea agreement itself, (3) the plea colloquy between the defendant and the court, (4) stipulated facts before the court, and (5) facts set forth in the presentence report. *Id.*

However, when the record does not contain an adequate factual basis for a plea, a "fair and just reason" for withdrawing the guilty plea exists. *Heid*, 651 F.3d at 856. For example, Heid pled guilty to conspiring to launder money in violation of 18 U.S.C. § 1956(h), which requires as an element of the crime that the transaction

at issue was "designed in whole or in part ... to conceal or disguise" a particular attribute of the money. *Id.* at 855. In that case, the defendant attempted to withdraw her plea because there was no evidence that she knew the purpose of the transaction was to conceal or disguise a particular attribute of the money, but the district court denied her request. On appeal, this Court reversed, holding Heid had shown a "fair and just reason" for withdrawing her plea because there was insufficient evidence in the record that she "knew that the transaction (at issue) was 'designed in whole or in part ... to conceal or disguise.'" *Id.*

C. There was no factual basis for Appellant's guilty plea of violating 18 U.S.C. § 666(a)(1)(B)

Maggio pled guilty to 18 U.S.C. § 666(a)(1)(B) on January 9, 2015. To prove him guilty of this offense, the Government had to prove that: (1) he was "an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof," (2) he corruptly solicited or demanded for the benefit of any person, or accepted/agreed 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 organization, government or agency involving anything of value of $5,000 or more" and (3) "the organization, government, or agency" receives more than $10,000 in federal funds. *Id.*

As to nexus, it has been held the bribe does not have to "affect," that is, be

"traceably skimmed from," or be given in exchange for derelict spending of, $10,000 in federal funds. *Salinas v. United States*, 522 U.S. at 57; *Sabri v. United States*, 541 U.S. at 605. *Salinas* reserved the question "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." *Salinas,* 522 U.S. at 59.

In *United States v. Hines*, 541 F.3d at 836, this Court interpreted these holdings to mean that no nexus is required at all between the bribe and federal funds. We submit, however, the Government does have to prove under § 666(a)(1)(B) the bribe was "in connection with" the "business" or "transactions" of "the organization, government or agency" that the defendant is an agent of, and this is discussed below.

This case presents that statutory interpretation question, and, we submit, it is also a constitutional question under the rule of lenity and the "necessary and proper" clause of Art. I, § 8, cl. 18. Without a nexus, Maggio contends the statute is over-broad. Maggio submits that nexus must be required to save the statute from uncon-stitutionality. Otherwise, we have overcriminalization and free ranging prosecution with no proof whatsoever of a federal interest.

While § 666(a)(1)(B) has been described as "extremely broad in scope"[18] and

[18] *United States v. Vitillo,* 490 F.3d 314, 321 (3d Cir. 2007):

utilizing "expansive, unqualified language,"[19] such an overbroad reading of the statute today, we submit, "would raise significant constitutional concerns"; *see, e.g.*, *McDonnell v. United States*, 2016 WL 3461561, at *18, 2016 U.S. Lexis 4062, at *42 (U.S. June 27, 2016); because it invites overcriminalization and prosecution without federal nexus or intent to be bribed.

The government argued that "Congress used intentionally broad language" in that particular statute, but the Supreme Court held that this didn't make Virginia Governor McDonnell's "setting up a meeting, calling another public official, or hosting an event" an "official act" for bribery under 18 U.S.C. § 201. *McDonnell,* 2016 WL 3461561, at *16, 2016 U.S. Lexis 4062, at *29. How is that different here

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> However, "§ 666 is extremely broad in scope," *United States v. Sotomayor-Vazquez,* 249 F.3d 1, 8 (1st Cir. 2001) (citing *Salinas v. United States,* 522 U.S. at 55-61), as that statute seeks to ensure the integrity of vast quantities of federal funds previously unprotected due to a "serious gap in the law," *United States v. Cicco,* 938 F.2d 441, 445 (3d Cir. 1991) (quoting the legislative history of § 666). *See also United States v. Rooney,* 37 F.3d 847, 851 (2d Cir. 1994) (citing the legislative history of § 666 and concluding that "Congress intended the terms of the statute to be 'construed broadly'").

