IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 16-1795
CRIMINAL

UNITED STATES OF AMERICA,
Appellee,
v.

MICHAEL MAGGIO,
Appellant

Appeal from the United States District Court
for the Eastern District of Arkansas

The Honorable Brian S. Miller
Chief United States District Judge

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

Michael Maggio, a former state court judge who remitted a multi-million dollar civil judgment in exchange for a bribe in the form of campaign contributions, appeals his bribery conviction. Because the district court court had jurisdiction over the charged offense, and because the district court correctly denied Maggio's motion to withdraw his guilty plea, Maggio's conviction should be affirmed. Maggio also appeals the substantive reasonableness of his sentence. Because the district court adequately supported the upward variance, Maggio's sentence should be affirmed.

Oral argument is not necessary; however, if oral argument is granted, the United States respectfully requests the same time granted to Maggio.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

Michael Maggio was charged with a violation of 18 U.S.C. § 666(a)(1)(B). The district court had jurisdiction under 18 U.S.C. § 3231. On January 9, 2015, Maggio pleaded guilty to the offense. DCD 3. Maggio was sentenced on March 24, 2016. DCD 44. A final judgment and commitment order was entered on the district court's docket on March 28, 2016. DCD 45. Maggio filed a timely notice of appeal on March 30, 2016. DCD 518. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. The District Court Had Jurisdiction in this Case Because the Information Charged an Offense Against the Laws of the United States.

United States v. Cotton, 535 U.S. 625 (2002)

II. The District Court Correctly Determined that There Was a Factual Basis for Maggio's Plea.

United States v. Heid, 651 F.3d 850 (8th Cir. 2011)

United States v. Siegelman, 640 F.3d 1159 (11th Cir. 2011)

III. Maggio's "As Applied" Challenge to 18 U.S.C. § 666 is Both Waived and Unavailing.

United States v. Seay, 620 F.3d 919, 921 (8th Cir. 2010)

United States v. Hines, 541 F.3d 833 (8th Cir. 2008)

IV. The District Court's Upward Variance at Sentencing Was Substantively Reasonable.

United States v. David, 682 F.3d 1074 (8th Cir. 2012)

V. Maggio's Bond on Appeal Should be Revoked.

United States v. Powell, 761 F.2d 1227, 1231 (8th Cir. 1995)

STATEMENT OF THE CASE

A. Procedural Background

On January 9, 2015, Michael Maggio consented to the entry of a one-count Information charging him with a violation of 18 U.S.C. § 666(a)(1)(B), bribery concerning programs receiving federal funds. DCD 1, 2. At the same hearing, Maggio pleaded guilty to the charge pursuant to a plea agreement and cooperation addendum. DCD 3, 4, 5.

On February 12, 2016, Maggio filed a motion to withdraw his guilty plea. DCD 21. The district court held a hearing on Maggio's motion to withdraw his guilty plea on February 26, 2016. DCD 36. The parties filed pre-hearing and post-hearing briefs. DCD 21, 31, 32, 34, 37, 38. On March 10, 2016, the district court entered an order denying Maggio's motion to withdraw his guilty plea. DCD 39.

On March 24, 2016, the district court held a sentencing hearing. DCD 44. The district court sentenced Maggio to ten years imprisonment, two years supervised release, no fine, no restitution, and a $100 special assessment. DCD 44. The district court ordered Maggio to report to the Bureau of Prisons to begin his term of imprisonment by 2:00 p.m. on Monday, May 23, 2016. *Id*. The Judgment and

Commitment Order was entered on March 28, 2016. DCD 45. On March 30, 2016, Maggio timely filed a notice of appeal. DCD 47.

On April 13, 2016, Maggio filed a motion before the district court seeking release pending appeal. DCD 59. The United States responded in opposition. DCD 63. On April 22, 2016, the district court entered an order granting Maggio's motion for release pending appeal. DCD 64.

B. Factual Basis for Maggio's Plea

In his plea agreement, Maggio stipulated to a six-page factual basis for the 18 U.S.C. § 666 bribery charge. DCD 4 at 5-10. At the change of plea hearing, this factual basis was read aloud. DCD 10, Plea Tr. at 16-22. Maggio, under oath, acknowledged that the recitation was accurate and pleaded guilty because he "commit[ted] the offense as charged." *Id*. at 22-23. A summary of the factual basis is as follows.

Maggio was a circuit judge and agent of Arkansas's Twentieth Judicial District. DCD 4 at 5. The Twentieth Judicial District received over $10,000 in federal funding in 2013 and 2014. *Id*. at 10. In May 2013, Maggio presided over a civil jury trial resulting in a $5.2 million verdict against Individual A's nursing home for neglect and mistreatment preceding the death of a patient. *Id.* at 6. At the same time, Maggio was preparing to run for the Arkansas Court of Appeals. *Id.* Maggio was assisted in his campaign by a lobbyist and political fundraiser, Individual B.

Id. Maggio knew that Individual B planned to solicit the "nursing home folks" for financial support for Maggio's campaign. *Id*.

On June 17, 2013, Individual A's nursing home filed a motion for new trial or remittitur. DCD 4 at 6. On June 27, 2013, Maggio officially announced his candidacy for the Arkansas Court of Appeals nonpartisan general election to be held in May 2014. *Id*. at 7. On June 29, 2013, Individual B told Maggio that Maggio's "first 50k," ($50,000 in campaign contributions) which Maggio understood included support from Individual A, was "on the way." *Id*. Individual B communicated to Maggio that in exchange for Maggio's ruling in favor of Individual A's nursing home, Individual A would provide campaign donations to Maggio. *Id*. at 7-8. During the time period these communications took place, Maggio and his representatives were prohibited by the Arkansas Code of Judicial Conduct from soliciting or accepting campaign contributions. *Id*. at 8.

On July 8, 2013, the same day that Maggio held a hearing on the motion for new trial or remittitur, Individual A sent checks for Maggio's campaign (disguised as donations to PACs) to Individual B. *Id*. at 8. On July 10, 2013, Maggio granted the nursing home's motion for remittitur and reduced the award from $5.2 million to $1 million. *Id*. at 7. Maggio admitted that 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 the nursing home. *Id*. at 8.

Between May 2013 and July 2013, Maggio communicated with Individual B in person, by text, and by telephone about the campaign or the nursing home lawsuit. DCD 4 at 9-10. Telephone records show that contemporaneously, Individual B communicated with Individual A. *Id*. For example:

On May 16, 2013 (following the verdict at approximately 5:50 pm):

6:22 pm	MAGGIO to Individual B	text
6:33 pm	Individual A to Individual B	call, 6 min 49 sec
6:40 pm	Individual B to MAGGIO	text
6:44 pm	MAGGIO to Individual B	text

On June 17, 2013 (following the filing of the motion for new trial or remittitur at 10:05 a.m.):

10:29am	Individual A to Individual B	call, 5 sec
5:51pm	Individual A to Individual B	call, 3 sec
6:23pm	Individual B to Individual A	call, 4 min 39 sec
9:26pm	Individual B to MAGGIO	text
9:27pm	MAGGIO to Individual B	text
9:28pm	MAGGIO to Individual B	text
9:42pm	MAGGIO to Individual B	text
9:45pm	Individual B to MAGGIO	text
9:47pm	MAGGIO to Individual B	text
9:49pm	Individual B to MAGGIO	text
9:49pm	MAGGIO to Individual B	text

On July 8, 2013 (prior to the remittitur hearing; the day that Individual A sent the checks to Individual B):

9:32 am	Individual B to MAGGIO	call, 4 sec
9:32 am	Individual B to MAGGIO	text
9:48 am	MAGGIO to Individual B	call, 31 sec
9:49 am	Individual B to MAGGIO	call, 4 min 15 sec

On July 9, 2013 (the day before Maggio granted the remittitur):

3:30pm	Individual B to MAGGIO	call, 6 sec
3:31pm	Individual B to MAGGIO	call, 1 min 22 sec
4:05pm	Individual B to Individual A	call, 8 min 27 sec

Id. at 6-9.

Candidates for the May 2014 judicial elections were permitted to solicit and accept campaign contributions beginning on November 21, 2013. DCD at 8. In December 2013 and January 2014, Individual B arranged for the PACs funded by Individual A to disburse money to Maggio's campaign. *Id*. at 8-9. In March 2014, when Individual A's contributions to the PACs became publicly known, Maggio deleted his text messages with Individual B. *Id*. at 10.

