No. 12-3554

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

TIMOTHY G. WHITEAGLE

Defendant-Appellant.

On appeal from the United States District Court
for the Western District of Wisconsin
Case No. 3:11-cr-00065
The Honorable Judge William M. Conley

BRIEF AND REQUIRED SHORT APPENDIX FOR DEFENDANT-APPELLANT TIMOTHY WHITEAGLE

Glenn C. Reynolds (Counsel of Record)
Rebecca A. Paulson
REYNOLDS & ASSOCIATES
407 East Main Street
Madison, WI 53703
(608) 257-3621
Attorneys for Defendant-Appellant,
Timothy Whiteagle

ORAL ARGUMENT REQUESTED

March 4, 2013

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 12-3554

Short Caption: United States of America v. Timothy G. Whiteagle, Appeal from the U.S. District Court of the Western District of Wisconsin, Case No. 3:11-cr-00065.

Pursuant to Circuit Rule 26.1, Defendant-Appellant, Timothy G. Whiteagle, makes the following disclosures:

A. The full name of every party that the attorney represents in this case:

Timothy G. Whiteagle

B. The names of all law firms whose partners or associates have appeared for the party in the case:

Reynolds & Associates

C. The party is not a corporation

s/ Glenn C. Reynolds Date: March 4, 2013
Glenn C. Reynolds
Counsel for Defendant-Appellant

STATEMENT CONCERNING ORAL ARGUMENT

Defendant-appellant Timothy G. Whiteagle respectfully requests oral argument pursuant to Circuit Rule 34(f). This appeal presents legal issues closely intertwined with the factual record developed below. Therefore, oral argument will assist the Court in deciding this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEAL CASES

UNITED STATES CODE SECTIONS

UNITED STATES SENTENCING GUIDELINES SECTIONS

FEDERAL RULES OF EVIDENCE

FEDARAL RULES OF CRIMINAL PROCEDURE

JURISDICTIONAL STATEMENT

This is a direct appeal from the United States District Court for the Western District of Wisconsin, of a judgment of conviction entered by the Honorable Judge William M. Conley on October 25, 2012. (App. 101.)[1] Following a jury trial, Timothy Whiteagle was found guilty of conspiracy to commit bribery under 18 U.S.C. §§ 371, bribery under 18 U.S.C. § 666(a)(2), aiding and abetting the solicitation of bribery under 18 U.S.C. § 666(a)(1)(B), filing false tax returns under 18 U.S.C. § 7206(1), and tampering with a witness under 18 U.S.C. § 1512(b)(3). Id. The district's jurisdiction was properly based on 18 U.S.C. § 3231, which confers jurisdiction over criminal violations of the laws of the United States. Whiteagle filed a timely notice of appeal on November 6, 2012. Appellate jurisdiction exists under 28 U.S.C. §§ 1291, 1294 because the judgment being appealed was entered by a district court within this circuit.

STATEMENT OF THE ISSUES

I. Is a defendant's right to a fair trial for bribery denied by the admission of evidence that the defendant committed acts of wire fraud by demanding money from a gaming vendor, when the defendant never forwarded the funds received to the official allegedly bribed?

II. Can the Government prove a bribery conspiracy beyond a reasonable doubt through the defendant's donations to a charity owned by the official allegedly bribed, where there is no evidence that the official sold his vote?

III. Does a district court commit clear error by calculating the "loss" caused by bribery as the value of contracts for which the official allegedly bribed voted, where the votes in favor

[1] This brief employs the following citation conventions. "TT __-__-__, __" refers to the trial transcripts by day, session ("A" for morning and "P" for afternoon), page and line number. "App. 1__" refers to the required short appendix (attached), which is numbered from 100 to 141. "Doc. 94-1, __" refers to the Superseding Indictment by docket number (94-1), and page number.

of the contracts were unanimous and in the best interest of constituents, and where the defendant's donations to the official allegedly bribed came after those votes?

STATEMENT OF THE CASE

After an extensive investigation, the defendant, a Ho-Chunk tribal member was indicted along with his paramour, Deborah Atherton, and a Ho-Chunk legislator, Clarence Pettibone, for a "payment-for-vote" bribery conspiracy regarding gaming vendor contracts promoted by Whiteagle as their "tribal lobbyist" or "consultant." The gaming vendors, Cash Systems Inc. and Money Centers of America, were not charged in the Indictment. (Doc. 94-1, 1–18).

After an eight-day jury trial, Whiteagle was convicted of one count of conspiracy to bribe a public official under 18 U.S.C. § 371, eight counts of bribery of a public official under 18 U.S.C. § 666(a), two counts of tax fraud under 26 U.S.C. § 7206(1), and one count of witness tampering under 18 U.S.C. § 1512(b)(3). (App. 101.)

Whiteagle filed a motion for a new trial on the grounds that the district court judge erred in admitting evidence that the defendants sent fraudulent invoices to the vendors on the grounds this evidence was introduced as "propensity evidence" of wire fraud and there was no proof that any of these funds were used as "pay offs" to Pettibone. Whiteagle also filed a motion for judgment of acquittal on the grounds that in spite of Whiteagle's post-vote payments to Pettibone for Tae Kwon Do to serve Ho-Chunk youth, there was no evidence that Pettibone agreed to sell his vote or accepted any money in exchange for supporting the contracts. The district court denied Whiteagle's motions for judgment of acquittal and new trial. (App. 108.)

The district court sentenced Whiteagle to 120 months in prison. (App. 102.) The district court called Whiteagle's crimes "heinous," and found that the fraudulently solicited funds (as opposed to the payments made by check to Pettibone for Tae Kwon Do) were actually paid in

cash to Pettibone as bribes. (App. 135.) Because there was n o evidence that these funds or any cash payments were ever paid to Pettibone, Whiteagle filed a motion to correct the sentence and for a new sentence hearing which was also denied. (App. 136.) Whiteagle filed a timely notice of appeal on November 6, 2012.

STATEMENT OF FACTS

I. Background

Timothy Whiteagle is a member of the Ho-Chunk Nation, a sovereign, federally recognized Indian tribal nation in Wisconsin. (TT 1-P-77, 4-6.) Whiteagle grew up in a traditional Ho-Chunk family, with little exposure to culture outside of the Ho-Chunk Nation. (TT 6-P-46, 5-13.) Like many other Ho-Chunk, Whiteagle grew up in extreme poverty. (TT 6-P-45, 9-24.) For most of his childhood and adolescence, he and his family lived either in wigwams or in clapboard houses that had no electricity, no heating, and no indoor plumbing. Id. Until recently, Whiteagle had never had the opportunity to live a comfortable life – much less a wealthy life.

Whiteagle's situation is not unique amongst the Ho-Chunk. (TT 7-A-109, 18-25.) Most Ho-Chunk members still live in considerable poverty. Id. Housing, in particular, continues to be a significant problem in the Ho-Chunk reservation. Several Ho-Chunk members, including elders, live in considerably substandard housing. (TT 6-P-60, 2-5.) Like many other Indian tribal nations, the Ho-Chunk Nation never had the funds to properly address these problems – until the advent of Indian gaming. (TT 6-P-50, 14-20.)

Indian gaming brought the Ho-Chunk Nation the resources it needed to make improvements and tackle pressing priorities. (TT 6-P-51, 2-7.) But it also brought its share of problems. Without the ability to finance and run its own gaming operation, the Ho-Chunk

Nation had to turn to outside vendors. (TT 1-P-94, 9-17.) Standing to make millions in profit from exclusive contracts with the Nation, these vendors began to aggressively vie for the Nation's business. (TT 1-P-134, 6-11.) Soon, gaming contracts became the most divisive issue within tribal politics. Id. To manipulate tribal politics and secure multi-million dollar contracts, outside gaming vendors began paying tens of thousands of dollars to retain Ho-Chunk members as lobbyists. (TT 1-P-126, 1-16.) One such lobbyist was Timothy Whiteagle. Id.