Whatever gap in federal law there allegedly is, if there really was a crime, the State of Arkansas could prosecute it for straight bribery under Ark. Code Ann. § 5-52-101 (abuse of public trust)? Here, the alleged bribe, over $25,000, it would be a class B felony (5-20 years imprisonment). In short, there is no gap in the law.

But, can Maggio even be convicted of that since there was no quid pro quo? *See* § 5-52-101(a)(3) (strongly suggesting quid pro quo required for the offense).

[19] *Salinas v. United States,* 522 U.S. at 56-57.

from Maggio granting a legally justified remittitur with no quid pro quo.

As the Supreme Court stated in *McDonnell*, courts "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell*, 2016 WL 3461561, at *18, 2016 U.S. Lexis 4062, at *44 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Being "extremely broad in scope" runs headlong into the fundamental rule of lenity.

Moreover, political bribery statutes "'that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.'" *Id.* (quoting *United States v. Sun-Diamond*, 526 U.S. 398, 408, 412 (1999)). In the event of a "'grievous ambiguity or uncertainty,'" the rule of lenity must apply, with construction of the statute in favor of the defendant. *Ocasio v. United States*, 136 S. Ct. 1423, 1434, n.8 (2016).

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. *See United States v. Gradwell,* 243 U.S. 476, 485 (1917); *McBoyle v. United States,* 283 U.S. 25, 27 (1931); *United States v. Bass,* 404 U.S. 336, 347-349 (1971). This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.

United States v. Santos, 553 U.S. 507, 514 (2008). "[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.' *See, e. g., Lewis v. United States,* 445 U.S. 55, 65 (1980). Where Congress has manifested its intention, we may not manufacture

ambiguity in order to defeat that intent." *Bifulco v. United States,* 447 U.S. 381, 387 (1980).[20]

Congress's manifest broad interpretation, is simply contrary to the fundamental rule of lenity. And why shouldn't the rule of lenity also apply to the nexus requirement? Without it, couldn't anything potentially be a federal crime, federal nexus or not? Any judge who rules in favor of a campaign contributor during the period of the campaign is at risk of a prosecution like Maggio's, even if the judicial act was completely justified by fact and law and within precedent. And that's just what this case boils down to.

That can't be the federal criminal law under a system of limited federal criminal powers. That's why we live within the "necessary and proper" clause, and, without true nexus between the federal government and the act, there is no federal power. Otherwise, it's interloping such as what happened in *McDonnell.* McDonnell committed no crime under the federal theory, but he endured a five week trial, the embarrassment of conviction of both him and his wife, affirmance in the Fourth Circuit before the Supreme Court said: No, this isn't a crime.

And here, irony of irony, the remittitur was legally required. *See* note 3,

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[20] *See also Johnson v. United States,* 135 S. Ct. 2551, 2557 (2015), holding void for vagueness the residual clause of the Armed Career Criminal Act because it invited arbitrary enforcement of the criminal law.

supra, page 2. Thus, as in *McDonnell*, Maggio got a campaign contribution for doing his job anyway in an impartial manner. The message about "Win, lose or draw, you have Individual A's support" (1/9/15 Tr. 19:4) underscores that there simply was no bribe. Yes, it looks bad because of the timing and who it came from,[21] like McDonnell looked bad, but it just cannot be a crime based on these facts without nexus.[22]

1. Maggio was not an agent of the State of Arkansas

The definition of "agent" in § 666 is "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and repre-

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[21] And campaign contributions from lawyers and litigants is necessarily a problem in any state that elects judges. That, however, is a political choice each state makes, and, yes, it looks bad, but it's not a crime every time a judicial candidate takes a contribution. If we want it to be, then appoint judges as the federal system and many states do. Arkansas doesn't, and probably never will.

[22] *Compare McDonnell,* 2016 WL 3461561, at *21, 2016 U.S. Lexis 4206, at *51:

> There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

Here, the government didn't come up with "boundless"; the Supreme Court did, and it's just wrong under the "necessary and proper" clause.

sentative[.]"

There is no factual record on which this Court could conclude that Maggio was an agent of the State of Arkansas. As the Arkansas Constitution provides, circuit judges are elected officials subject only to the superintending control of the Arkansas Supreme Court.[23] *See* Ark. Const. Amend. 80, §§ 4, 6, & 17. Indeed, circuit judges routinely preside over cases where the State of Arkansas is a party just as federal courts do when the government is a party. That is the point of an independent judiciary, an essential part of the bedrock of our democracy. *See* Federalist Papers No. 78.

