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

APPELLANT'S REPLY BRIEF

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Federal courts are courts of limited jurisdiction, and, without a nexus requirement, § 666 invites overcriminalization without regard to whether the "necessary and proper" clause has been complied with to show the federal interest.

A. Merits

Appellant concedes (as he must) that *Sabri v. United States,* 541 U.S. 600, 605-06 (2004), on its face forecloses appellant's nexus argument because the Court there required no nexus be shown between the federal funds and the bribe. On the other hand, a post-*Sabri* case substantially on point, *United States v. Whitfield,* 590 F.3d 325 (5th Cir. 2008), required proof of nexus between the bribee judge and the federal funds via the "agent" connection.[2] We urge that *Whitfield* be followed. The government argues it conflicts with circuit precedent, *United States v. Hines,* 541 F.3d 833 (8th Cir. 2008), holding no federal nexus with the funds need be shown. If this Court does not follow *Whitfield,* then there is a potential circuit split.

The "'expansive, unqualified' language" of § 666 noted in *Sabri*'s quoting

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[1] This combines the government's first three arguments.

[2] Accord: *United States v. Frega,* 933 F.Supp. 1536 (S.D.Cal. 1996); *United States v. Scruggs,* 2011 WL 1832769 (N.D. Miss. 2011).

Salinas v. United States, 522 U.S. 52, 56-57 (1997), and relied upon by the government (Govt's Br. 41-42) directly leads to overcriminalization where there is no justifiable or identifiable federal interest. Appellant thus submits that *Sabri* should now be limited by the Supreme Court in light of *McDonnell v. United States,* 136 S. Ct. 2355 (2016), and the rule of lenity. (Appt's Br. 29-30)

Appellant, of course, acknowledges this Court doesn't have the authority or power to limit *Sabri* and that must come from the Supreme Court. This Court does, however, have the power to overrule or limit *Hines* in light of the later *McDonnell* and follow *Whitfield. See United States v. Williams,* 537 F.3d 969, 975 (8th Cir. 2008).

Federal courts are courts of limited jurisdiction, and they cannot be given power to prosecute every public official the government decides. As we already noted, "Otherwise, we have overcriminalization and free ranging prosecution with no proof whatsoever of a federal interest." (Appt's Br. at 29) The federal interest to prosecute crimes should not be assumed or bootstrapped, and it should be integral to any federal prosecution.

B. Appellate waivers

As stated in Appellant's Opening Brief, jurisdiction is never waivable. Thus, appellate waivers don't preclude appeals. Indeed, 28 U.S.C. § 1291 gives the Court appellate jurisdiction. Then, the court determines the effect of the waiver.

"Notably, the existence of an appellate waiver does not impact this Court's jurisdiction. *United States v. Gwinnett,* 483 F.3d 200, 203 (3d Cir. 2007)." *United States v. Ligons,* 395 Fed. Appx. 916, 917 (3d Cir. 2010). "'The enforcement of appellate waivers fits comfortably in the rubric of a mere claim-processing rule,' assuming that a defendant's appellate waiver 'is unenforceable does not constitute an impermissible assumption of jurisdiction.'" *United States v. Caruthers,* 458 F.3d 459, 472 n.6 (6th Cir. 2006).

> We "retain[] subject matter jurisdiction over the appeal by a defendant who ha[s] signed an appellate waiver." *United States v. Gwinnett,* 483 F.3d 200, 203 (3d Cir. 2007). We will not exercise that jurisdiction to review the merits of Kayes's appeal if we conclude that his appellate waiver should be enforced. *Id.*

United States v. Kayes, 567 Fed. Appx. 125, 127 n.3 (3d Cir. 2014).

> Then, there is a "miscarriage of justice" exception.
>
> When the government invokes an appellate waiver, we must decline to exercise jurisdiction over the appeal when: (1) the defendant knowingly and voluntarily agreed to the waiver; and (2) the issues on appeal fall within the scope of the waiver, except when doing so would work a miscarriage of justice. See *United States v. Saferstein,* 673 F.3d 237, 241-42 (3d Cir. 2012) (citing *United States v. Corso,* 549 F.3d 921, 926 (3d Cir. 2008)).