C. Appellate Waiver

As part of the plea agreement, Maggio "waive[d] the right to appeal the conviction and sentence," but he preserved "the right to appeal claims of prosecutorial misconduct and the . . . right to appeal the sentence if the sentence imposed is above the Guideline range that is established at sentencing . . . ." DCD 4 at 3. Maggio also "waive[d] the right to collaterally attack the conviction and sentence pursuant to [28 U.S.C. § 2255] except for claims based on ineffective assistance of counsel or prosecutorial misconduct." *Id*.

At the change of plea hearing, the district court directed the Assistant U.S. Attorney to read the appellate waiver. DCD 10, Plea Tr. at 13-15. Maggio, under oath, stated that he understood his appellate waiver. *Id*. at 15.

D. Motion to Withdraw Plea

Pursuant to the plea agreement and and addendum, Maggio agreed to cooperate with the United States in the ongoing investigation. DCD 4, 5. On January 19, 2016, after four prior debriefings, Maggio took a polygraph examination at the request of the United States and failed. DCD 31 at 12. In a post-polygraph interview, Maggio revealed that his communications with Individual B were more detailed than he had previously disclosed to the United States. *Id*. The materiality of those details was substantial. *Id*. Maggio revealed that Individual B told him that Individual A was following the nursing home case and would be appreciative of Maggio making the right decision. *Id*. Maggio also revealed that Individual B told Maggio that Individual A's contributions to Maggio would have to be handled differently than Individual A's contributions to other candidates. *Id*. Maggio further revealed that sometime between November 2013 and January 2014, Maggio approached Individual B to ask where the rest of the promised $50,000 was, since Maggio had only received $25,000. *Id*.

After Maggio revealed this information, Maggio ceased cooperating with the United States and communicating with his attorneys. DCD 31 at 13; DCD 13, 18. The district court denied Maggio's attorneys' first and second motions to withdraw as counsel. DCD 20. On February 5, 2016, Maggio hired new counsel. DCD 17. New counsel declined to meet with the United States to discuss the newly-provided information or why Maggio had ceased cooperating. DCD 31 at 13.

On February 10, 2016, the United States informed the U.S. Probation Office that Maggio had failed to comply with the terms of the plea agreement and addendum, despite being provided numerous opportunities to do so. DCD 31 at 13. Specifically, Maggio failed to truthfully disclose all information and knowledge regarding his, Individual A's, and Individual B's criminal conduct; failed to be available for interview upon reasonable request; and ceased cooperating with the United States. *Id*. As a result of Maggio's breach of the plea agreement and Addendum, the United States revoked its agreement to favorable sentencing stipulations. *Id*. at 11-12. A revised Presentence Report reflecting the new sentencing calculations was released on February 11, 2016. *Id*. at 13.

On February 12, 2016, thirteen months after Maggio's guilty plea, two weeks prior to his then-scheduled sentencing, and one day after the new Presentence Report was released, Maggio (through his new counsel) filed a motion to withdraw his

guilty plea and to dismiss the § 666 charge. DCD 21. Maggio claimed primarily that the plea lacked an adequate factual basis, inasmuch as "accepting a bribe in order to issue a ruling in a civil case had no connection with . . . the business of" the Twentieth Judicial District or the federal funds it received. *Id*. at 5-10. Relatedly, Maggio argued that his counsel had been ineffective in telling him "that his conduct violated 18 U.S.C. § 666" when it "clearly [did] not." *Id*. at 11. The United States opposed Maggio's attempt to withdraw his plea. DCD 31.

On February 16, 2016, the district court granted Maggio's original attorneys' motion to withdraw on the basis of their being accused of ineffective assistance of counsel. DCD 24. Maggio thereafter filed an amended motion in which he explicitly withdrew his ineffective assistance claim, but added a claim that § 666, as applied to his conduct, exceeds Congress's authority under the Spending Clause. DCD 32 at 1, 15-16; *see also* Sentencing Tr. at 3. Maggio also expanded his challenge to the adequacy of the factual basis for the plea, arguing that there was insufficient proof of a *quid pro quo* or that the Twentieth Judicial District received $10,000 in federal funds. DCD 32 at 7-8, 13-14. The United States again responded in opposition. DCD 34.

The district court held a hearing on Maggio's motion to withdraw his plea on February 26, 2016. DCD 41, Mot. Hrg. Tr. 2/26/16. Maggio filed a post-hearing

brief in which he conceded that the factual basis was adequate to show that the Twentieth Judicial District received $10,000 in federal funds. DCD 37, at 5.

On March 10, 2016, the district court entered an order denying Maggio's motion to withdraw his plea. DCD 39. Citing *Sabri v. United States*, 541 U.S. 600 (2004), and *United States v. Hines*, 541 F.3d 833 (8th Cir. 2008), the district court recognized "that the government was not required to establish a connection between the bribery in question and the federal funds establishing jurisdiction under [§ 666] to establish that Maggio violated" the statute. *Id*. at 1. The district court also observed that *Sabri* and *Hines* rejected Spending Clause challenges to the statute. *Id*. at 2. The district court concluded that Maggio had presented no "fair and just reason" under Fed. R. Crim. P. 11(d)(2)(B) for withdrawing his plea: the Plea Agreement established an adequate factual basis that he was an agent of the Twentieth Judicial District (DCD 39 at 8) which received over $10,000 in federal funds in 2013 and 2014 (DCD 39 at 10-11), and that he accepted a bribe "in connection with [the] business" of that agency (DCD 39 at 8-10). With respect to the *quid pro quo*, the district court stated that the facts in the Plea Agreement were sufficient to establish an explicit agreement to remit the verdict in exchange for campaign contributions. *Id*. at 8-9.

E. Sentencing

On March 24, 2016, the district court held a sentencing hearing. DCD 44. The parties filed sentencing memoranda in advance of the hearing, and Maggio submitted objections to the Presentence Investigation Report directly to the Probation Office. DCD 42, 43. Maggio requested a downward departure and variance to a sentence of probation. DCD 42. The United States requested the statutory maximum sentence of ten years. DCD 43.

At sentencing, the district court calculated Maggio's total offense level as follows:

- Pursuant to U.S.S.G. § 2C1.1(a), Maggio's base offense level was 14, because he was a public official.
- Pursuant to U.S.S.G. § 2C1.1(b)(2) and § 2B1.1(b)(1)(C), Maggio's base offense level was increased by four levels because the value of the payment received by Maggio was between $15,000 and $40,000.
- Pursuant to U.S.S.G. § 2C1.1(b)(3), the base offense level was increased by four levels because Maggio was an elected public official.
- Pursuant to U.S.S.G. § 3C1.1, the base offense level was increased by two levels because Maggio obstructed or impeded the administration of justice.

Sentencing Tr. at 14. The United States objected to the district court's decision to use the value of the payment received by Maggio, rather than the value of the benefit

received by the bribe-giver, to determine the loss amount under U.S.S.G. § 2B1.1(b)(1). Sentencing Tr. at 8-11. The Presentence Investigation Report (draft 4, dated 3/23/16) called for an 18 level increase under U.S.S.G. § 2C1.1(b)(2) & Application Note 3, and U.S.S.G. § 2B1.1(b)(1)(J), because the benefit received by Individual A in return for the bribe to Maggio was $4.2 million (the amount by which Maggio remitted the $5.2 million verdict). Maggio submitted an objection to the Probation Office. The district court sustained Maggio's objection to the use of the remittitur amount. Sentencing Tr. at 6-8, 14.

The district court calculated Maggio's total offense level at 24, Criminal History Category I, resulting in an advisory sentencing guidelines range of 51 to 63 months. Sentencing Tr. at 14. The district court, after noting that it was not bound to sentence Maggio within the sentencing guidelines range, sentenced Maggio to ten years imprisonment, the statutory maximum term of imprisonment for a violation of 18 U.S.C. § 666. In imposing "the most amount of time I can give you," *see* Sentencing Tr. at 25, the district court described its reasoning at length:

> 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 – the 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 a 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 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 . . . between five and ten years. And what is – probation was never in my mind. And 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. It's the most amount of time I can give you.