A circuit judge could not be, on the one hand, an agent of the State of Arkansas while, on the other hand, ruling on cases where the State is a party. Thus, judges are authorized to act on behalf of the State with respect to non-judicial business, but are authorized to act on behalf of the People and the rule of law with respect to judicial business.

For instance, in *United States v. Whitfield*, 590 F.3d at 346, the Fifth Circuit concluded that the trial judges in that case were agents of Mississippi's Administra-

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[23] The Arkansas Supreme Court might logically be an agency of the State of Arkansas, but, does that mean Maggio is an agent of the Arkansas Supreme Court or the State of Arkansas for all purposes? No. The court had the power to remove him, *see* text accompanying note 6, *supra,* but that still doesn't make him an "agent" for federal criminal purposes.

tive Office of the Courts ("AOC"), "but only in so far as they performed functions that involved AOC funds." *Id.* at 345. There apparently is no case law holding that a judge was an "agent" for purposes of § 666. *See* ELLEN S. PODGOR, ET AL., WHITE COLLAR CRIME § 7.3 at 218-19 (2013).

Here, the Government has not alleged that Maggio was an agent of Arkansas's AOC, but even if it did, then Maggio could only have been an agent for *nonjudicial* business because the purpose of Arkansas's AOC, like Mississippi's AOC is "for the administration of the *nonjudicial* business of the judicial branch." Ark. Code Ann. § 16-10-102 (emphasis added). Thus, when Maggio remitted the judgment in the civil case at issue, properly no less, he was acting in his judicial capacity, not under the control of the State or any of its agencies. Therefore, because Maggio was not an agent of the State of Arkansas, he cannot be prosecuted under § 666(a)(1)(B) because the first element of the statute cannot be met.

2. Establishing that a campaign contribution is a bribe

In federal bribery prosecutions where the alleged bribe is a bona fide campaign contribution, the law is clear. The government must prove an explicit agreement ("quid pro quo") existed to connect the acts ("I will do this if you do that" or conversely "I will not do this unless you do that"). This is true whether brought under the Hobbs Act, Honest Services Fraud, Bribery of Public Officials, or as here, Bribery Involving Federally Funded Programs. *United States v. Siegelman*, 640 F.3d

1159, 1170 (11th Cir. 2011). A campaign contribution is not per se a bribe. It is a necessary evil in democracies and where officials, including judges, are elected.

The U.S. Attorney's Manual urges caution as to campaign contributions, and, under 18 U.S.C. § 201, it says:

> [C]ampaign contributions represent a necessary feature of the American political process, they normally inure to the benefit of a campaign committee rather than directly to the personal benefit of a public officer, and they are almost always given and received with a generalized expectation of currying favor with the candidate benefitting therefrom.

U.S. Attorney's Criminal Resource Manual 2046.[24]

The only facts alleged in the record before the Court are that a person identified as "Individual B," a political fundraiser, stated "Win, lose or draw, you have Individual A's support." 1/9/15 Tr. 19:4. The Government attempts to convert the innocent to the corrupt by adding that

> Maggio understood that the purpose of this message was not to reassure Maggio that he had Individual A's support regardless of any decision on the remittitur, but rather Individual B was reminding Maggio [of the opposite:] to make a favorable ruling to Individual A and Company A because of Individual A's financial support of Maggio's campaign.

Id. at 19:6-11 (bracketed material added). Later it is alleged that Individual B said Maggio would receive campaign financial support if he made the "tough calls while on the bench." *Id.* at 19:13-14. Once again the conversion is supplied by the Gov-

[24] https://www.justice.gov/usam/criminal-resource-manual-2046-other-issues.

ernment: "Maggio understood that Individual B was advising Maggio that, in exchange for Maggio's ruling in favor of Company A and Individual A, Individual A would provide campaign donations to Maggio." *Id.* at 19:15-17 This amounts to an allegation that patently appropriate and innocent statements made by Individual B constituted a quid pro quo or explicit agreement that Maggio would receive campaign contributions in specific amounts *only* if he granted remittitur in a civil case.