II. Whiteagle's clients

This case began in 2002, when Cash Systems, Inc. retained Whiteagle as a lobbyist. (TT 2-A-167, 2-3.) Whiteagle, a veteran in tribal politics and former member of the Ho-Chunk Legislature, claimed to have influence over the Legislature, and the ability to secure Cash Systems a long-term, multi-million dollar contract for cash access services. (TT 6-P-105, 4-23.) With the prospect of profiting millions, Cash Systems was willing to pay Whiteagle $22,500 per month. (TT 6-P-56, 17-25.)

But Whiteagle did not have the influence he claimed. (TT 6-P-105, 18-23.) He was a controversial figure within the Nation. (TT 1-P-139, 9-11.) Therefore, to keep making more money than he ever dreamed of making, Whiteagle lied: he told Cash Systems that he had control over his cousin, a Ho-Chunk legislator named Clarence Pettibone. (TT 6-A-104, 8-25.)

Clarence Pettibone was an outstanding legislator. He was the person to whom Whiteagle would bring his ideas to better the Nation, whether through gaming contracts or housing projects. Id. But Pettibone never attempted to unduly influence his colleagues in the legislature. (TT 7-A-126–127.)

Cash Systems won a contract with the Ho-Chunk Nation because it had the best business proposal. Cash Systems first won a contract on May 20, 2002, when the Ho-Chunk Legislature

met to select a cash access service vendor. (TT 1-P-100, 21-25.) Before making the selection, the Legislature held a bid process that pinned Cash Systems against two competitors. Id. Even after the Legislature vetted Cash Systems through the bid process, the Ho-Chunk Business Department still spent significant time to negotiate the best contract possible with Cash Systems. (TT 1-P-101, 6–21.)

As the years passed, more competition pressed on Cash systems turf and Whiteagle began to lie to Cash Systems about his control over Clarence Pettibone and the need for more and more money to keep their contract. Fueled by greed to receive exorbitant bonuses from Cash Systems, Whiteagle began to paint a much different picture of his relationship with Pettibone. (TT 7-A-123, 1-3.) Through a series of email exchanges, Whiteagle told Cash Systems executives that he, through his alleged influence of Pettibone, held the key to the survival of Cash Systems' contract. (TT 6-P-105, 6-23.) Whiteagle then began demanding that Cash Systems send him multiple bonus payments – which he claimed, without much explanation, Pettibone demanded for miscellaneous expenses. (E.g., TT 6-P-133, 3-22.) To extract even more money from Cash Systems, Whiteagle submitted several false invoices for reimbursement of exorbitant, non-existing expenses. (E.g., TT 6-P-128, 2-18.)

Whiteagle became greedier, and had no problem lying to his client to get as much of it as possible. (TT 6-P-104, 23-25.) In 2006, enticed by the prospect of making even more money, Whiteagle began secretly working as a consultant and lobbyist for Money Centers of America ("MCA"), a Cash Systems competitor vying to secure a cash access service contract with the Ho-Chunk Nation. (TT 6-P-106, 1-18.) Not satisfied, Whiteagle did exactly what he had done with Cash Systems: boasted about his ability to control the Legislature through Pettibone to extract even more payments from MCA. (TT 6-P-107, 2-20.)

MCA, just as Cash Systems before it, also won a contract with the Ho-Chunk Nation because it has the best business proposal. Unlike other vendors, MCA offered something the Nation was eager to attain: the ability to provide its own cash access in the foreseeable future. (TT 1-P-143, 2-6.) MCA offered the Nation the ability to "switch" into self-sufficiency – which would increase the Nation's revenue by a staggering three to four million dollars annually. (TT 1-P-143, 7-10.) For that reason, just as with Cash Systems, the Ho-Chunk Business Department officially recommended that the Legislature select MCA. (TT 1-P-107, 16-18.) The Legislature followed that recommendation by awarding MCA the contract on March 19, 2008. (TT 1-P-108, 21-23.)

Indeed, the Ho-Chunk Nation had a significant vetting process to ensure that both Cash Systems' and MCA's contract benefited the Nation. Each contract the Legislature approved went through an attorney in the Ho-Chunk Department of Justice, the business director, a legislative attorney, and someone in the Office of the President – including the President or the Vice President. (TT 5-P-7, 6-15.)

In spite of his personal failings, Whiteagle never stopped trying to improve the living conditions of the Ho-Chunk people. In 2006, he and his paramour, Deborah Atherton, began working to bring housing mortgage services to the Ho-Chunk Nation through a small Kentucky company named Trinity Financial Group ("Trinity"). (TT 7-A-86–88.) Their goal was to implement the much-needed improvement in Ho-Chunk housing. (TT 6-P-89–90.) As he had done before with many of his other ideas, Whiteagle began to talk to Pettibone about promoting a contract with Trinity within the Ho-Chunk Legislature. (TT 6-P-90–91.)

III. Whiteagle's donations to Pettibone

Whiteagle and Pettibone are more than cousins: within Ho-Chunk culture, they are brothers. (TT 6-A-38–39.) Whiteagle and Pettibone grew up together; worked together; and had family vacations together. (TT 2-A-136, 142, 148.) In honor of this relationship, Whiteagle frequently gave gifts – sometimes worth several thousand dollars – to Pettibone and his family. Id.

Unlike Whiteagle, Pettibone never intended to, and never did, accumulate wealth. Instead, Pettibone invested his money in his real passion: a tae kwon do studio he maintained for Ho-Chunk children. (E.g., TT 6-P-101–102.) He did whatever he could to raise funds for tae kwon do: he sold items at work, he held raffles at pow-wows, and he worked to gather donations from tribal members and outsiders alike. (TT 6-P-62–63.) Through this tae kwon do studio, Pettibone helped dozens of troubled Ho-Chunk children from foster homes. (TT 6-P-66, 6-14.)

Therefore, when Whiteagle started to gather money from his consulting contracts, he also started donating more and more money to Pettibone's tae kwon do studio – as well as requesting that his clients do the same. (TT 6-P-62–63.) And his clients agreed as a matter of corporate responsibility. (TT 2-P-58, 5-25.) Cash Systems, for example, made a payment specifically because it knew that donating to tribal causes was an important gesture of good faith. Id.

IV. Pettibone's votes

The companies Whiteagle brought into the Ho-Chunk Nation had business proposals that were in the best interest of the Nation. (TT 2-P-87, 14-17.) Each contract the Legislature approved went through an attorney in the Ho-Chunk Department of Justice, the business director, a legislative attorney, and someone in the Office of the President – including the President or the Vice President. (TT 5-P-7, 6-15.)

As a legislator, Pettibone always supported contracts with these three vendors – but he was not alone. (TT 5-P-23, 15-25.) With the exception of Pettibone's last motion in support of Trinity, not a single Ho-Chunk legislator opposed Pettibone's motions in favor of Cash Systems, MCA and Trinity. The Ho-Chunk Legislature approved Cash Systems' contract unanimously and MCA's contract with a single abstention. (Gov't Exs. 1-1, 1-2.) The same was true of the preliminary contracts with Trinity. (Gov't Ex. 1-3.)

V. The indictment

In 2011, the United States Government indicted Whiteagle, Pettibone and Atherton for an alleged conspiracy between the three to funnel bribes from Cash Systems, MCA and Trinity to Pettibone. (Dkt. # 94-1) A subsequent, superseding indictment charged Whiteagle with conspiracy to commit bribery in violation of section 371, Title 18, United States Code; multiple counts of willfully causing bribery in violation of sections 2(a) and 666(a)(2), Title 18, United States Code; and multiple counts of aiding and abetting solicitation of bribery in violation of sections 2(b) and 666(a)(1)(B), Title 18, United States Code. Id. Whiteagle entered not guilty pleas on all counts.[2]

Using Whiteagle's emails to Cash Systems, MCA and Trinity, as well as Whiteagle's extensive paper trail of payments to Pettibone's tae kwon do studio, the Government claimed that Whiteagle, with Atherton's help, had acted with the corrupt intent to influence or reward Pettibone for his votes. In doing so, the Government incurred the burden to prove that Whiteagle's email allegations regarding his influence over Pettibone were true.