Sentencing Tr. at 22-25.

Additionally, in the Statement of Reasons attached to the Judgment and Commitment Order, the district court indicated that the upward variance was warranted pursuant to 18 U.S.C. § 3553 based on the nature and circumstances of the offense, namely, Maggio's "Extreme Conduct." DCD 45, Attachment page 3. The district court further indicated that it varied upward "To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." *Id*.

F. Release Pending Appeal

At the sentencing hearing, Maggio requested 90 days to self-surrender. Sentencing Tr. at 25. The district court directed Maggio to report in 60 days, on May 23, 2016. On April 19, 2016, Maggio filed a motion for release pending appeal. DCD 59. Maggio indicated that he would appeal the district court's denial of his motion to withdraw his guilty plea. *Id*. at 3. Maggio also asserted that he would appeal the "lack of jurisdiction under the charge of federal program bribery" and "no evidence of any federal funds or *quid pro quo* arrangement." *Id*. at 2.

The United States opposed Maggio's motion for release pending appeal. DCD 63. The United States asserted that Maggio did not meet the standard for bond set forth in 18 U.S.C. § 3143(b)(1)(B), because he did not raise a substantial question of law or fact, and because the issues raised in Maggio's motion were precluded by his appellate waiver. DCD 63 at 3-8. On April 22, 2016, the district court entered an order releasing Maggio during the pendency of his appeal, stating:

> Nothing indicates that Maggio will flee or poses a danger to the safety of the community, so the issues are whether the question that will be presented by Maggio on appeal is substantial and whether a reversal will occur if the Eighth Circuit rules in his favor. Based on my reading of 18 U.S.C section 666(a)(1)(B) and case law interpreting it, I am persuaded that it applies to Maggio's actions just as it applied to the deputy sheriff in *United States v. Hines*, 541 F.3d 833 (8th Cir. 2008). Unfortunately, there is no case law applying the statute to a judge who took a bribe under circumstances similar to those at issue herein. Further, if the Eighth Circuit rules in Maggio's favor, and holds that the statute does not apply to state judges acting similarly to Maggio, a reversal is almost certain to occur.

DCD 64, at 1-2.

SUMMARY OF THE ARGUMENT

The district court had jurisdiction in this case because the Information charged an offense against the United States. The Information alleged all necessary elements of the offense. Additionally, a valid guilty plea waives all non-jurisdictional defects in a charging document.

The district court correctly denied Maggio's motion to withdraw his guilty plea. Maggio's effort to withdraw his guilty plea more than thirteen months after his plea hearing was an effort to avoid sentencing, and in particular the consequences of his breach of the plea agreement. There was an adequate factual basis for Maggio's plea. Maggio was an agent of the state court, and Maggio accepted a bribe in connection with the business of that court. Maggio's admissions in the plea colloquy established the necessary *quid pro quo* to connect the campaign contributions and Maggio's act of remitting a judgment by $4.2 million.

Maggio's "as applied" challenge to 18 U.S.C. § 666 is both waived and unavailing. Section 666 does not require proof of a nexus between the corrupt act and the federal funds. The statute is a valid exercise of Congress's authority under the Spending and Necessary and Proper Clauses.

The district court's decision to vary upward in sentencing Maggio from 51-63

months to the statutory maximum term of 120 months was substantively reasonable. The district court based its decision on Maggio's extreme conduct, and on the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and just punishment for the offense. Alternately, this Court can affirm Maggio's sentence because the district court miscalculated the advisory sentencing guidelines range when it based the loss amount on the amount of the bribe received by Maggio rather than the benefit received by the bribe giver.

This Court should revoke Maggio's bond pending appeal, because Maggio cannot demonstrate a "substantial question of law or fact" necessary to satisfy § 3143(b)(1)(B).

ARGUMENT

I. The District Court Had Jurisdiction Because the Information Charged An Offense Against the Laws of the United States.

A. Standard of Review

The question of whether a district court has subject matter jurisdiction over a case is reviewed *de novo*. *See, e.g.*, *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005). "[S]ubject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002).

B. Argument

Maggio asserts that the district court lacked federal jurisdiction because, according to Maggio, the face of the charging document (here, an Information) failed to charge a federal offense. Appellant Br. at 17. More specifically, Maggio argues that the Information was facially inadequate because "[n]othing in the [I]nformation alleges any nexus between the alleged bribe and the receipt of federal funds or any federal program by the Twentieth Judicial District." *Id*. at 21.

The Information charged Maggio with bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 666. DCD 2. Because Maggio was charged with an offense against the laws of the United States, the district court had statutory jurisdiction pursuant to 18 U.S.C. § 3231. "Subject matter jurisdiction in

every federal criminal prosecution comes from 18 U.S.C. § 3231 . . . . That's the beginning and the end of the 'jurisdictional' inquiry." *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003) (quoting *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999)). The alleged insufficiency of an Information is not a jurisdictional issue. *See Cotton*, 535 U.S. at 630. The matter of jurisdiction has to do only with "the court's statutory or constitutional *power* to adjudicate the case." *Id.* (emphasis in original). "[D]efects in an indictment do not deprive a court of its power to adjudicate a case." *Cotton*, 535 U.S. at 630.

Maggio's challenge, therefore, is that the Information was deficient for failing to allege a nexus between the bribe and the federal funds. Appellant Br. at 20-22. A valid guilty plea, however, waives all non-jurisdictional defects to an Indictment or Information. *See United States v. Seay*, 620 F.3d 919, 921 (8th Cir. 2010); *United States v. Frook*, 616 F.3d 773, 778 (8th Cir. 2010) (by pleading guilty, defendant waived challenge to alleged defect in indictment); *United States v. Todd*, 521 F.3d 891, 895 (8th Cir. 2008) ("A guilty plea waives all defects except those that are jurisdictional . . . Although we previously characterized an indictment that fails to state an offense as a jurisdictional defect . . . the Supreme Court clarified more recently [in *Cotton*] that a defective indictment does not deprive a court of jurisdiction.") (internal punctuation and citations omitted). Therefore, by pleading

guilty, Maggio waived any challenge to the sufficiency of the Information to state an offense.[1]

Even if Maggio's challenge to the Information were not waived, his argument fails. There was no need to allege a nexus between the bribe and the federal funds in the Information because this is not an element of the offense. *See United States v. Sewell*, 513 F.3d 820, 821 (8th Cir. 2008) (indictment adequately states offense if it contains all essential elements of offense charged, fairly informs defendant of the charges, and alleges sufficient information for defendant to plead conviction or acquittal as bar to subsequent prosecution). "[T]he plain language of the statute does not require, as an element to be proved beyond a reasonable doubt, a nexus between the activity that constitutes a violation [of § 666] and federal funds." *United States v. Hines*, 541 F.3d 833, 836 (8th Cir. 2008); *Sabri v. United States*, 541 U.S. 600, 605-07 (2004). Indeed, Maggio acknowledges in his brief that receipt of federal funds by the Twentieth Judicial District satisfies the nexus under this Court's precedent. Appellant Br. at 22 (*citing Hines*, 541 F.3d at 835-36).

C. Conclusion

The district court had subject matter jurisdiction because the Information charged an offense against the United States. Maggio waived his challenge to the

[1] Maggio's plea agreement also contained an appellate waiver that would preclude review of this issue, above and beyond the waiver that occurs as a result of a valid guilty plea. DCD 4, at 3-4.

sufficiency of the Information. Additionally, even if the Court were to consider the merit of Maggio's claim that the indictment was deficient, Maggio is wrong. The Information alleged all necessary elements.

II. The District Court Correctly Determined that There Was A Factual Basis for Maggio's Plea.

A. Standard of Review

This Court reviews 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. Argument

Maggio asserts that his plea contained an inadequate factual basis, and therefore the district court abused its discretion in denying his motion to withdraw his guilty plea. The lack of an adequate factual basis for a guilty plea is a fair and just reason to withdraw a guilty plea. *See Heid*, 651 F.3d at 856. Because the record contained sufficient evidence at the time of the plea from which the district court could reasonably determine that Maggio committed the offense, the district court did not abuse its discretion in denying Maggio's motion to withdraw his plea. *See United States v. Cheney*, 571 F.3d 764, 769 (8th Cir. 2009). The facts outlined by the Assistant U.S. Attorney in her summary of the plea agreement, a colloquy between the defendant and the district court, and stipulated facts were sufficient for the district court to find a factual basis for a plea. *See United States v. Brown*, 331 F.3d 591, 595 (8th Cir. 2003).