These facts fall short of meeting the most basic requirements; for example, defined terms, subject matter, and meeting of the minds which is necessary to establish any explicit agreement. No briber, no bribee.

3. Maggio's remittitur ruling was not "in connection with any business, transaction, or series of transactions" of any State, local or county government or any agency

A judge who accepts a bribe in exchange for a favorable ruling in a civil case cannot be convicted under § 666(a)(1)(B) as a matter of law. The Fifth Circuit's *Whitfield* is apparently the only appellate case involving facts closely similar to those at issue here,[25] and the "key issue" in determining whether the judges could be held liable under § 666 was whether the judge's decisions "were connected with the transactions or business of the [organization the judge represents]." *Whitfield,* 590

[25] Two Mississippi circuit judges accepted bribes from an attorney in exchange for favorable rulings in pending civil cases.

F.3d at 346.[26] The Fifth Circuit found that it was clear from the record in that case that, although the judges were agents of Mississippi's AOC, "their role as [agents of the AOC] ... had nothing to do with their capacity as judicial decision-makers." *Id.* Therefore, because the bribes in question were in conjunction with the handling of the judges' civil cases and "clearly had no 'connection with any business, transaction, or series of transactions' of the AOC," their convictions under § 666 could not stand. *Id.* The District Court asked this very question of the prosecutor at Maggio's hearing on his motion to withdraw, paraphrasing, how does remitting a civil judgment in the State of Arkansas between two private individuals ever become a federal question or a federal crime? 3/24/16 Tr. 7:13-18. The answer is implied in the question – especially if the civil judgment should have been remitted because it was based on passion or prejudice, as was the case here.

The Information charges Maggio under § 666(a)(1)(B) (federal program bribery) alleging that he accepted a bribe "intending to be influenced and rewarded in connection with a business, transaction, and series of transactions of the State of Arkansas, Twentieth Judicial District, Second Division that involved $5,000 or more." [Doc. 2, ¶ 7]

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[26] *Accord: United States v. Frega*, 933 F. Supp. 1536, 1542 (S.D.Cal. 1996), and *United States v. Scruggs*, 2011 WL 1832769, *14 (N.D. Miss. May 13, 2011), discussed *infra* with *Whitfield.*

Maggio submits, however, that it is clear from the plea colloquy that there is no factual basis for the plea. The purported factual basis for the plea was that Maggio granted a remittitur in a civil case pending before him "in part because Maggio wanted to retain Individual A's financial support of his campaign for the Court of Appeals" and he "accepted Individual A's financial support of his campaign for the Arkansas Court of Appeals intending to be influenced and induced to remit the judgment against Company A." [1/9/15 Tr. at 20:23–21:1] There are no facts in the Information, Plea Agreement, plea colloquy or any other document to establish that Maggio accepted something of value "intending to be influenced or rewarded *in connection with any business, transaction or series of transactions*" of the State of Arkansas, Twentieth Judicial District as required by the plain language of § 666(a)(1)(B). But, again, no nexus.

4. *Hines* is distinguishable and *Whitfield* should be followed; if not, *Hines* is constitutionally suspect under *McDonnell* and the necessary and proper clause.

a. Distinguishable

Further, the government's primary authority, *United States v. Hines*, is distinguishable from this case because of the role of the civil deputy sheriff in conducting evictions. The Court should instead follow the Fifth Circuit's *United States v. Whitfield* involving an allegedly bribed trial judge which finds the judge not an agent of the state. And, if *Hines* is not distinguishable, then we submit it is

subject to overruling in light of *McDonnell v. United States* because this prosecution then violates the rule of lenity or the "necessary and proper" clause.

In *Hines*, deputies were taking bribes from various moving companies and property owners in order to be influenced in performing their eviction-related duties, *i.e.*, the business of the sheriff's department. *Hines* challenged the applicability of the statute to his conduct, arguing that "he was not entrusted with the disbursements of any money, federal or otherwise; his dealings were purely local and could not jeopardize in any significant manner the integrity of federal programs; and the federal monies given to St. Louis County did not reach his department." *Id.*, 541 F.3d at 836. The Eighth Circuit held the government was not required to show any "connection between federal funds and the activity that constitutes a violation of § 666." *Id.*

The facts of Maggio's case are different from *Hines* because the deputies in *Hines* were accepting bribes in connection with the actual business of the sheriff's department. Further, the challenge to the applicability of § 666 is different in this case as well. *Hines* addresses the argument that the government does not have to trace the alleged bribe to federal money. Maggio is not challenging whether federal funds reached the State of Arkansas or the Twentieth Judicial Circuit. Rather, Maggio is challenging the lack of evidence that he accepted something of value intending to be influenced or rewarded "in connection with" any business, transac-

tion, or series of transactions of the organization he supposedly represents. Moreover, there is nothing intrinsically corrupt about his granting this legally justified remittitur.