[2] Co-defendant Clarence Pettibone entered a guilty plea, based on a plea agreement, on April 10, 2012. The Government dismissed the charges against co-defendant Deborah Atherton, based on a plea agreement, after Atherton entered a guilty plea on unrelated charges.

During an eight-day trial, the jury heard testimony from 38 witnesses on behalf of the Government and 15 witnesses on behalf of Whiteagle. After 6 hours of deliberation, the jury found Whiteagle guilty on all counts.

SUMMARY OF ARGUMENT

I. The district court abused its discretion in denying Whiteagle a new trial. By admitting Whiteagle's false invoices, the district court allowed the Government to introduce propensity and hearsay evidence whose prejudicial effect substantially outweighed its probative value. As evidence that Whiteagle lied, the false invoices invited the jury to speculate, without any evidence, that Whiteagle had used the money he obtained pursuant to the invoices to bribe Pettibone. Similarly, as evidence that Pettibone lied, the false statements invited the jury to speculate, without any evidence, that Pettibone was part of the alleged bribery conspiracy.

II. The district court erred in denying Whiteagle a judgment of acquittal on counts of conspiracy, willfully causing bribery, and aiding and abetting solicitation of bribery. No reasonable juror could have found Whiteagle guilty of these offenses because the Government failed to prove beyond a reasonable doubt key elements of each offense. The Government failed to prove beyond a reasonable doubt that Pettibone knew about Whiteagle's actions, as required to prove a conspiracy; and that either Whiteagle or Pettibone acted with corrupt intent, as required to prove causing or soliciting bribery.

III. The district court applied the wrong sentencing guidelines by improperly categorizing Whiteagle's criminal conduct as the payment of "bribes" – as opposed to "gratuities" under the Sentencing Guidelines. For sentencing purposes, a vote is not "bought" if it is cast for the benefit of constituents. Virtually all of Whiteagle's payments to Pettibone

were made after his legislative actions and by all accounts the contracts were good contracts in the best interest of the Ho-Chunk Nation. The district court also applied an incorrect sentencing level enhancement by finding that the "loss" from the offense was equivalent to the value of the vendor contracts as opposed to the payments actually made directly to Pettibone. Since the trial evidence established irrefutable evidence that all these contracts were unanimously supported and recommended, Pettibone was not the "but-for" cause of Whiteagle's clients obtaining the contracts. There was therefore no "loss" under the Guidelines except the value of those payments to Pettibone.

ARGUMENT

I. The district court abused its discretion in denying Whiteagle's motion for a new trial because it allowed the Government to introduce inadmissible evidence.

Whiteagle has a fundamental right to a fair trial. Pointer v. Texas, 380 U.S. 400, 403 (1965). The appellate court reviews a district court's denial of a motion for a new trial under an abuse of discretion standard. United States v. Bender, 539 F.3d 449, 455 (7th Cir. 2008). The appellate court "may grant a new trial … in the interest of justice." Fed. R. Crim. P. 33. In evaluating a motion for a new trial, the appellate court may weigh evidence, evaluate credibility, and grant the motion if "the substantial rights of the defendant have been jeopardized." United States v. Eberhart, 388 F.3d 1043, 1052 (7th Cir. 2004); United States v. Washington, 184 F.3d 653, 657 (7th Cir. 1999).

In this case, the district court abused its discretion in denying Whiteagle's motion for a new trial. (See App. 108.) The district court allowed the Government to introduce two pieces of evidence that jeopardized Whiteagle's fundamental right to a fair trial: Whiteagle's false invoices to Cash Systems, which were propensity evidence and overly prejudicial; and Pettibone's false statements to the FBI, which were hearsay and also overly prejudicial.

A. Admitting Whiteagle's false invoices to Cash Systems was overly prejudicial because the invoices were propensity evidence that invited the jury to speculate on Whiteagle's guilt.

A defendant's false statements are inadmissible where used to show the defendant's propensity to commit the offense charged. See Fed. R. Evid. 404(b); see also United States v. Conner, 583 F.3d 1011, 1018 (7th Cir. 2011). A defendant's false statements are admissible only where "inextricably connected" with the offense charged. Id. Even then, false statements are inadmissible if their prejudicial effect outweighs their probative value. See Fed. R. Evid. 403; see also United States v. Saunders, 166 F.3d 907, 920 (7th Cir. 1999). Admitting false statements is overly prejudicial where the statements invite the jury to speculate on the defendant's guilt. United States v. Hernendez, 84 F.3d 931, 933 (7th Cir. 1996). Admitting overly prejudicial evidence is reversible error unless the verdict is "surely unattributable" to the evidence admitted. See Waldemer v. United States, 106 F.3d 729, 731 (7th Cir. 1996).

In this case, the district court erred by allowing the Government to introduce as evidence several false invoices that Whiteagle submitted to Cash Systems. (See App. 108.) Before trial, the defense moved to exclude from evidence false invoices that Whiteagle had submitted to Cash Systems. (TT 6-P-146, 12-19.) These invoices consisted of fabricated, exorbitant expenses that Whiteagle told Cash Systems he had incurred as part of his lobbying efforts. Id. The defense noted that, given the Government had no evidence that Whiteagle had actually used the invoices to foster the alleged bribery scheme, the invoices would amount to overly prejudicial propensity evidence Id. Over the defense's objections, the district court allowed the Government to introduce the false invoices into evidence. (TT 6-P-146, 20-24.) The defense renewed its objection during trial and in Whiteagle's motion for a new trial – to no effect. (App. 108.)

Whiteagle's false invoices were inadmissible under Rule 404(b), Fed. R. Evid., because there was no evidence that they were connected with the alleged conspiracy. Regardless, the false invoices were inadmissible under Rule 403, Fed. R. Evid., because they had the overly prejudicial effect of inviting the jury to speculate on Whiteagle's guilt. Admitting the false invoices was not harmless error because, as the defense noted in timely objections, they had an unquestionable effect on the verdict. See Waldemar, 106 F.3d at 731.

1. The Government failed to show that Whiteagle's false invoices were sufficiently connected with the alleged bribery conspiracy.

Whiteagle's false invoices were inadmissible under Rule 404(b), Fed. R. Evid., because they were not "inextricably connected" with any of the offenses with which the Government charged Whiteagle. See Conner, 583 F.3d at 1018. Whiteagle submitted these invoices in order to get reimbursed for expenses that he never incurred. (App. 109.) Therefore, these invoices were evidence of wire fraud – not bribery.

The Government introduced no evidence that connected these invoices with the alleged bribery conspiracy. (See TT 7-P-75–76.) There was no evidence that the money Whiteagle received from these invoices went, or should have gone, to Pettibone. See id. Indeed, none of these invoices correlated with the amounts the Government alleged Whiteagle relayed to Pettibone, or with the amounts Whiteagle withdrew in cash during the alleged conspiracy. (See Gov't Exh. 16-1–16-19.) Not coincidentally, the Government did not include Whiteagle's submission of the false invoices as overt acts in the alleged conspiracy. (Doc. 94-1, 11–14.)

Without evidence that the false invoices were connected to the case, the false invoices proved only that Whiteagle lied – which would do nothing more than show propensity to bribe. See Conner, 583 F.3d at 1018. Therefore, the false invoices were inadmissible under Rule 404(b), Fed. R. Evid.

2. Admitting Whiteagle's false invoices had the overly prejudicial effect of inviting the jury to speculate on Whiteagle's guilt.