To establish a factual basis for Maggio's plea, the record must demonstrate that: (1) Maggio was an agent of Twentieth Judicial District of the State of Arkansas; (2) Maggio corruptly solicited or accepted or agreed to accept something of value in connection with the business, transaction, or series of transactions of the Twentieth Judicial District; (3) the business, transaction, or series of transactions involved something valuing $5,000 or more; and (4) the Twentieth Judicial District received benefits pursuant to a federal program in excess of $10,000 in the calendar years 2013 and 2014. *See* 18 U.S.C. § 666; DCD 39 (order denying motion and amended motion to withdraw plea) at 7-8; DCD 4 (plea agreement) at 1-2. On appeal, Maggio challenges only the adequacy of the factual basis for the first two elements.

1. Maggio was an agent of Twentieth Judicial District of the State of Arkansas.

Maggio asserts that there is "no factual record on which this Court could conclude Maggio was an agent of the State of Arkansas." Appellant Br. at 34. When faced with this same argument below, the district court noted that in Maggio's plea agreement, he stipulated that "[d]uring his tenure as a circuit judge, [he] was an agent of the State of Arkansas and the Twentieth Judicial District . . . ." DCD 39 at 8; DCD 4 at 5. At the plea hearing, Maggio acknowledged making the stipulation knowingly and voluntarily. Plea Tr. at 17, 22. A knowing and voluntary

stipulation to an element of a charged offense is sufficient to establish that element. *See United States v. Martin*, 777 F.3d 984, 993 (8th Cir. 2015) (defendant's stipulation established that he was an Indian under statute governing crimes committed in Indian country).

2. Maggio accepted a bribe in connection with the business, transaction, or series of transactions of the Twentieth Judicial District.

a. *Quid Pro Quo*

Maggio first challenges the proof that the campaign contributions from Individual A constituted a bribe. In essence, Maggio argues that his factual basis lacks sufficient proof of a *quid pro quo* to connect the campaign contributions and Maggio's act of remitting the judgment. *See McCormick v. United States*, 500 U.S. 257, 273 (1992) (holding in a Hobbs Act extortion under color of official right case that "[w]hen the property consists of campaign contributions, the government is required to show that "the payments [were] made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.").

Maggio, in his plea agreement, agreed that based on his communications with Individual B, he "understood that ... Individual B was reminding Maggio to make a favorable ruling to Individual A and Company A [on the remittitur] because of Individual A's financial support of Maggio's campaign." DCD 4 at 7. Maggio

also agreed that, based on a different communication with Individual B, he "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.* Finally, the plea agreement provided that "Maggio reduced the judgment against Company A from $5.2 million to $1 million." *Id.* Maggio admitted that 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 the nursing home. *Id.* at 8. Maggio, while under oath, confirmed the accuracy of these statements following the Assistant U.S. Attorney's summarization of the plea agreement. Plea Tr. at 19-22. These facts are sufficient to establish the explicit agreement to reduce the judgment in exchange for contributions to Maggio's campaign. *See United States v. Siegelman*, 640 F.3d 1159, 1172 (11th Cir. 2011) (explicit agreement to take or forego some specific action in exchange for a campaign donation may be implied from the official's words and actions).

In *Siegelman*, the Eleventh Circuit assumed, without deciding, that a *quid pro quo* instruction is required under § 666 when the thing of value is a campaign contribution. *Siegelman*, 640 F.3d at 1170-1172. The *Siegelman* court held that *McCormick*'s explicit *quid pro quo* requirement is satisfied where the campaign

contribution is made in return for a specific official action, but the agreement need not be "express." *Id*. at 1226. The court also emphasized that the *quid pro quo* requirement can be satisfied by circumstantial evidence. *Id.* at 1172; *see United States v. Terry*, 707 F.3d 607, 614 (6th Cir. 2012) (affirming Honest Services conviction for elected judge who accepted a campaign contribution and later directed summary judgment in donor's favor and noting that "[w]hat is needed is an agreement, full stop, which can be formal or informal, written or oral. As most bribery agreements will be oral and informal, the question is one of inferences taken from what the participants say, mean and do, all matters that juries are fully equipped to assess."); *see also United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992) (in Hobbs Act case, the jury may consider both direct and circumstantial evidence, including the context in which a conversation took place, to determine if there was a meeting of the minds on a *quid pro quo*; so long as the terms of the *quid pro quo* are "clear and unambiguous"; the understanding need not be verbally explicit); *but see United States v. Inzunza*, 580 F.3d 894, 900 (9th Cir. 2009).

Finally, throughout his brief, Maggio suggests that he committed no crime because the remittitur was lawful. *See* Appellant Br. at 2, 32. As his under oath, factual admissions indicate, Maggio did not remit the judgment against Individual A's nursing home because he believed it was appropriate or legally required, he did

so because he wanted Individual A's financing for his court of appeals campaign. DCD 4 at 8.

b. The remittitur was in connection with the business, transaction, or series of transactions of the Twentieth Judicial District.

Maggio asserts that the factual basis is insufficient to establish that his remittitur ruling was in connection with the "business, transaction, or series of transactions" of the Twentieth Judicial District. However, as the district court recognized in denying the motion to withdraw, Maggio stipulated in his plea agreement that he was "an agent of the State of Arkansas and the Twentieth Judicial District." DCD 39 at 10. Maggio also stipulated that as an agent, "he presided over ... civil ... cases in Faulkner, Van Buren, and Searcy counties." *Id*. Maggio further stipulated that in one of his civil cases in Faulkner County, he "accepted Individual A's financial support of his campaign ... intending to be influenced and remit the judgment against Company A." *Id.* "Accordingly, Maggio's [under oath] stipulation that he presided over civil cases in Faulkner County and accepted financial support in exchange for reducing a judgment in a case filed in the Twentieth Judicial District, is sufficient to conclude that Maggio accepted that bribe in connection with the business or transaction of the Twentieth Judicial District of the State of Arkansas." *Id*.

3. The remaining factors weigh against Maggio's motion to withdraw his plea.

Because the district court determined that Maggio did not present a fair and just reason to withdraw his plea, the district court was not required to consider "whether the defendant has asserted his innocence to the charge, the length of time between the plea of guilty and the motion to withdraw, and whether the government will be prejudiced by the withdrawal." *United States v. Austin*, 413 F.3d 856, 857 (8th Cir. 2005); *United States v. Wicker*, 80 F.3d 263, 266 (8th Cir. 1996). However, in addition to the fact that Maggio's sworn admissions before the district court were sufficient to support a violation of 18 U.S.C. § 666(a)(1)(B), the remaining factors all weighed heavily in favor of denying the motion to withdraw.

a. Maggio's motion to withdraw his guilty plea was an effort to avoid the consequences of his breach of the plea agreement and addendum.

With respect to the timing of Maggio's motion to withdraw, the timing of his filing in conjunction with the sequence of events makes clear that Maggio was simply seeking to avoid the consequences of his breach of the Plea Agreement and Addendum. Pursuant to the Plea Agreement and an Addendum, Maggio agreed to cooperate with the United States in the ongoing investigation. DCD 4, 5. On January 19, 2016, after four prior debriefings, Maggio took a polygraph examination at the request of the United States and failed. DCD 31 at 12. In a post-polygraph

interview, Maggio revealed that his communications with Individual B were more detailed than he had previously disclosed to the United States. *Id*. The materiality of those details was substantial. *Id*. Maggio revealed that Individual B told him that Individual A was following the nursing home case and would be appreciative of Maggio making the right decision. *Id*. Maggio also revealed that Individual B told Maggio that Individual A's contributions to Maggio would have to be handled differently than Individual A's contributions to other candidates. *Id*. Maggio further revealed that sometime between November 2013 and January 2014, Maggio approached Individual B to ask where the rest of the promised $50,000 was, since Maggio had only received $25,000. *Id*.