The State of Arkansas was not involved in any way in the civil case where Maggio granted a remittitur. But § 666(a)(1)(B) clearly requires that the bribe be paid "in connection with" the business or transaction of the organization the defendant represents. The government must show that federal funds were jeopardized in some way by Maggio's actions. The phrase "in connection with" must have meaning. To ignore the phrase "in connection with" would violate fundamental rules of statutory construction, which require the Court to adhere to the plain meaning of the statute and give meaning to every word in the statute. *See In re Larsen*, 59 F.3d 783, 786 (8th Cir. 1995) (recognizing the canon of statutory construction that every word in a statute has meaning).

Further, if the Court were to accept the Government's interpretation of § 666, then every alleged bribe to any agent of an organization, or of a State or local government, or any agency thereof, could be prosecuted under the statute regardless of the purpose of the bribe, and whether or not it involved the business of the agency he or she represented. That simply cannot and should not be the law. Otherwise, we have federal overcriminalization of something with absolutely no federal interest or nexus.

Such a construction ignores the plain meaning of § 666(a)(1)(B) and should be rejected by this Court as the Fifth Circuit did in *Whitfield* and as potentially the Supreme Court would in *McDonnell*. *Whitfield* is more in point than *Hines,* and it should be followed.

Also in accord is *United States v. Frega,* 933 F.Supp. at 1542, holding that the bribe must relate to the program receiving the federal funds, not just to the governmental entity involved:

> A survey of published cases involving § 666 indicates that courts have required that this funding be shown to exist at a fairly specific level, and not at the general governmental level. For example, the defendant in *United States v. Valentine,* 63 F.3d 459 (6th Cir. 1995), worked as Secretary/Treasurer of the water department for a Tennessee city. The Sixth Circuit held that § 666 required a showing that the water department, as opposed to the city government, receive more than $10,000 in federal funding in a given year. *Id.* at 462; *see also Simas,* 937 F.2d at 463 (multi-county transportation agency as the recipient, as opposed to the counties). This specificity is significant in that it reinforces the view that § 666 was intended to protect the integrity of federal funds, and not as a general anti-corruption statute. Otherwise, the $10,000 element in *Valentine* could have been satisfied by the fact that the city received more than $10,000 in federal funding, and as an employee of the municipal water department, the defendant was a city employee.

Also similar is *United States v. Scruggs*, 2011 WL 1832769, at *14, a post-conviction § 2255 proceeding where a trial attorney pled guilty to attempting to bribe a judge to influence him on a pending civil case. There was no nexus or connection between the bribe and the business of the agency the judge represented. This satisfied the court that defendant showed actual innocence of the § 666 charge

under *Whitfield* and granted post-conviction relief from the conviction. It should also be noted that *Scuggs* is post-*Sabri* and *Salinas* and came post-conviction.

Therefore, under the plain language of § 666(a)(1)(B), aside from the narrow reading it requires, and the relevant case law, there was no factual basis for Maggio's plea of guilty. "Fair and just" reasons existed for allowing him to withdraw his plea. Although *Hines* seemingly authorizes a broad reading, that holding (1) violates the face of the statute itself or (2) is an unconstitutional expansion of federal jurisdiction if it doesn't. While one panel generally cannot overrule another, the general rule prohibiting one panel from overruling another panel does not apply when an intervening Supreme Court decision is handed down. *United States v. Williams,* 537 F.3d 969, 975 (8th Cir. 2008); *Novus Franchising, Inc. v. Dawson,* 725 F.3d 885, 891 (8th Cir. 2013).