Even if Whiteagle's false invoices were otherwise admissible, admitting them had the overly prejudicial effect of inviting the jury to speculate on Whiteagle's guilt. See Hernendez, 84 F.3d at 933. Because there was no "inextricable connection" between the invoices and bribery, the jury was left with evidence that Whiteagle lied – but with no evidence as to why Whiteagle lied. Without evidence of where the money from the invoices went, the jury was left to speculate on Whiteagle's guilt of a bribery conspiracy simply because Whiteagle had lied.

The Government's closing argument illustrates the overly prejudicial effect of admitting Whiteagle's false invoices. During closing argument, the Government argued:

> Let's look at the bogus invoices…. Why fabricate? Why would an honest business man have to fabricate invoices? Why not put down a real invoice for the real work you did so what you're getting is legitimate? You fabricate the invoice because the funds you're asking for are elicit. And that's exactly what Tim Whiteagle was doing here because he could not provide an invoice that truthfully stated what he was going to do with the money.

(TT 7-P-75–76, 24–6.) However, there was absolutely no evidence to indicate, one way or another, what Whiteagle "was going to do with the money." In essence, the Government argued that Whiteagle lied, and asked the jury to speculate, without proof, that the money he received pursuant to that lie went to bribery. This is precisely the kind of prejudicial speculation that Rule 403, Fed. R. Evid., precludes.

3. Admitting Whiteagle's false invoices was not harmless error.

In denying Whiteagle's motion for a new trial, the district court incorrectly concluded that admitting the false invoices was harmless error. (See App. 109.) The district court based its conclusion on the fact that the defense did not request a corrective jury instruction, and on the fact that the defense ultimately argued that the false invoices were evidence of Whiteagle's

boasting – which supported the defense's theory of the case. Id. However, neither fact supports the district court's ultimate conclusion.

Although the defense did not request a corrective jury instruction to address the false invoices, it did move for a mistrial immediately following admission of the false invoices. (TT 6-P-127, 9-19.) When making the motion, defense counsel specified that the false invoices indicated propensity and, without proof of their connection to any bribe, would substantially affect Whiteagle's right to a fair trial. Id. The district court denied the motion. Id. Likewise, although the defense argued the false invoices were additional evidence of Whiteagle's boasting, it did so only as a corrective measure. The defense already had Whiteagle's other emails, in which he falsely alleged to have control over Pettibone and the legislature, as evidence of Whiteagle's boasting. (See, e.g., Gov't Exs. 3-1(i), 3-6(c), 4-4.) To conclude that the invoices were harmless because the defense had to mitigate their harm is to defy logic.

Regardless, the verdict was not "surely unattributable" to admitting the false invoices. See Waldamar, 106 F.3d at 731. The invoices were evidence that Whiteagle repeatedly lied, which would naturally undermine his credibility with the jury. More importantly, the Government made clear that its theory was that Whiteagle had used the money received from the false invoices for "elicit purposes" – meaning bribery. (TT 7-P-75–76, 24–6.) In the aggregate, there is no reason to believe that the false invoices had nothing to do with the verdict.

B. Pettibone's false statements to the FBI were hearsay and were not admissible as statements "in furtherance of a conspiracy."

The district court erred by allowing the Government to introduce into evidence Pettibone's false statements to the FBI. (See App. 109.) Prior to trial, the defense moved to exclude from evidence false statements that Pettibone had made to the FBI regarding Whiteagle's activities. (TT 5-A-135–136.) Specifically, when the FBI first interviewed

Pettibone in 2008, Pettibone told agents that he was not aware of Whiteagle's involvement with gaming vendors – which he lated admitted to be a lie. Id. The defense noted that the statements were hearsay that, as statements of concealment, did not fall under the hearsay exception for statements made "in furtherance of a conspiracy." (App. 109–10.) Nonetheless, the district court allowed the Government to introduce the false statements into evidence. Id. The defense renewed its objection during trial and in Whiteagle's motion for a new trial – to no effect. Id.

1. Pettibone's false statements were hearsay despite being false.

The fact that a co-conspirator's out-of-court statement is false does not exempt the statement from hearsay rules. Anderson v. United States, 417 U.S. 211, 219-20 (1974). In Anderson, the Supreme Court held that a co-conspirator's false statements are not hearsay only if the Government's sole purpose in introducing them is to show that they are false – as opposed to seeking an additional inference. Id. at 217-18, 220. Specifically, the Court noted that, in that case, "the point of the prosecutor's introducing [sic] [the false] statements was simply to prove that the statements were made so as to establish a foundation for a later, through other admissible evidence, that they were false." Id. In other words, the Court noted that the purpose of introducing the false statements in Anderson was to show nothing but a lie – as opposed to seeking an additional inference.

Accordingly, the Sixth Circuit has held that a co-conspirator's false statement is hearsay if the Government's purpose in introducing the statement is to show a "guilty mind." See Lyle v. Koehler, 720 F.2d 426, 433 n.11 (6th Cir. 1983). In Lyle, the district court had allowed the Government to introduce two letters written by a non-testifying co-defendant, which contained false statements made in an attempt to create a false alibi for both defendants. Id. Holding that the letters were hearsay, the appellate court rejected the argument that Anderson excluded any

false statement from the hearsay category. Id. at 433 n.11.

Instead, the Sixth Circuit held that Anderson's holding addressed the purpose of introducing a co-conspirator's statement. Id. Accordingly, the court held that the letters were hearsay because the Government introduced them as evidence of an attempted cover-up – which incriminated both defendants. Id. at 432. The court wrote:

> Believing the alibi to be false, the prosecution obviously did not seek to introduce the letters in order to demonstrate the truth of the particular statements they contained. Rather, the government intended to have the jury infer from the statements … a "guilty mind." This guilty mind inference in turn invited the jury to infer [the defendant's] substantive guilt.… [The letters] were introduced because by inference they assert the proposition of fact that [the defendants] committed the [offense] and hence need [sic] an alibi. Accordingly, we conclude that the letters are hearsay.

Id. at 432-33; see also United States v. Holbert, 578 F.2d 128, 130 (5th Cir. 1978) (holding that it impermissible to allow the jury to infer a guilty mind from false exculpatory statements).

In this case, the district court incorrectly held that Pettibone's out-of-court, false statements to the FBI were not hearsay simply because they were false. (See App. 109–110.) The Government introduced evidence that Pettibone had told the FBI that he did not know Whiteagle was working for gaming vendors. (TT 7-P-67, 3-8.) The Government then argued that the fact that Pettibone had lied showed that Pettibone was guilty of participating in the alleged bribery conspiracy. Id. In other words, the Government argued Pettibone's false statements showed "guilty mind." This is exactly what Anderson and Lyle prohibit: using a co-conspirator's false statements to invite the jury to speculate on the existence of a conspiracy. See Anderson, 417 U.S. at 217-18, 220; see also Lyle, 720 F.2d at 433 n.11.

2. As statements of concealment, Pettibone's false statements were not made "in furtherance of a conspiracy."

A co-conspirator's hearsay statements are not admissible unless made "in furtherance of a conspiracy," pursuant to Rule 801(d)(2)(E), Fed. R. Evid. See Anderson, 417 U.S. at 220. It is well established that statements made only to conceal activity are not "in furtherance of a conspiracy" under Rule 801(d)(2)(E). See, e.g., In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 664 (7th Cir. 2002) ("efforts at concealing a conspiracy are not themselves part of the conspiracy"); see also Anderson, 417 U.S. at 218.

In this case, Pettibone's false statements to the FBI did not qualify for the exception under Rule 801(d)(2)(E), Fed. R. Evid. The Government made clear that its theory was that Pettibone's statements were made to conceal an ongoing bribery conspiracy. (TT 7-P-67, 3-8.) More importantly, the district court accepted this characterization. (See App. 109-110.) Therefore, admitting Pettibone's false statements violated Rule 801, Fed. R. Evid.