After Maggio revealed this information, Maggio ceased cooperating with the United States and communicating with his attorneys. DCD 31 at 13; DCD 13, 18. The district court denied Maggio's attorneys' first and second motions to withdraw as counsel. DCD 20. On February 5, 2016, Maggio hired new counsel. DCD 17. New counsel declined to meet with the United States to discuss the newly-provided information or why Maggio had ceased cooperating. DCD 31 at 13.

On February 10, 2016, the United States informed the U.S. Probation Office that Maggio had failed to comply with the terms of the Plea Agreement and Addendum, despite being provided numerous opportunities to do so. DCD 31 at

13. Specifically, Maggio failed to truthfully disclose all information and knowledge regarding his, Individual A's, and Individual B's criminal conduct; failed to be available for interview upon reasonable request; and ceased cooperating with the United States. *Id*. As a result of Maggio's breach of the Plea Agreement and Addendum, the United States revoked its agreement to favorable sentencing stipulations. *Id*. at 11-12. A revised Presentence Report reflecting the new sentencing calculations was released on February 11, 2016. *Id*. at 13.

On February 12, 2016, *thirteen months after* Maggio's guilty plea, and *two weeks prior to* his then-scheduled sentencing, and one day after the new Presentence Report was released, Maggio (through his new counsel) filed a motion to withdraw his guilty plea and to dismiss the § 666 charge. DCD 21. The length of time between Maggio's plea and motion to withdraw, and the timing of Maggio's filing in context of the events demonstrates that Maggio was simply trying to avoid the consequences of his breach of the plea agreement and addendum. "Post plea regrets by a defendant caused by contemplation of the prison term he faces are not a fair and just reason" to allow a defendant to withdraw his plea of guilty. *United States v. Stuttley*, 103 F.3d 684, 686 (8th Cir. 1996); *see United States v. Teeter*, 561 F.3d 768, 770 (8th Cir. 2009).

b. Prejudice to the United States

With respect to prejudice to the United States, the United States recognizes that it could proceed with other, more serious, charges that are also supported by the evidence in this case. Indeed, Maggio's factual admissions would be admissible against him pursuant to the plain terms of Plea Agreement. *See* DCD 4 at 14-15. However, the United States would be prejudiced by the granting of the motion inasmuch as the passage of a substantial period of time would provide similarly situated defendants with the ability to escape their obligations under valid and binding plea agreements and affect witness memories. The United States has an interest in the finality of the proceedings.

C. Conclusion

Because the factual basis for Maggio's plea was adequate on all elements, Maggio could not show a fair and just reason to withdraw his guilty plea. The district court did not abuse its discretion in denying Maggio's motion to withdraw his guilty plea.

III. Maggio's "As Applied" Challenge to 18 U.S.C. § 666 is Both Waived and Unavailing.

A. Standard of Review

An unconditional guilty plea forecloses non-jurisdictional claims, including "as applied" challenges to a statute. *United States v. Seay*, 620 F.3d 919, 921 (8th Cir. 2010).

B. Argument

1. Maggio's "as applied" challenge to the statute is waived by his valid guilty plea and his appellate waiver.

Maggio attempts to raise an "as applied" challenge to § 666 by squeezing it through the door of his challenge to the factual basis of his plea. Maggio argues that his factual basis is insufficient because, according to Maggio, "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." Appellant Br. at 37. Maggio's "as applied" argument does not present a question of whether the record of his plea contained sufficient factual evidence to meet the elements of the offense. *Cheney*, 571 F.3d at 769. Maggio's challenge, rather, is a legal one – a constitutional challenge to the application of 18 U.S.C. § 666 to his conduct. As such, Maggio's challenge is waived.

An "as applied" constitutional challenge to a statute is a non-jurisdictional challenge, and an unconditional guilty plea forecloses non-jurisdictional claims. *See Seay*, 620 F.3d at 921 (defendant's challenge to the constitutionality of the state "as applied" to him foreclosed by his plea); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *United States v. Trotter*, 478 F.3d 918, 919 (8th Cir. 2007) (defendant entered conditional plea expressly reserving his right to challenge the "as applied" constitutional issue on appeal); . Additionally, Maggio's plea agreement also contained an appellate waiver that would preclude review of this issue, above and beyond the waiver that occurs as a result of a valid guilty plea. DCD 4, at 3-4.

2. Maggio's "as applied" challenge to § 666 is unavailing.

Even if the Court were to consider the merit of Maggio's challenge to § 666, Maggio cannot prevail under this Court's and Supreme Court precedent.

The Fifth Circuit case upon which Maggio relies in support of his argument that "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, *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009), does not support this proposition, and as discussed below, *Whitfield* is contrary to this Court's precedent. *See Hines*, 541 F.3d at 835.

Whitfield involved two Mississippi state court judges convicted on various charges for accepting bribes in exchange for favorable rulings in civil cases. *Whitfield*, 590 F.3d at 336-41. Included among the charges was a violation of 18 U.S.C. § 666, which alleged that the judges were agents of the Mississippi Administrative Office of the Courts (AOC), which is a Mississippi state agency charged with administering the "nonjudicial business of the courts of the state." *Id.* at 344. Following their conviction at trial, the judges appealed, and the Fifth Circuit requested briefing to address whether the judges' rulings in the underlying civil cases "were made in connection with the transactions or business of the AOC." *Id*.

The Fifth Circuit in *Whitfield* began its analysis by considering whether the judges were in fact "agents" of the AOC. Taking a narrow view of the "agent" element based on prior circuit precedent, the Fifth Circuit reasoned that the judges were agents of the AOC, "but only in so far as they performed functions that involved AOC funds." *Id.* at 345. Having determined that the judges were agents of the AOC, the court turned to the question of whether the judges' decisions in the underlying civil cases "were connected with the transactions or business of the AOC." *Id.* Unlike the charges and facts here, in *Whitfield* the court concluded that, "insofar as [the judges] may have been agents of the AOC, their role as such

had nothing to do with their capacity as judicial decisionmakers." *Id.* at 346. This was so because the AOC expressly dealt with the administration of *nonjudicial* court business (such as hiring employees), whereas the judges' rulings involved "*judicial* business of the Mississippi courts." *Id.* (emphasis in original). Thus, in the Fifth Circuit's view, bribing a judge to perform a *judicial* function had no "'connection with any business, transaction, or series of transactions'" of the AOC, which dealt solely with *nonjudicial* administration. *Id.* (quoting 18 U.S.C. § 666(a)(1)(B)).

The facts and holding of *Whitfield* are readily distinguishable from this case. The key fact driving the Fifth Circuit's analysis in *Whitfield* was that the Mississippi judges were charged to be agents only of the AOC, *a nonjudicial administrative agency*. The judges' judicial rulings could not be "in connection with the business, transaction, or series of transactions" of the AOC because the AOC simply did not conduct judicial business. Here, by contrast, Maggio stipulated to being an agent—not of some administrative agency—but of the court itself: a judicial institution designated as the Twentieth Judicial District for the State of Arkansas.[2]

[2] "In 2013 and 2014, the defendant, Michael A. Maggio, was an elected circuit judge for the State of Arkansas, Twentieth Judicial District, Second Division. During his tenure as a circuit judge, Maggio was an agent of the State of Arkansas and the Twentieth Judicial District, and he presided over criminal, civil, domestic relations, and probate cases filed in Faulkner, Van Buren, and Searcy counties." Plea Tr. at 17; DCD at 5.

Thus, when Maggio made a judicial ruling on the motion for remittitur,[3] he was performing a quintessential judicial function within the scope of his agency relationship with a judicial institution. *See United States v. Fernandez*, 722 F.3d 1, 11 (1st Cir. 2013) (holding that § 666 applies to a lawmaker engaged in the "business" of passing laws, not merely the "commercial conduct" of the legislature); *United States v. Robinson*, 663 F.3d 265, 274 (7th Cir. 2011) (holding that in the context of § 666 "[t]he 'business' of a federally funded "organization, government, or agency' is not commonly 'business' in the commercial sense of the word"). The judicial act that constituted the subject of the bribe therefore had a direct "connection with the business, transaction, or series of transactions" of the Twentieth Judicial District. *Whitfield* does not insulate Maggio from criminal liability.