United States v. Kinard, 563 Fed. Appx. 166, 168 (3d Cir. 2014). Also considering the "miscarriage of justice" exception are *Gwinnett,* 483 F.3d at 203, and *United States v. Khattak,* 273 F.3d 557, 562-63 (3d Cir. 2001).

If the court finds merit in any of Appellant's arguments, then the "miscarriage

of justice" exception applies.

C. Appellant's "as applied" challenge is jurisdictional

Appellant agrees that non-jurisdictional claims are waivable by a guilty plea, as stated in *United States v. Seay,* 620 F.3d 919, 921 (8th Cir. 2010). (Govt's Br. 33) *Seay,* however, was a *District of Columbia v. Heller,* 554 U.S. 570 (2008), challenge to 18 U.S.C. § 922(g), a primary federal firearms statute. Essentially, Seay was raising a defense to the charge via a later Supreme Court case he was hoping altered factual application of § 922(g) as to him, and it certainly didn't.

Appellant submits, however, that his "as applied" challenge *is* jurisdictional because it deals, not with a mere defense, but with proof of federal nexus and the "necessary and proper" clause and the ability to prosecute at all under *Whitfield,*[3] *Frega,* and *Scruggs.*

D. Conclusion

We agree with the government that "[t]he integrity of the court system suffers irreparable harm when a judge fixes a court case for a bribe. The federal government has a compelling interest in ensuring its limited funding is not disbursed to a justify institution plagued by corruption." (Govt's Br. 42) But, why is there no federal link

[3] Appellant also concedes he admitted to the "agent" link in the original plea colloquy, but that is precisely what he was seeking to undo in the plea withdrawal. Under *Whitfield,* the government cannot prove it. At least he attempted to withdraw that fact from the plea rather than appealing without having done so.

between the federal funding and the case the remittitur occurred in? If the money went for drug or juvenile court, it had nothing to do with Appellant's court and his actions.

The federal link is attenuated; indeed, it isn't even hypothetical on these facts. Grants are for specific purposes, and they aren't fungible money any more, if they really ever were. Compare *Sabri,* 541 U.S. at 606 ("Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.") with *id.* at 613-14 (Thomas, J., concurring):

> But simply noting that "[m]oney is fungible," *ibid.,* for instance, does not explain how there could be any federal interest in "prosecut[ing] a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000," .... It would be difficult to describe the chain of inferences and assumptions in which the Court would have to indulge to connect such a bribe to a federal interest in any federal funds or programs as being "plainly adapted" to their protection. And, this is just one example of many in which any federal interest in protecting federal funds is equally attenuated, and yet the bribe is covered by the expansive language of § 666(a)(2). (citation omitted)

As Justice Thomas noted, federalism also suffers greatly when the federal government overcriminalizes and takes over prosecuting state officials where the states are perfectly capable of prosecuting crimes if they think they can prove it.

"Our federalism" must be respected; see, e.g., *Younger v. Harris,* 401 U.S. 37, 44-45 (1971); *United States v. Lopez,* 514 U.S. 549, 561 n.3 (1995) (states have primary criminal jurisdiction); at least to some degree. Appellant submits the

compelling fundamental need to respect federalism must require there be a nexus between the money and the act so there clearly is federal jurisdiction; not just something the federal government assumes and takes away from the states. And, that need also counsels now following *Whitfield* and *McDonnell* and limiting federal jurisdiction to crimes of actual nexus to federal funds.

IV.

The upward variance of the sentence was unreasonable under 18 U.S.C. § 3553(a).

As we all well know, sentencing factors start with 18 U.S.C. § 3553(a)(2):

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; ....

The government points out that appellant "breached the trust of the plaintiffs who put their faith in the legal system to justly resolve their dispute with the nursing home." (Govt's Br. 47) He granted a remittitur that everybody except the plaintiffs and government recognizes was appropriate because the damages awarded the plaintiffs for the nursing home death were clearly excessive. Then, he gets his sentence increased because of that. There can logically be no loss of $4.2 million.

What's the purpose of doubling the range from 51-63 to 120 months? It can only be deterrence of others, but that's already factored into the base offense level selected by the U.S. Sentencing Commission.

The public is safe: Maggio will never be a judge again, and almost certainly will never be a lawyer again either. He's a pariah in Arkansas because of the notoriety of this case and the repeated news stories. (Sent. Memo. at 1-2; Doc. 42) No non-homicide case in Arkansas has been in the public eye like this one. He can't even get work.