3. Admitting Pettibone's false statements was not harmless error.

The use of hearsay to prove a defendant's guilt is reversible error. See United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004). This is true even if the hearsay evidence is not overly damaging, and even if the defense does not request a limiting jury instruction. Gaines v. Thieret, 846 F.2d 402, 405 (7th Cir. 1988). Admitting hearsay is harmless error only if it clearly "does not contribute to the verdict." United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002).

In this case, admitting Pettibone's false statements to the FBI was not harmless error. The Government argued to the jury that Pettibone's lie was evidence that Whiteagle and Pettibone were involved in the alleged conspiracy. (TT 7-P-67, 3-8.) Given the Government produced no direct evidence of Pettibone's knowledge of the alleged conspiracy, this argument unquestionably contributed to the verdict. See Thompson, 286 F.3d at 962.

II. The District Court erred in denying Whiteagle's motion for judgment of acquittal because the Government failed to prove beyond a reasonable doubt the elements of willfully causing bribery and of aiding and abetting bribery.

Whiteagle has a fundamental constitutional right to have every element of the crimes charged against him proven beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Indeed, the Due Process Clause protects Whiteagle against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. (emphasis added). Accordingly, Whiteagle's convictions cannot stand unless there is sufficient evidence to permit a reasonable juror to conclude that the Government proved every element of the crimes charged beyond a reasonable doubt. United States v. Roman, 728 F.2d 846, 857 (7th Cir. 1984).

In reviewing a district court's denial of a motion for judgment of acquittal, the appellate court reviews the district court's decision de novo. United States v. James, 540 F.3d 702, 706 (7th Cir. 2008); see also Fed. R. Crim. P. 29. Should the appellate court determine that the evidence gives equal or nearly equal support to an inference of innocence as it does to an inference of guilt in any element of the crimes charged, the court must overturn the conviction. United States v. Johnson, 592 F.3d 749, 755 (7th Cir. 2010).

Circumstantial evidence cannot prove an element beyond a reasonable doubt if it supports "other scenarios that do not lead to the ultimate inference the Government seeks to draw." United States v. Cartwright, 359 F.3d 281, 291 (3d Cir. 2004). Where evidence supports more than one scenario, the jury cannot speculate or assume the existence of an element. Newman v. Metrish, 543 F.3d 793, 796 (6th Cir. 2008) ("[a]lthough circumstantial evidence alone can support a conviction, there are times that it amounts to only reasonable speculation and not sufficient evidence"). In other words, if the evidence gives "equal or nearly equal" support to an

inference of innocence as it does to an inference of guilt, the appellate court must overturn the conviction. Johnson, 592 F.3d at 755. Assumptions are not reasonable inferences – and cannot support a finding beyond a reasonable doubt. Id.

In this case, the district court erred in denying Whiteagle's motion for a judgment of acquittal on Counts 1, 2, 3, 5, 6, 7 and 8 of the superseding indictment. (App. 111–122.) The Government failed to prove beyond a reasonable doubt that: (A) Pettibone knew about the alleged criminal activity, as to prove a conspiracy under Count 1; (B) Whiteagle acted with corrupt intent to influence or reward Pettibone in connection with specific payments from Cash Systems, as to prove bribery under Counts 2, 3 and 5; (C) Pettibone solicited specific payments from Cash Systems or MCA, as to prove soliciting bribery under Count 6; and (D) Pettibone or Whiteagle acted "corruptly … with intent to influence or reward" Pettibone in connection with the hiring of Jon Pettibone, as to prove bribery and soliciting bribery under Counts 7 and 8.

A. The Government failed to prove the conspiracy charged against Whiteagle because it failed to prove beyond a reasonable doubt that Pettibone knew about the alleged conspiracy.

Count 1 of the superseding indictment charged Whiteagle with conspiracy in violation of 18 U.S.C. § 371. (Doc. 94-1, 1–14.) To prove a conspiracy, the Government must prove beyond a reasonable doubt that all conspirators had knowledge of the criminal activity. United States v. Freeman, 434 F.3d 369, 376 (7th Cir. 2005); see also United States v. Montgomery, 384 F.3d 1050, 1062 (9th Cir. 2004). This is true even if the Government does not need to prove that other conspirators were actually members of the conspiracy. Id. Evidence of a conspirator's knowledge must be "clear and unequivocal." United States v. Fellabaum, 408 F.2d 220, 224 (7th Cir. 1969) (citing Ingram v. United States, 360 U.S. 672, 680 (1959)). Therefore, no reasonable juror can find beyond a reasonable doubt that a conspirator had knowledge of the criminal

activity by "piling inference upon inference." United States v. Coe, 718 F.2d 830, 837 (7th Cir. 1983); United States v. Campa, 529 F.3d 980, 1023 (11th Cir. 2008).

In this case, no reasonable juror could have found beyond a reasonable doubt that Pettibone knew of the nature or extent of Whiteagle's activities – much less that Pettibone had agreed to them. At trial, the Government attempted to prove that Pettibone knew about the alleged criminal activity through three pieces of evidence: (1) emails from Whiteagle to his clients; (2) testimony from Kristine Fortney, Pettibone's ex-wife; and (3) Pettibone's false statements to the FBI. Either standing alone or in the aggregate, these three pieces of evidence support the inference that Pettibone had no knowledge of any criminal activity as equally as they support the opposite inference. See Johnson, 592 F.3d at 755. Therefore, the Court should overturn Whiteagle's conviction of conspiracy.

1. Whiteagle's email references to Pettibone's knowledge were insufficient to prove beyond a reasonable doubt that Pettibone knew about the alleged conspiracy.

The heart of the Government's case regarding Pettibone's involvement in the alleged conspiracy were emails sent from Whiteagle to his two clients, Cash Systems and MCA. (See, e.g., Gov't Exs. 3-1(i), 3-6(c), 4-4.) In these emails, Whiteagle often boasted about having conversations with Pettibone regarding influencing the Ho-Chunk Legislature in favor of these two vendors. Id. However, both sides introduced overwhelming evidence that Whiteagle constantly lied by submitting bogus invoices and boasting that his clients' contracts depended on his lobbying efforts. (See, e.g., TT 2-A-148, 19-21.) These lies enabled Whiteagle to extract large sums of money from his clients. Therefore, Whiteagle's emails supported the inference that Whiteagle lied about having conversations with Pettibone – at least as much as they supported the inference the Government sought to draw. See Johnson, 592 F.3d at 755.

More importantly, Whiteagle's emails were not probative of Pettibone's knowledge because Pettibone had nothing to do with them. Whiteagle was the author of the emails; and his clients where the recipients of the emails. The Government produced no evidence that Pettibone ever wrote or was even aware of Whiteagle's emails. Notably, the Government produced no emails to or from Pettibone that corroborated the allegations Whiteagle made in his emails – despite having access to every single email Pettibone had written and received during the period of the alleged conspiracy.

During closing arguments, the Government argued that Pettibone's knowledge of the alleged conspiracy was evident from the fact that Whiteagle had copied Pettibone as a recipient to one of his emails to MCA. (Gov't Exs. 4-19, 4-20.) During closing argument, the Government argued:

> This email shows you, beyond a doubt, that Mr. Pettibone is not kept in the dark. He's not a man of honor. It's not Whiteagle lying about Mr. Pettibone's role. Mr. Pettibone is copied in this email and they're talking about how they're both going to need to be compensated if [MCA] gets the deal.