The other cases relied upon by Maggio are likewise inapposite. In *United States v. Frega*, 933 F. Supp. 1536 (S.D. Cal. 1996), the district court in California found that bribing state judges to fix civil cases did not violate 18 U.S.C. § 666 on the narrow ground that the conduct did "not appear to have threatened, either directly or indirectly, federal funds." *Frega*, 933 F. Supp. at 1543. *Frega*'s

[3] "On or about July 8, 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 10, 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." Plea Tr. at 19; DCD at 7.

reasoning has since been rejected by both the Supreme Court and this Court. *See Sabri v. United States*, 541 U.S. 600, 604-06 (2004) (refusing to read into 18 U.S.C. § 666 a requirement to prove a "connection between a bribe or kickback and some federal money"); *Salinas v. United States*, 522 U.S. 52 (1997) (government is not required to trace the federal money to the corrupted business or transaction itself); *Hines*, 541 F.3d at 836 (no requirement of connection between federal funds and the activity that constitutes a violation of § 666).

Maggio's reliance on *United States v. Scruggs*, 2011 WL 1832769 (N.D. Miss. 2011) (unpublished), is similarly misplaced. There, like in *Frega*, the district court in Mississippi found that bribing a state judge to fix a civil court case did not constitute a violation of 18 U.S.C. § 666. *Scruggs*, 2011 WL 1832769 at *14. Although the judge in *Scruggs* was alleged to be "an agent of a subdivision of the judicial branch of the state government of Mississippi," the district court assumed (without explanation) that the judge was an agent of the Mississippi AOC and therefore found *Whitfield* controlling. Here, by contrast, Maggio admitted to being an agent of the court—a judicial institution—thus bringing his judicial rulings on pending cases in direct connection with the business of the court itself.

The more apposite case is one from this Court – *United States v. Hines*. Hines was a deputy sheriff with the St. Louis County Sheriff's Office tasked with

enforcing court orders of eviction. *See Hines*, 541 F.3d at 835. Hines was charged and convicted under 18 U.S.C. § 666 based on his receipt of cash payments from a real estate firm in exchange for conducting timely evictions. *See id.* On appeal, Hines argued that § 666 did not apply to him because "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.* at 836. This Court rejected each of these arguments, reiterating its longstanding interpretation of § 666 to not require "any connection between federal funds and the activity that constitutes a violation of § 666." *Id.*

Hines underscores the compelling federal interest in maintaining the integrity of federally funded institutions against the threat of corruption. The United States Supreme Court and other federal courts of appeal agree with this approach. *See Salinas v. United States*, 522 U.S. 52, 61 (1997) (acceptance of bribes by an official of a jail housing federal prisoners pursuant to an agreement with the federal government "was a threat to the integrity and proper operation of the federal program"); *Fischer v. United States*, 529 U.S. 667, 681-82 (2000) (highlighting in a case under § 666(b) that "[f]raudulent acts threaten the program's integrity," and "raise the risk participating organizations will lack the resources requisite to provide

the level and quality of care envisioned by the program"); *United States v. Keen*, 676 F.3d 981, 990 (11th Cir. 2012) (noting that "fraudulent conduct poses a threat to the integrity of the entity, which in turn poses a threat to the federal funds entrusted to that entity" and "[n]owhere does the statutory text either mention or imply an additional qualifying requirement that the person be authorized to act specifically with respect to the entity's funds"); *Fernandez*, 722 F.3d at 11 (highlighting § 666's purpose of protecting the integrity of institutions receiving federal funds); *United States v. Vitillo*, 490 F.3d 314, 323 (3d Cir. 2007); *United States v. Hudson*, 491 F.3d 590, 595 (6th Cir. 2007); *United States v. Spano*, 401 F.3d 837, 839-41 (7th Cir. 2005); *United States v. Sotomayor-Vazquez*, 249 F.3d 1, 8, 10 (1st Cir. 2001) ("[T]he expansive statutory definition [in § 666(d)(1)] recognizes that an individual can affect agency funds despite a lack of power to authorize their direct disbursement. Therefore, to broadly protect the integrity of federal funds given to an agency, § 666 applies to any individual who represents the agency in any way, as representing or acting on behalf of an agency can affect its funds even if the action does not directly involve financial disbursement. . . . [Section] 666 has been given a wide scope, to include all employees from the lowest clerk to the highest administrator.").

3. *McDonnell* does not Overrule *Hines*

Maggio suggests that *McDonnell v. United States*, 2016 WL 3461561 (2016), is an "intervening Supreme Court decision" that would allow a panel of this Court to overrule *Hines*. In *McDonnell*, the Supreme Court held that a government official's actions in setting up a meeting, talking to another official, or organizing an event or agreeing to do so, without more, did not qualify as an "official act," for purposes of federal bribery prosecution. *Id.* at *16. Maggio, by contrast, in his capacity as a judge for the Twentieth Judicial District, actually signed a remittitur order in a case pending before him in exchange for campaign contributions. This is precisely the type of clear, unambiguous, official corrupt act that does qualify for bribery prosecution. Further, it is unclear how the holding in *McDonnell*, which limits the term "official act," has any impact on the holding in *Hines* regarding the federal funds-nexus issue. Indeed, the word "nexus" does not even appear in the *McDonnell* decision.

To the extent that Maggio argues that 18 U.S.C. § 666 is overbroad and unconstitutional, *see* Appellant Br. at 29, the United States Supreme Court has twice provided guidance on this question and, in both instances, held that § 666 is to be construed broadly and, as such, the government is not required to allege or prove that the federal funds were directly involved in the bribe. *See Salinas*, 522 U.S. at

55-61; *Sabri*, 541 U.S. 602-06. Nothing in *McDonnell* overruled the holdings of *Salinas* or *Sabri.* In particular, in *Sabri*, the petitioner-defendant facially challenged the constitutionality of the § 666 after being convicted for offering bribes to a city councilman. *See id.* at 602. The petitioner-defendant argued that § 666, as expansively interpreted by *Salinas*, exceeded Congress's Spending Clause power. The Supreme Court disagreed and determined that § 666 was a valid exercise of Congress's authority under the Spending and Necessary and Proper Clauses, because § 666 was necessary to protect federal monies paid to local governments and other entities. *See id*. at 605. The Supreme Court, in so ruling, highlighted the fungible character of money, noting that proof of a bribe's effect on federal funds is unnecessary where the recipient organization receives federal funding, since federal grants to one division of a recipient organization free up funds in another division. *See id*. at 606 ("Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.").

C. Conclusion

The integrity of the court system suffers potentially irreparable harm when a judge fixes a court case in exchange for a bribe. The federal government has a compelling interest in ensuring that its limited funding is not disbursed to a judicial institution plagued by corruption. Section 666 provides a mechanism to protect

that interest. Although Maggio's "as applied" challenge to the statute is waived, even if this Court were to consider Maggio's "as applied" challenge, Maggio's conduct fell squarely within reach of § 666.

IV. The District Court's Upward Variance at Sentencing Was Substantively Reasonable.

A. Standard of Review

This Court reviews the substantive reasonableness of the district court's sentence for an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). Under this standard, the Court reviews the sentence "for significant procedural error and then, if necessary, for substantive reasonableness . . . considering the totality of the circumstances." *United States v. David*, 682 F.3d 1074, 1076-77 (8th Cir. 2012). "We review with great deference the reasonableness of a sentence for abuse of discretion, and it will be the unusual case when we reverse a district court sentence as substantively unreasonable. . . . [A]lthough we may consider the extent of the variance, the Supreme Court has specifically rejected using the percentage of a departure or variance as the standard for determining the strength of the justifications required for a specific sentence." *Id*. at 1077.

B. Argument

The district court's decision to vary upward from 51-63 months to 120 months was substantively reasonable based on Maggio's extreme conduct and the need for the sentence to reflect the seriousness of the offense. In the alternative, this Court can affirm the 120 month sentence because the district court procedurally erred by failing to use the value of the benefit received by Individual A as the bribe-giver to

determine the loss amount under U.S.S.G. § 2B1.1(b)(1), which would have resulted in a guideline range exceeding 120 months.