Distinguishable or not, following *Hines* applied to these facts creates a conflict with the Fifth Circuit in *Whitfield* and its authorities as to nexus to the federal funding. Thus, a circuit conflict would exist, and certiorari would be more likely. U.S.S.Ct. Rule 10(a).

b. *McDonnell* and "necessary and proper"

Congress gets its power to declare crimes from the "necessary and proper" clause of U.S. Const. Art. I, § 8, cl. 18. In *Sabri v. United States*, 541 U.S. at 605-06, the Court said:

> Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars. *See generally McCulloch v. Maryland,* 17 U.S. 316 (1819) (establishing review for means-ends rationality under the Necessary and Proper Clause). *See also Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276 (1981) (same); *Hanna v. Plumer,* 380 U.S. 460, 472 (1965) (same). ...
>
> It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a quid pro quo for some dereliction in spending a federal grant. *Cf. Salinas v. United States,* 522 U.S. 52, 56-57 (1997) (The "expansive, unqualified" language of the statute "does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B)"). But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. ...

Sabri, we submit, simply cannot be expansively construed any more without violating the "necessary and proper" clause and over-criminalizing campaign contributions under *McDonnell* without a quid pro quo.

D. The remaining factors weighed in favor of permitting Maggio to withdraw his guilty plea

The remaining factors the District Court needed to consider were whether Maggio asserted his innocence, how much time elapsed between the guilty plea and the motion to withdraw, and whether granting the motion would prejudice the government.

First, Maggio asserted he was actually innocent for the reasons discussed above. Maggio further asserted that he did not solicit, demand, or even accept anything of value in order to be influenced to remit the judgment in a civil case, and only admitted to doing so because he was pressured beyond his free will by previous counsel. Although Maggio admitted to having a conflict of interest and allowing improper considerations to creep into the exercise of his judicial discretion, he never admitted to meeting the specific elements of bribery under § 666(a)(1)(B). Yet, he admitted something that isn't true and can't be proven.

Second, Maggio conceded that the length of time between his guilty plea (January 9, 2015) and his motion to withdraw (February 12, 2016) was significant, although he had not been sentenced. However, it was not until Maggio obtained new trial counsel that he fully understood and appreciated the legal issues in his case. More important, however, the length of time must become irrelevant since a jurisdictional challenge can be made literally at any time. Since Maggio challenges federal jurisdiction here, the length of time has to be legally meaningless in the Rule 11 calculus. A jurisdictional claim is never barred by any delay.

Finally, granting the motion to withdraw would not have prejudiced the government. The government was the party seeking to continue the sentencing in his case and sentencing had already been continued for a year.

E. As applied to the facts of this case, 18 U.S.C. § 666(a)(1)(B) is inapplicable and reliance on the statute violates the "necessary and proper" clause of the U.S. Constitution.

Maggio contends that the statute, as applied here, should not be construed to govern and that it violates the U.S. Constitution. In spite of the rulings in *Sabri v. United States* and other cases expanding the reach of § 666(a)(1)(B) to this case – where no federal, state or commingled funds were ever alleged to have been misapplied, misappropriated, embezzled, or otherwise jeopardized – is inconsistent with reasonable statutory construction and the constitutional limits on the legislature to interfere with purely state matters. Further, it cannot be justified under the spending or the necessary and proper clauses to the U.S. Constitution. U.S. Const. Art. I § 8, cl. 1 & c. 18.

F. Conclusion

The only charge in the Information against Maggio is for federal program bribery pursuant to 18 U.S.C. § 666(a)(1)(B). The guilty plea lacks an adequate factual basis because the Government cannot establish that Maggio's conduct violated § 666(a)(1)(B) for any of three reasons:

First, no bribe: there was no bribe under § 666(a)(1)(B or *McDonnell* because granting the remittitur was legally justified under the facts and law, and that is now a fact beyond dispute. *See* note 3, *supra,* on page 2. There was no solicitation of a campaign contribution, let alone in exchange for the remittitur that wasn't

required by the law anyway.

Second, no quid pro quo: there was no quid pro quo between the campaign contribution and the alleged action he was bribed to do. Remember the government's offer of proof of messages in the plea colloquy: "Win, lose or draw, you have Individual A's support." (1/9/15 Tr. 19:4) Maggio did nothing the law didn't already require him to do.