(TT 7-P-93, 10-15.) But this email alone is not sufficient to prove beyond a reasonable doubt that Pettibone knew of any alleged criminal activity. The Government introduced no evidence that Pettibone solicited being copied as a recipient; knew of the email in advance; responded to the email; or received any of Whiteagle's many other emails to either vendor. Without evidence of Pettibone's anteceding knowledge or follow-up action, the fact that Whiteagle included Pettibone into one of his many emails was not the kind of "clear, unequivocal" evidence required to support an inference that Pettibone knew about the alleged conspiracy. See Fellabaum, 408 F.2d at 224. Ultimately, to conclude that a public official is part of a bribery conspiracy because he receives an unsolicited email from a lobbyist is to stretch the conspiracy and bribery statutes beyond a breaking point.

In any event, there was significant evidence that Pettibone acted completely independently of Whiteagle's alleged influence. Both sides introduced evidence that, with the exception of Pettibone's last motion in support of Trinity, not a single Ho-Chunk legislator opposed Pettibone's motions in favor of Cash Systems, MCA and Trinity. The Ho-Chunk Legislature approved Cash Systems' contract unanimously and MCA's contract with a single abstention. (TT 1-P-103, 142.) The same was true of the preliminary contracts with Trinity. (Gov't Ex. 1-3.) More importantly, the Ho-Chunk Nation thoroughly vetted these contracts, and considered them to be in its best business interest. (TT 1-P-133, 1-5; TT 2-P-87, 14-17.) Notably, a Ho-Chunk legislator testified that Pettibone never attempted to influence any legislators' vote in favor of Trinity or Whiteagle's clients. (TT 5-P-23, 15-25.)

Therefore, the evidence gives "equal or nearly equal" support to the inference that Pettibone had no knowledge of Whiteagle's alleged criminal activities. See Johnson, 592 F.3d at 755. Concededly, as the district court noted, it was reasonable for the jury to reject the defense's theory that Whiteagle was lying in his email references to Pettibone's involvement in the alleged conspiracy. (App. 115.) However, it was not reasonable for the jury to reject overwhelming evidence that Pettibone neither attempted nor succeeded to influence the Ho-Chunk Legislature – which is what Whiteagle's emails alleged Pettibone was doing. Given this evidence, it was at least as reasonable for the jury to conclude that Whiteagle's emails were no more than lies.

2. Christine Fortney's testimony was insufficient to prove beyond a reasonable doubt that Pettibone knew about the alleged conspiracy.

The Government also tried to prove Pettibone's knowledge of the alleged conspiracy through the testimony of Christine Fortney, Pettibone's ex-wife. Preliminarily, it is important to note that Fortney admitted to be biased against both Whiteagle and Pettibone: she testified that "didn't really care for [Whiteagle] too much," and that she had procured an FBI investigation of

Pettibone during her divorce from him. (TT 2-A-120, 3-16.) Regardless, her testimony was not probative of Pettibone's knowledge.

Through Fortney's testimony, the Government introduced three pieces of evidence to prove Pettibone's involvement in the alleged conspiracy – none of which, alone or combined, were sufficient to meet the Government's burden. First, that Pettibone had no reaction when Fortney told him that Whiteagle intended to donate $100,000 to Pettibone's tae kwon do studio. (TT 2-A-135, 9-14.) Second, that Pettibone admitted to Fortney that the Firebird, the subject of Count 4, was a gift from Whiteagle. (TT 2-A-136, 1-7.) And third, that Whiteagle had conversations with Pettibone in which Whiteagle insisted that the Ho-Chunk Legislature keep Cash Systems' contract in place. (TT 2-A-129, 2-11.) The district court erred in finding that these three parts of Fortney's testimony were sufficient, alone or in the aggregate, to show Pettibone's knowledge of the alleged conspiracy. (See App. 112–114.)

First, the district court incorrectly concluded that Pettibone's knowledge of the potential $100,000 donation alone would be "at least some evidence of Pettibone's knowledge of Whiteagle's plan to unduly influence [Pettibone's] vote." (App. 113.) However, the district court's conclusion overlooked the remainder of Fortney's testimony, which gave "equal or nearly equal support" to the opposite inference. See Johnson, 592 F.3d at 755.

When considered with the rest of Fortney's testimony, Pettibone's reaction to the $100,000 supported the inference that a donation from Whiteagle to Pettibone's tae kwon do studio would not surprise Pettibone. Fortney testified that Whiteagle and Pettibone had a family-like relationship; that Whiteagle frequently gave Pettibone and his family gifts that cost tens of thousands of dollars; and that Pettibone was particularly passionate about his tae kwon do studio. (TT 2-A-136, 142, 148.) Therefore, it was not reasonable for the jury to conclude that

Pettibone's lack of reaction to the proposed donation proved, beyond a reasonable doubt, that Pettibone knew of the alleged conspiracy.

Second, the district court incorrectly concluded that Whiteagle giving Pettibone the Firebird was sufficient to prove Pettibone knew about the alleged conspiracy. (See App. 114.) In support of its conclusion, the district court pointed to two other pieces of evidence: a December 18, 2007, email from Atherton to Trinity, with a copy to Whiteagle; and evidence that Whiteagle allegedly "laundered" the Firebird's title by giving the car to his daughter, who later gave it to Pettibone. Id. However, neither piece of evidence is anyhow relevant to Pettibone's knowledge: nothing indicates that Pettibone was ever aware of Atherton's email, or of the alleged "laundering." Without evidence that Pettibone knew about how Whiteagle procured or transferred the Firebird, it is not reasonable to conclude that transfer of the Firebird showed Pettibone knew about the conspiracy.

Third, the district court incorrectly concluded that Whiteagle's conversations with Pettibone about Cash Systems showed Pettibone's knew of the alleged conspiracy. Id. Once again, the aggregate of Fortney's testimony supported the opposite inference. Fortney testified that Pettibone frequently talked to other constituents about the Ho-Chunk Nation's gaming contracts; that she "didn't really listen" to the conversations between Whiteagle and Pettibone; and that she only heard "bits and pieces" of them. (TT 2-A-131, 148.)

Given the aggregate of Fortney's testimony, no reasonable juror could have concluded, beyond a reasonable doubt, that Pettibone knew of any alleged criminal activity simply from having conversations with Whiteagle. All this evidence shows is that Pettibone entertained conversations about gaming vendors with constituents; and that Whiteagle – as a consultant for Cash Systems and as a constituent – lobbied Pettibone. In other words, the Government failed to

show that these conversations made Pettibone aware that Whiteagle was attempting to "corruptly … influence or reward" Pettibone in connection with Cash Systems' contract.

3. Pettibone's false statements to the FBI were insufficient to prove beyond a reasonable doubt that Pettibone knew about the alleged conspiracy.

Finally, the Government tried to prove Pettibone's knowledge of a conspiracy based on false statements he made to the FBI. (See App. 115.) Specifically, the Government introduced evidence that Pettibone had told FBI investigators that he did not know that Whiteagle was working as a consultant for Cash Systems and MCA. See id. As a preliminary matter, as previously noted, these statements were inadmissible hearsay. In any event, these statements are not sufficient to prove beyond a reasonable doubt that Pettibone knew of any criminal activity.

Concededly, Pettibone's false statements could support an inference that Pettibone was attempting to hide a conspiracy. However, they equally support an inference that Pettibone was lying for a variety of other reasons. See Johnson, 592 F.3d at 755. For example, both sides introduced evidence that tribal politics mandated that lobbyists for different vendors operate anonymously to have any chance of success. (TT 4-A-60, 4-14.) Therefore, it was equally reasonable for a juror to assume to Pettibone lied to protect Whiteagle's identity as a paid lobbyist. Id. Although Pettibone should have told the truth, to infer knowledge of criminal activity based on his refusal to divulge information about Whiteagle would be to pile "inference upon inference." See Coe, 718 F.2d at 837.

B. The Government failed to prove Whiteagle's guilt of bribery because the Government failed to prove beyond a reasonable doubt that Whiteagle had the corrupt intent to influence or reward Pettibone.

Counts 2, 3 and 5 in the superseding indictment charged Whiteagle with bribery, in violation of 18 U.S.C. § 666(a)(2), based on four specific payments from Cash Systems (Doc.