1. Maggio's sentence is substantively reasonable.

Maggio does not argue that the district court committed procedural error in imposing his sentence. Rather, Maggio challenges the substantive reasonableness of his sentence. Maggio asserts that the district court abused its discretion in varying upward because, according to Maggio, the district court based the upward departure on "Maggio's status as an elected judge, a factor which the guidelines already accounted for." Appellant Br. at 52 (internal quotation omitted). Here, Maggio refers to the fact that his base offense level was increased by four levels under U.S.S.G. § 2C1.1(b)(3), because Maggio was an elected public official. *Id.* Maggio is wrong about the district court's basis for varying upward; however, the United States notes that "factors that have already been taken into account in calculating the advisory Guidelines range can nevertheless form the basis of a variance." *David*, 682 F.3d at 1077.

The district court varied upward because the 51-63 month guideline range was "not enough" to address the nature, circumstances, and seriousness of the offense, namely, Maggio's "extreme conduct" in presiding over a jury trial and then "crooked[ly]" reducing that jury's verdict for a bribe. 18 U.S.C. § 3553(a)(1);

Sentencing Tr. at 23-24; DCD 45, Attachment page 3. The district court specifically noted that although it did not increase Maggio's offense level by the $4.2 million dollar amount (which would have increased his guideline range from 51-63 months to 235-293 months), assigning his conduct a lower dollar amount rendered his conduct no less crooked. Sentencing Tr. at 22-23. That Maggio was only promised a small donation in exchange for reducing a large jury award does not mitigate Maggio's conduct, but rather aggravates it.

Further, while the sentencing guidelines accounted for the fact that Maggio was an elected public official who took a bribe and obstructed justice, the district court varied upward because these guidelines did not adequately reflect the "seriousness of the offense," namely, the gravity of a judge compromising the system through which citizens peaceably seek justice, stating "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." Sentencing Tr. at 22-23; DCD 45, Attachment page 3; 18 U.S.C. § 3553(a)(2)(A) ("the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."). In comparing the significant harm done by drug dealers (who regularly receive 5, 10, 15, 20 year sentences) to Maggio's conduct, the district court noted, "a judge is the system." Sentencing Tr. at 23-24. By selling a

verdict as a means to obtain a higher judicial office, Maggio breached the trust of the plaintiffs who put their faith in the legal system to justly resolve their dispute with the nursing home. This conduct seriously undermines the public's trust and confidence in, and the integrity of, the judicial system.

While Maggio's upward variance from 51-63 months to 120 months was significant, this Court has affirmed substantial variances where, as here, the district court offered appropriate justification. *See, e.g.*, *United States v. Abrica-Sanchez*, 808 F.3d 330 (8th Cir. 2015) (affirming upward variance from 15-21 months to 48 months based on defendant's history and characteristics); *United States v. Richart*, 662 F.3d 1037, 1053 (8th Cir. 2011) (affirming upward variance from 0-6 month advisory guideline range to 120 months, based on just punishment and deterrence where defendant's false statements related to concealment of involvement in murder); *United States v. Miller*, 646 F.3d 1128 (8th Cir. 2011) (affirming upward variance from 15-21 month advisory guideline range to 69 months, based on nature of offense and defendant's history and characteristics); *United States v. Lozoya*, 623 F.3d 624, 627 (8th Cir. 2010) (affirming defendants' upward variances of 65 and 43 months to 180 months, based on nature, circumstances, and seriousness of offense of brutal attack in voluntary manslaughter case); *Ferguson v. United States*, 623 F.3d 627 (8th Cir. 2010) (affirming upward variance from 6-12 months to 60

months based on nature and circumstances of offense, defendant's history and characteristics, and need for general deterrence); *United States v. Foy*, 617 F.3d 1029, 1038 (8th Cir. 2010) (affirming a 218 month upward variance to 480 months, in extortion by mail case based on nature and circumstances of offense and nature of defendant's criminal history, and noting "[w]e are not entitled ... under our deferential review to overturn a sentencing decision because we might have reasonably concluded a different sentence was appropriate); *United States v. Azure*, 596 F.3d 449, 456 (8th Cir. 2010) (affirming decision to run two sentences consecutively in order to achieve a 180–month sentence, which was 84 months above advisory guideline range for each count, based on history and characteristics of defendant and nature of offense); *United States v. Dehghani*, 550 F.3d 716, 723 (8th Cir. 2008) (affirming upward variance of 105 months to 432 months imprisonment in child pornography case, where advisory guidelines range did not sufficiently account for the scope of defendant's criminal conduct or obstructive behavior while awaiting sentencing, and acknowledging that "[b]ecause the sentencing judge is in a superior position to weigh the relevant factors under § 3553(a), the fact that we might reasonably conclude that a different sentence was appropriate is insufficient to justify reversal of the district court" (internal quotation omitted)); *United States v. Gnavi*, 474 F.3d 532, 537-38 (8th Cir. 2007) (affirming

54% upward variance to 120 months for defendant convicted in child pornography sting based on the need to protect the public from the defendant).

Additionally, Maggio's sentence is not out of line with sentences imposed on other corrupt judges. *See* 18 U.S.C. § 3553(a)(6) (need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct). Where judicial officials participate in bribery schemes, significant terms of imprisonment are, and should be, the result. *See, e.g.*, *United States v. Acevedo Hernandez*, Crim. No. 14-380,DCD 218-219 (D.P.R.) (Jun. 11, 2015) (sentence of 120 months for commonwealth judge who accepted bribes to acquit a businessman of vehicular homicide charges); *United States v. Terry*, 707 F.3d 607 (6th Cir. 2013) (sentence of 63 months for state court judge who denied summary judgment motions in exchange for campaign contributions); *United States v. Teel*, 691 F.3d 578 (5th Cir. 2012) (sentences of 75 months and 51 months for state court judges who issued favorable rulings in civil cases in exchange for bribes in the form of bank loans); *United States v. Collins*, 972 F.2d 1385 (5th Cir. 1992) (sentence of 82 months for federal judge who accepted bribe to reduce sentence by more than half). While Maggio's sentence is at the high end of those sentences, Maggio has the additional distinction of corrupting not only a mulit-million dollar

verdict, but also the electoral system by using the disguised bribe money to fund his campaign for a higher bench.

Because the district court offered appropriate justification under the § 3553 factors for the upward variance, the district court did not abuse its discretion and Maggio's sentence should be affirmed as substantively reasonable.

2. An alternate ground for affirmance of Maggio's 120 month sentence exists.

The United States submits that an alternate ground for affirmance of Maggio's 120 month sentence exists, in that the district court erroneously used the value of the bribe payment received by Maggio, rather than the value of the benefit received by Individual A as the bribe-giver, to determine the loss amount under U.S.S.G. § 2B1.1(b)(1). *See United States v. Gnavi*, 474 F.3d 532, 536 n.3 (8th Cir. 2007) (government defending sentence imposed by district court is not bound by district court's reasoning or calculations and may propose alternate legal theory). This Court may affirm Maggio's sentence on any ground supported by the record. *United States v. Garrido*, 995 F.2d 808, 813 (8th Cir. 1993). A district court's loss amount determination is reviewed for clear error. *United States v. Parish*, 565 F.3d 528, 534 (8th Cir. 2009).

Prior to sentencing, the Presentence Investigation Report (draft 4, dated 3/23/16) called for an 18 level increase under U.S.S.G. § 2C1.1(b)(2) & Application

Note 3, and U.S.S.G. § 2B1.1(b)(1)(J), because the benefit received by Individual A in return for the bribe to Maggio was $4.2 million (the amount by which Maggio remitted the $5.2 million verdict). Maggio submitted an objection to the Probation Office, and the district court sustained Maggio's objection to the use of the remittitur amount. Sentencing Tr. at 6-8, 14.

The United States objected to the district court's decision to use the value of the payment received by Maggio, rather than the value of the benefit received by the bribe-giver, to determine the loss amount under U.S.S.G. § 2B1.1(b)(1). Sentencing Tr. at 8-11. It was the position of the United States that Maggio's base offense level of 14 should be increased by 18 levels because the benefit received by Individual B in return for the bribe to Maggio (the $4.2 million amount of the remittitur) was between $3,500,000 and $9,500,000. See U.S.S.G. § 2C1.1(b)(2) & Application Note 3, and U.S.S.G. § 2B1.1(b)(1)(J).

U.S.S.G. § 2C1.1(b)(2) provides for an increase in the bribery base offense level "[i]f the value of…the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official…exceeded $5,000…." The amount of the increase is then determined by cross reference to the enhancement table in U.S.S.G. § 2B1.1; here, to U.S.S.G. § 2B1.1(b)(1)(J) (more than $3,500,000, but less than

$9,500,000). The bribery guidelines use the following illustration: "A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000." U.S.S.G. § 2C1.1(b)(2), Application Note 3.