Third, no federal nexus: there was no nexus between federal money that some other part of the judicial district received and Maggio's granting a legally sound remittitur in an individual civil case. Remember that remittitur was acceptable to the plaintiffs as reasonable and fair, and *they* chose to forego a new trial which they could have had if they objected. The government alleges no nexus on the face of the charging document (Information ¶ 7 [Doc. 2 at 2]; 1/9/15 Tr. 22:6-9), and it only can show that the judicial district received federal funds for some undefined purpose.

Therefore, Maggio pled guilty to something that isn't even a federal crime.

III.

Appellant's upward departure to a 120 month sentence from a 51-63 month Guideline range is unreasonable under the Sentencing Guidelines.

A. Standard of review

> This court reviews an upward departure, if objected-to, for abuse of discretion. *Gall v. United States,* 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007) ("Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard."); *United States v. Vasquez,* 552 F.3d 734, 738 (8th Cir. 2009).

United States v. White Twin, 682 F.3d 773, 775 (8th Cir. 2012).

B. Guideline calculation

Pursuant to U.S.S.G. § 2C1.1(a), Maggio's base offense level was 14 because he was a public official. He received a 4 level enhancement for being an elected public official. U.S.S.G. § 2C1.1(b)(3). He also received a 4 level enhancement for receiving a benefit of $10,000 to $30,000 and a 2 level enhancement for obstruction of justice. This total offense level of 24, criminal history category I, resulted in a sentencing guidelines range of 51 to 63 months imprisonment. 3/24/16 Tr. 18:18-21. Maggio argued for a downward variance, and the Government argued for 120 months. *Id.* at 19 & 22.

A sentence outside the guidelines range must be substantively reasonable and "supported by the law and the record in the case." *United States v. Martinez*, 821

F.3d 984, 989 (8th Cir. 2016) (quoting *Gall v. United States*, 552 U.S. at 46). Any upward variance from the guideline range must be "supported by the 18 U.S.C. § 3553(a) factors." *Martinez*, 821 F.3d at 989 (citing *United States v. Hummingbird*, 743 F.3d 636, 638 (8th Cir. 2014)). The District Court must "'consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (quoting *Gall v. United States*, 552 U.S. at 50).

In applying an upward variance at Maggio's sentencing hearing, the District Court stated as follows:

> All right. Here's the deal. I could not, in good conscience, say that the value – place the value of the crime at 4.2 million, and so I didn't give you the 18-point increase. But I will say this, that I had a jury in here on Monday, and I have juries all the time, and when I start with my juries, what I say to them is – first thing I start off by saying is that, "Look, people say that the system is broken, and when people say that, what I want to do is hold up a big mirror, because the juries are the ones who make the decisions. Judges don't. And we provide a system – the reason we have courts is so people can come in and resolve their disputes in a place where they know it's going to be fair."
>
> ...
>
> But when it comes down to it, the question is, if a judge is allowed to take money – and even in this case, I'm still trying to figure out exactly how this happened, how the transaction occurred. But what we know is there was communication and then there was a remittitur. I said, I can't put an amount on it, but it's crooked. And, Mr. Maggio, it's crooked.
>
> And the problem with that is, is that I put people in prison every day – not every day but when I'm on the bench I put people – I put drug dealers in prison for five, ten, 15, 20 years for standing on the street corner selling crack cocaine or being involved in a conspiracy

where they are talking on the phone about crack.

And I asked myself this morning on my way over here from Helena driving over, What is worse: A dope dealer on the phone talking about a dope deal, or a dirty judge? There's no question. In society a dirty judge is by far more harmful to society than any dope dealer. Now, you say dope dealers kill people and they do all of that, but a judge is the system. And I don't want to preach to you and I don't want to preach to anybody else, because the truth is, what I – the responsibility I give to you and hold you up to, I have to think about that every day as I drive around and walk around because I'm held to it too. If somebody comes to you and starts trying to talk about a case, "I can't talk to you." You know, if somebody offers you something, get on the phone, call the cops, and say, "Somebody is over here trying to talk to me about something." That's what we're bound to do. "I can't even talk to you about that" is what we have to say.

And so I've gone back and forth, Ms. Peters, and I say, Mr. Hensley, between five and ten years. And what is – probation was never in my mind. And then the question, as I'm driving over here today, and I'm reading this stuff when I get back over here, and I'm reading it last night and yesterday is: What is the appropriate sentence? The guidelines say 51 to 63 months. That's not enough. It's not enough, Mr. Maggio.