94-1, 15–17.) The Government alleged that Whiteagle "corruptly caused an executive of Cash Systems, Inc., to agree to give [the four specific payments] to Pettibone … with intent to influence and reward Pettibone." Id. The word "caused" means that these Counts charged Whiteagle with willfully causing a crime under 18 U.S.C. § 2(b). However, Cash Systems sent all four payments to Whiteagle, and there was no evidence that Whiteagle ever relayed any part of the payments to Pettibone.

A violation of section 2(b) requires proof that the defendant actually caused the underlying offense to occur. See United States v. Motley, 940 F.2d 1079, 1082 (7th Cir. 1991) (holding that section 2(b) criminalizes causing a crime through a third party's actions). Therefore, even if Whiteagle used Cash Systems as a dupe, the Government had the burden of proving that Whiteagle acted "with intent to influence or reward" Clarence Pettibone. See 18 U.S.C. § 666(a)(2); see also United States v. Agostino, 132 F.3d 1183, 1189 (7th Cir. 1997) (outlining the elements of the statute). Accordingly, in order to prove Whiteagle willfully caused Cash Systems to bribe Pettibone by sending the four specific payments, the Government had to prove beyond a reasonable doubt that Whiteagle intended each specific payment to influence Pettibone. See id.

The Government fell far short of its burden. First, there was no evidence that Whiteagle ever intended Pettibone to know about the four specific payments underlying those counts. Second, there was overwhelming evidence supporting the inference that the four payments specified in those counts were a result of Whiteagle's ongoing efforts to enrich himself – rather than to influence Pettibone.

1. Without evidence that Whiteagle intended Pettibone to know about the payments, there can be no inference that Whiteagle intended the payments to influence Pettibone.

The intent element of section 666(a)(2) cannot exist without the defendant's intent that the targeted official be, at the very least, aware of the bribe. Although the statute does not require the recipient to be the official, it does require the target of the intended influence or reward to be the official. See 18 U.S.C. § 666(a)(2) (prohibiting corruptly giving, offering or agreeing to give "anything of value to any person, with intent to influence or reward an agent"). For a defendant to intend to influence or reward an official, the defendant must intend that the official, at the very minimum, know about the transaction. This case exemplifies that logic: if Whiteagle never intended for Pettibone to know about Cash Systems' payments, then Whiteagle never intended Cash Systems' payments to influence or reward Pettibone.

During closing argument, the Government implied to the jury that it was sufficient for the jury to find that Whiteagle caused Cash Systems to agree to relay a bribe to Pettibone. Specifically, the Government stated that:

> even if Whiteagle did not give the bribe money to Pettibone, he still caused Cash Systems to agree to give a bribe to Pettibone, to agree to offer a bribe to Pettibone. And that is what he is charged with in Count 2, causing Glaser to agree to offer a bribe. And regardless of whether money ended up in Pettibone's pocket, that's exactly what Whiteagle did, he caused Glaser of Cash Systems to offer this bribe.

(TT 7-P-78, 10-17.) But this is not an accurate statement of the law: it completely overlooks the "intent to influence or reward" element of 18 U.S.C. § 666(a)(2). Concededly, the statute did not require the Government to prove that Whiteagle actually gave the money to Pettibone. However, the statute did require the Government to prove beyond a reasonable doubt that Whiteagle, not Cash Systems, intended to influence or reward Pettibone by causing Cash Systems to agree to provide the alleged bribe. And the Government failed to do so.

The Government produced no evidence that Whiteagle intended Pettibone to know – or that Pettibone ever knew – about the payments underlying the charges of willfully causing

bribery. The only evidence the Government produced in support of these Counts were emails from Whiteagle to Cash Systems, and documents showing Cash Systems sent Whiteagle the payments. (Gov't Exs. 3-1(i), 4-3, 4-4, 4-10, 16-17(a).) Although the emails showed that Whiteagle alleged the money would go to Pettibone, there was no evidence that Pettibone ever knew of these allegations: Pettibone did not write or receive any of the emails the Government produced. See id. The Government produced no other evidence that Whiteagle ever intended Pettibone to know about the payments.

Likewise, the Government produced no evidence that Whiteagle ever gave Pettibone any part of the payments underlying those charges. (See Gov't Ex. 16-1–16-19.) It is noteworthy that the Government had a record of every traceable financial transaction involving Whiteagle and his businesses between 2002 and 2009. See id. That record showed easily traceable transactions – many of which formed the basis for other Counts against Whiteagle. Despite this paper trail, the Government did not point to a single transaction as circumstantial evidence that Whiteagle relayed to Pettibone any part of the payments underlying the charges of willfully causing bribery.

The district court incorrectly concluded that the jury could infer otherwise based on other pieces of evidence. (App. 115–116.) Regarding Count 2, the district court pointed to "other evidence of Whiteagle claiming to exert influence over Pettibone," a likely (but unexplained) reference to the same emails that Pettibone never received or talked about. (App. 117.) Regarding Count 3, the district court pointed to evidence that Whiteagle admitted using "some of the money from Cash Systems … to buy campaign materials for Pettibone"; however, there was no evidence that Pettibone ever knew the campaign materials came from Cash Systems' money. See id. Regarding Count 5, the district court pointed to evidence that Whiteagle withdrew in

cash less than half of the payment underlying the charge (a $3,000 withdrawal against an $8,000 payment) as evidence of a "larger bribery scheme." Id.

None of these additional pieces of evidence prove a necessary fact for conviction under Counts 2, 3 and 5: whether Whiteagle ever intended that Pettibone received, or at least knew about, the payments. The Government had the burden to prove the "intent … to influence or reward" element separately and beyond a reasonable doubt. Evidence that Whiteagle claimed the payments would go to Pettibone, but then never communicated or relayed the payments to Pettibone, is not the kind of "clear and unequivocal" circumstantial evidence that can prove an element of a crime beyond a reasonable doubt. The Government had access to a vast paper trail of emails and financial transactions; yet, it failed to produce a single document that showed Whiteagle ever even told Pettibone about the payments.

2. The evidence supported an inference that Whiteagle intended to keep the payments for himself – rather than influence or reward Pettibone.

There was overwhelming evidence that Whiteagle provided false invoices to Cash Systems in order to extract money from the vendor. (TT 7-P-75, 8-15). Additionally, both sides introduced evidence that Whiteagle repeatedly lied to Cash Systems about his consulting work within the Ho-Chunk Nation to obtain cash advances, loans and bonuses from the vendor. (TT 7-P-158, 14-20.) This evidence was consistent with the evidence the Government presented in support of the charges of willfully causing a bribe. Therefore, the evidence gave "equal or nearly equal" support to the inference that Whiteagle solicited the four payments underlying Counts 2, 3 and 5 with the intent to enrich himself – as opposed to the corrupt intent to influence or reward Pettibone. See Johnson, 592 F.3d at 755.

To support the opposite inference, during closing argument, the Government argued that "all the evidence in this case shows that Whiteagle was sharing [the payments from Cash

Systems] with Pettibone." (TT 7-P-80, 7-9.) This statement completely overlooks overwhelming evidence that Whiteagle spent enormous amounts of money – virtually everything he ever got from his cash access vendor clients – on himself. Absent evidence that Whiteagle relayed at least some payments to Pettibone, and with Pettibone's knowledge, the conclusion that Whiteagle shared with Pettibone the payments underlying Counts 2, 3 and 5 is no more than an assumption – and it cannot support a finding of guilt beyond a reasonable doubt. Newman, 543 F.3d at 796.

C. The Government failed to prove Whiteagle's guilt of aiding and abetting solicitation of a bribe because the Government failed to prove beyond a reasonable doubt that Pettibone solicited a bribe.