David Z. Scuggs, the lawyer bribing the Mississippi judge, only got 14 months. *Scruggs,* 2011 WL 1832769 at *1. He was worth potentially hundreds of millions from tobacco and Katrina litigation before he fell.[4] How egregious is that? How else did he get so rich? Was he just bribing state judges with cash and apparently with the prospect of being appointed to the federal bench to get what he wanted?[5] Scruggs's co-conspirators, one a former lawyer, got two years.[6] The

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[4] Richard Fausset & Jenny Jarvie, "Katrina lawyer at the eye of a storm," L.A. Times (Nov. 30, 2007); Jonathan D. Glater, "Scruggs Pleads Guilty in Bribery Case," N.Y. Times (Mar. 14, 2008); Morning Edition, "An Attorney's Fall: From Billionaire To Inmate," NPR (Dec. 22, 2010).

[5] Peter J. Boyer, "The Bribe: How the Mississippi lawyer who brought down Big Tobacco overstepped," The New Yorker (May 19, 2008).

[6] Anne Urda, "2 More Get Jail Time In Scruggs Scandal," Law360 (Feb. 17, 2009).

judge? He reported the bribe effort, and six wiretaps resulted.[7] Confronted with their own words, the bribers pled.

We concede it is intuitively appropriate the bribed judge be sentenced to more than the person making the bribe. But, when the briber is a lawyer, a person also sworn to uphold the law and holding a position within the legal system that also is highly important in advocating vigorously and fairly for his or her client in seeking justice without subverting the truth, then that lawyer deserves having the book thrown at him or her, too. Two years in Mississippi involving $25M; but ten years in Arkansas involving $4.2M that the plaintiffs weren't entitled to anyway because the remittitur had to be granted.

Even the former Arkansas Treasurer, Martha Shoffner, now Inmate No. 27648-009, convicted of taking bribes to place *$2 billion* in state investments, resulting in a $1,714,889.35 in commissions only got 30 months in 2015 in this same court after a jury trial.[8]

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[7] Morning Edition, NPR, note 4, supra.

[8] USAO, E.D.Ark. "Former Arkansas State Treasurer Martha Shoffner Sentenced To 30 Months In Prison For Extortion And Bribery," Press Release (Aug. 28, 2015):

> In mid-2010, Stephens [the immunized briber] made the first $6,000 payment to Shoffner at the State Capitol, resulting in Stephens' bond inventory increasing above that of other brokers for the State of Arkansas, ultimately reaching over $600 million in bond inventory in August 2012. In total, Stephens received approximately $2 billion in

That's the unreasonableness, and a within Guideline sentence was appropriate. Clearly, if the conviction stands, Appellant deserves imprisonment, and he admits it. (Doc. 42 at 1-2) His loss of the benefit of the cooperation agreement already left him at 51-63 months, no longer maybe half that if he'd cooperated.[9] But ten years?

V.

The Government waived revocation of release pending appeal by not appealing the District Court's release order.

The District Court had enough concern about the viability of Appellant's issues to grant release pending appeal a few weeks before the surrender date. (Doc. 64) The government vigorously opposed release (Doc. 63), but it didn't appeal.

The District Court's release order was appealable under 18 U.S.C. § 3145(c):

> (c) Appeal from a release or detention order. An appeal from a

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> bond business, earning approximately $1,714,889.35 in commissions. (bracketed material added)

[9] The government notes that Appellant failed a polygraph as a part of his debriefing. (Govt's Br. at 29) The inherent unreliability and subjectivity of a polygraph is why they aren't admissible. *United States v. Scheffer,* 523 U.S. 303, 312 (1998):

> Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams.

> release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a) (2) or (b) (2), and who meets the conditions of release set forth in section 3143(a) (1) or (b) (1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

Accord: 18 U.S.C. § 3731(¶ 3-4):

> An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or ... a decision or order granting release.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Not having appealed within thirty days of the release decision, the government waived the revocation of release argument.

CONCLUSION

The judgment of the District Court should be reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this brief was prepared in WordPerfect X8, and the program provides a word count of 2,450 words.

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I certify that a copy was emailed to Assistant U.S. Attorney Julie Peters on August 22, 2016.

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