So here's what I'm going to do. I'm going to remand you to the Bureau of Prisons for a term of 120 months. That's the most amount of time I can give you.

3/24/16 Tr. 22:22–25:2.

C. Substantive reasonableness and abuse of discretion

The substantive reasonableness of a sentence "is reviewed under a deferential abuse-of-discretion standard." *United States v. Webster*, 820 F.3d 944, 945 (8th Cir. 2016) (per curiam) (citing *United States v. Feemster*, 572 F.3d at 461). Appellate review is "narrow and deferential"; an above-the-guideline sentence is not presumably unreasonable nor are "extraordinary circumstances" required. *Feemster*, 572

F.3d at 461, 464. Although the District Court's decision to apply an upward variance based on the § 3553(a) factors is owed "due deference," this Court "'may consider the extent of the deviation,'" *Feemster*, 572 F.3d at 461–62, in order "to correct sentences that are based on unreasonable weighing decisions[.]" *United States v. Kane*, 639 F.3d 1121, 1136 (8th Cir. 2011). "[S]ubstantial variances based upon factors already taken into account in a defendant's guidelines sentencing range seriously undermine sentencing uniformity." *United States v. Solis-Bermudez*, 501 F.3d 882, 885 (8th Cir. 2007).

Thus, this Court recently remanded for resentencing in *United States v. Martinez*, holding that an eleven year upward variance was substantively unreasonable because the defendant's violent conduct during the crimes was "already accounted for" by the guidelines. *United States v. Martinez*, 821 F.3d at 989 (121-151 month guideline range varied upward to 262-327 months and defendant sentenced to 262 months).

Maggio, who was an elected circuit judge in the Twentieth Judicial District of Arkansas, received a 4 level enhancement for being "an elected public official or any public official in a high-level decision-making or sensitive position." U.S.S.G. § 2C1.1(b)(3). The Commentary states that a judge is a "public official in a high-level decision-making position." Commentary ¶ 4. Further, under Arkansas law circuit judges are elected officials. *See* Ark. Code Ann. § 7-10-102; Ark. Const.,

Amend. 80, §§ 6 & 10.

The District Court, however, then gave an upward variance of 57 months, thereby almost doubling Maggio's 63 month guideline maximum to the statutory maximum. It is clear from the record that the court's significant upward variance was based on Maggio's status as an elected judge, a factor which "the guidelines already accounted for[.]" *Martinez*, 821 F.3d at 989. This "severe variance" was substantively unreasonable under the reasoning of *Martinez*. *See also United States v. Chance*, 306 F.3d 356, 395 (6th Cir. 2002) (defendant received § 2C1.1 enhancement for being an official "holding a high-level decision-making or sensitive position and, thus, an upward departure for being "the highest law enforcement official in the county" was substantively unreasonable).

Yes, the District Court undeniably makes a valid point: "What is worse: A dope dealer on the phone talking about a dope deal, or a dirty judge? There's no question. In society a dirty judge is by far more harmful to society than any dope dealer." 3/24/16 Tr. 24:3-6.[27] But, that's already factored into the guidelines, and it is substantively unreasonable to double up and enhance Maggio yet again for that. Thus, the District Court abused its discretion in the upward departure.

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[27] As an aside, the sentencing judge was on the Arkansas Court of Appeals (2007-08) before being appointed to the federal bench. www.fjc.gov: Biographical Directory of Federal Judges.

CONCLUSION

The order of the District Court denying the motion to withdraw the plea should be reversed and this case remanded to the District Court. This Court should hold § 666(a)(1)(B) requires nexus under the rule of lenity or the necessary and proper clause and follow *United States v. Whitfield* from the Fifth Circuit and distinguish *United States v. Hines*.

Alternatively, the Court should hold the upward departure was unreasonable for double counting Maggio's status as an elected official at the time of the offense and reverse the sentence and remand for resentencing.

Respectfully submitted,

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I certify that this brief was prepared in WordPerfect X8, and the program provides a word count of 13,629 words, Statement of the Case to Conclusion.

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CERTIFICATE OF SERVICE

I certify that a copy was served by email on Assistant U.S. Attorney Julie Peters on July 11, 2016.

/s/ John Wesley Hall
John Wesley Hall

Addendum