The commentary to the bribery guideline emphasizes that "for deterrence purposes, the punishment should be commensurate with the gain to the payer or recipient of the bribe, whichever is higher." U.S.S.G. § 2C1.1, Commentary (Background). Courts interpreting this commentary use the expected benefit of the official act to the bribe-giver, and not the amount of the bribe received, in calculating the amount of loss under § 2C1.1(b)(2). *See United States v. Ziglin*, 964 F.2d 756, 758 (8th Cir. 1992) (holding that district court properly based loss on amount of tax liability defendant sought to eliminate for third parties, not on defendant's personal kickbacks from role in bribery scheme); *United States v. DeVegter*, 439 F.3d 1299, 1303-04 (11th Cir. 2006) (reversing district court that based enhancement on value of bribes instead of estimated profit to company receiving contract); *United States v. Muhammad*, 120 F.3d 688, 700 (7th Cir. 1997) (assessing loss from defendant-juror who sought bribe to sway jury verdict as the $933,000 damage award at stake in trial and not the $2,500 bribe juror sought); *United States v. Kant*, 946 F.2d 267, 269 (4th

Cir. 1991) (reversing district court that based enhancement on value of bribes instead of estimated profit to company receiving contract).

The district court declined to use the $4.2 million remittitur amount because, "I can't really look at this record and tell whether Mr. Maggio would have remitted some portion of that regardless of the arrangement he had." Sentencing Tr. at 7. Acknowledging that the district court was not present for the nursing home jury trial, and had not read the trial transcripts, nevertheless the district court stated, "I will say this, the reason why, because I think I would have remitted it, looking at the facts that I have, and I was not there at trial." *Id*. The district court then cited retired U.S. District Judge James M. Moody's deposition in the pending civil suit,[4] a small selection of which was attached to Maggio's sentencing memorandum. DCD 42, Exhibits 5& 6. As an expert witness retained by Individual A and Individual B in the state court civil case (in which the plaintiffs seek to recover the $4.2 million from Individual A and Individual B that Maggio corruptly remitted), retired Judge Moody

[4] After Maggio's, Individual A's, and Individual's B's actions were revealed, the plaintiffs in the nursing home case whose verdict was corruptly remitted filed a state court civil suit against Maggio, Individual A, and Individual B, seeking to recover the amount of the remittitur. *See Rosey Perkins et al v. Michael Maggio, et al.*, Faulkner County Circuit Court No. 23CV-14-862 (filed November 18, 2014). On April 10, 2015, the court dismissed Maggio from the suit because he had judicial immunity. *Id.* The state court civil case has proceeded apart from the criminal case, and remains pending.

opined that the nursing home verdict was "excessive" and "a remittitur should have been granted" to $1 million, but "recognize[d] that other people similarly qualified to me could reach a different conclusion." *Id*., Exhibit 6, 54-58.

The United States submits that Maggio's "I stole it, but it wasn't worth that much anyway" speculation at sentencing regarding value of the nursing home verdict had no place in this criminal litigation. The jurors in the nursing home lawsuit, after hearing all the testimony and reviewing the evidence, awarded damages in the amount of $5.2 million. The only other individual in that courtroom who was in a position to evaluate and affect that verdict admitted in federal court that he *corruptly* deprived the plaintiffs of their jury award. As the United States argued during the sentencing hearing, looking at the record before the district court, the only certainty was that in remitting the verdict, Maggio corruptly provided a $4.2 million expected benefit to Individual A. Sentencing Tr. at 9. Accordingly, the United States submits that Maggio's offense level should have been increased by 18 levels under U.S.S.G. § 2C1.1(b)(2) & Application Note 3, and U.S.S.G. § 2B1.1(b)(1)(J). If the district court had correctly applied this adjustment, Maggio's total offense level would have been 38, Criminal History Category I, for a range of 235-293 months. Maggio's 120 month sentence, at the statutory maximum, is well below that range.

C. Conclusion

The district court did not abuse its discretion by varying upward when imposing Maggio's sentence, from 51-63 months to 120 months. The district court sufficiently justified the upward variance based on the § 3553 factors. Alternatively, this Court can affirm Maggio's 120 month sentence because had the district court correctly calculated the loss amount under U.S.S.G. § 2B1.1(b)(1), Maggio's advisory guideline range would have far exceeded 120 months.

V. Maggio's Bond on Appeal Should be Revoked.

On April 22, 2016, the district court entered an order releasing Maggio during the pendency of his appeal, stating:

> Nothing indicates that Maggio will flee or poses a danger to the safety of the community, so the issues are whether the question that will be presented by Maggio on appeal is substantial and whether a reversal will occur if the Eighth Circuit rules in his favor. Based on my reading of 18 U.S.C section 666(a)(1)(B) and case law interpreting it, I am persuaded that it applies to Maggio's actions just as it applied to the deputy sheriff in *United States v. Hines*, 541 F.3d 833 (8th Cir. 2008). Unfortunately, there is no case law applying the statute to a judge who took a bribe under circumstances similar to those at issue herein. Further, if the Eighth Circuit rules in Maggio's favor, and holds that the statute does not apply to state judges acting similarly to Maggio, a reversal is almost certain to occur.

DCD 64, at 1-2. The United States opposed Maggio's motion for release pending appeal. DCD 63.

The intent of the Bail Reform Act of 1984 "was, bluntly, that fewer convicted persons remain at large while pursuing their appeals." *United States v. Powell*, 761 F.2d 1227, 1231 (8th Cir. 1995) (en banc). A defendant bears the burden of establishing that he is entitled to release pending appeal. *See id.* at 1232. For a defendant to obtain release pending appeal, the district court or court of appeals "must find (A) by clear and convincing evidence that the defendant is unlikely to flee or pose a danger to others, and (B) that his appeal raises a substantial question of

law or fact that is likely to result in reversal, new trial, or reduction to a sentence that would be served before disposition of the appeal." *United States v. Marshall*, 78 F.3d 365, 366 (8th Cir. 1996) (internal quotation omitted); 18 U.S.C. § 3143(b)(1)(A)&(B). The issue on appeal must present "'a close question' – not 'simply that reasonable judges could differ' – on a question 'so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in in the defendant's favor.'" *Marshall*, 78 F.3d at 366 (quoting *Powell*, 761 F.2d at 1234).

As set forth in Section III of this brief, and in the district court's order denying Maggio's motion to withdraw his plea, Maggio's conduct as a state court judge falls within the scope of 18 U.S.C. § 666. DCD 39. Further, Maggio's challenge to the application of § 666 to a judge who takes a bribe in a civil case is in fact waived. Even if considered on the merits, this issue does not, as Maggio argues, set up a potential circuit split between this Court and the Fifth Circuit on an important legal issue; the *Whitfield* case provides a narrow holding that is factually distinguishable from Maggio's case, and is in contradiction with *Hines*.

Finally, if the factual sufficiency of a guilty plea presented a close question of law and/or fact for purposes of remaining free on bond pending appeal, every defendant who found himself with post plea remorse would be entitled to remain at

large. The exception would then swallow the rule, contrary to congressional intent and this Court's precedent. *United States v. Andis*, 333 F.3d 866, 891-92 (8th Cir. 2003).

The statutory language of the Bail Reform Act favors detention for defendants who have been convicted and sentenced. This Court has made very clear that release pending appeal under § 3143(b) is a very limited exception to detention. Because Maggio cannot demonstrate a "substantial question of law or fact" necessary to satisfy § 3143(b)(1)(B), this Court should revoke Maggio's bond pending appeal and direct that he report forthwith to the Bureau of Prisons.

CONCLUSION

For the foregoing reasons and citations to authority, Maggio's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATION OF WORK PROCESSING PROGRAM AND COMPLIANCE WITH RULE 32(a)

In accordance with Eighth Circuit Local Rule 28A(h), I hereby certify that this brief was prepared with Microsoft Word 2010 and scanned for viruses. This brief is virus-free. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure Rule 32(a)(7)(B) because it contains 12,800 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically resubmitted this brief for review on August 2, 2016.

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