Count 6 charged Whiteagle with violating section 666(a)(1)(B). Count 6 alleged that Whiteagle aided and abetted Pettibone in "corruptly solicit[ing] and demand[ing] money from [Money Centers] intending to be influenced and rewarded." (Doc. 94-1, 17–18.) The use of the words "aided and abetted" means this Counts charged Whiteagle with aiding and abetting a crime under 18 U.S.C. § 2(a).

A violation of section 2(a) requires proof that the principal actually committed the offense. See Motley, 940 F.2d at 1082. Therefore, in connection with Count 6, the Government had the burden to prove beyond a reasonable doubt that Pettibone actually solicited a bribe from MCA – even if he used Whiteagle as an intermediary. See 18 U.S.C. § 666(a)(1)(B); see also Agostino, 132 F.3d at 1189 (7th Cir. 1997) (outlining the elements).

No reasonable juror could have found Whiteagle guilty beyond a reasonable doubt of Count 6 because the evidence was insufficient to show Pettibone committed the underlying offense. The evidence supported the inference that Pettibone had no knowledge of Whiteagle's

exchanges with MCA – at least as much as it supported the opposite inference. Accordingly, the Court should enter a judgment of acquittal on Count 6. Johnson, 592 F.3d at 755.

The only pieces of evidence through which the Government attempted to prove Pettibone's solicitation were Whiteagle's email exhanges with MCA. However, as previously noted, these emails were not probative of Pettibone's involvement: they showed only that Pettibone received a copy of a single email. (Gov't Exs. 4-19, 4-20.) Once again, despite having access to a vast paper trail, the Government failed to produce a single email showing Pettibone knew about, approved or controlled Whiteagle's dealings with MCA.

D. The Government failed to prove beyond a reasonable doubt that either Whiteagle or Pettibone acted "corruptly" or "with intent to influence or reward" in connection with Jon Pettibone's employment.

Counts 7 and 8 charged Whiteagle with violating sections 666(a)(2) and 666(a)(1)(B) in connection with MCA's hiring of Jon Pettibone. Count 7 alleged that Whiteagle aided and abetted Pettibone in "corruptly solicit[ing] and demand[ing] for the benefit of a relative that [MCA] employ the relative … intending to be influenced or rewarded." (Doc. 94-1, 18–19.) The use of the words "aided and abetted" means this Count charged Whiteagle with aiding and abetting a crime under 18 U.S.C. § 2(a).

Count 8 alleged that Whiteagle "corruptly caused an officer of [MCA] to agree to employ … a relative of Clarence P. Pettibone, with intent to influence or reward Pettibone." (Doc. 94-1, 19.) The use of the word "caused" means this Count charged Whiteagle with willfully causing a crime under 18 U.S.C. § 2(b).

As previously noted, a violation of section 2(a) requires proof that the principal actually committed the offense. See Motley, 940 F.2d at 1082. Therefore, in connection with Count 7, the Government had the burden to prove beyond a reasonable doubt that Pettibone acted

"corruptly" and "with intent to be influenced or rewarded." See 18 U.S.C. § 666(a)(1)(B); see also Agostino, 132 F.3d at 1189 (7th Cir. 1997) (outlining the elements).

Similarly, as previously noted, a violation of section 2(b) requires proof that the defendant actually caused the underlying offense. See Motley, 940 F.2d at 1082 (holding that section 2(b) criminalizes causing a crime through a third party's actions). Therefore, even if Whiteagle used MCA as a dupe, the Government had the burden of proving that Whiteagle acted "corruptly" and "with intent to influence or reward" Clarence Pettibone. See 18 U.S.C. § 666(a)(2); see also Agostino, 132 F.3d at 1189.

No reasonable juror could have found Whiteagle guilty beyond a reasonable doubt of Counts 7 or 8 because the Government failed to prove that either Pettibone or Whiteagle acted "corruptly" or "with intent to influence or reward" Pettibone. Not only did the Government fall short of its burden to prove a guilty inference beyond a reasonable doubt, but it also introduced overwhelming evidence to support the opposite, innocent inference. Specifically, the evidence the Government produced in support of Counts 7 and 8 showed that Whiteagle merely suggested that MCA hire Jon Pettibone because doing so was a good business decision.

The evidence the Government produced on Counts 7 and 8 showed that Whiteagle and Pettibone did not act with a corrupt intent to influence or reward Pettibone. One of the Government's key pieces of evidence on Counts 7 and 8 was a March 18, 2008 email from Whiteagle to MCA. In the email, Whiteagle writes: "[Pettibone] also wanted John [sic] Pettibone would [sic] continue to work for the new booths along with Roxanne Choka." (App. 120.) Whiteagle goes on to explain that the two workers "are verrry [sic] valuable to [MCA] as they can do things politically that I could not do anf [sic] they would be very loyal." Id.

Rather than supporting the Government's theory of the case, this email shows that neither Whiteagle nor Pettibone acted corruptly or with intent to influence or reward in connection with Jon Pettibone's hiring. The email's language makes clear that Whiteagle is merely suggesting that MCA hire Jon Pettibone – as opposed to demanding it or soliciting it as a kickback. See id. Notably, this email's language stands in stark contrast to Whiteagle's other emails, in which often he often used strong language to make demands for more money. (See, e.g., App. 118.)

More importantly, the email shows a legitimate business rationale for Whiteagle's suggestion that MCA hire Jon Pettibone: Jon Pettibone would make a resourceful and loyal employee. Id. Multiple witnesses corroborated this rationale. Joseph Decorah testified that he also recommended Jon Pettibone's hiring because Pettibone's experience and political connections in the field made him the best candidate for the job. Notably, both defense and Government witnesses testified that it was common for new cash access vendors to retain tribal employees working for previous vendors.

The Government attempted to rebut this rationale through the testimony of Lauren Anderson. However, Anderson's testimony was not probative of any corrupt intent behind the suggestion to hire Jon Pettibone. Anderson merely testified that she did not understand what Jon Pettibone's purpose was as an employee. However, Anderson conceded she did not know anything about the process through which Money Centers hired him, his duties, or his field of work. Ultimately, her testimony was not probative of Pettibone's or Whiteagle's intent in suggesting Jon Pettibone's hiring.

Therefore, the evidence supported an inference that Pettibone and Whiteagle suggested Jon Pettibone's hiring without acting corruptly or with intent to influence or reward Pettibone.

Accordingly, no reasonable juror could have found Whiteagle guilty of Counts 7 and 8 beyond a reasonable doubt. See Newman, 543 F.3d at 796.

III. The District Court erred in imposing a sentence of 120 months because it based that sentence on improper base levels and enhancements, and because that sentence is substantively unreasonable given the evidence presented at trial.

A. In calculating the base level for Whiteagle's sentence, the district court clearly erred in considering the payments to be bribes – as opposed to gratuities.

In sentencing for a conviction under 18 U.S.C. 666, the district court must distinguish gratuities from bribes. If the conduct that formed the conviction was more akin to causing the payment of bribes, then the applicable provision is U.S.S.G. § 2C1.1. See Agostino, 132 F.3d at 1195. However, if the conduct that formed the conviction was more akin to causing the payment of gratuities, then the applicable provision is U.S.S.G. § 2C1.2. The difference in base sentencing levels between the two provisions is stark. The base level for defendants who are not public officials is 9 under § 2C1.2 – as compared to 12 under § 2C1.1. Therefore, it is clear error for the district court to characterize gratuities as bribes. See id.

The difference between a bribe and a gratuity is simple: the distinction turns on the defendant's intent. Id. If the payor's intent is to influence future actions, the payment is a bribe; if the payor's intent is to reward past actions, the payment is a gratuity. Id. This distinction is evident from the commentary to sections 2C1.1 and 2C1.2, U.S.S.G. The commentary to section 2C1.1 explains that the section "applies to a person who offers or gives a bribe for … inducing a public official to participate in a fraud or to induce his official actions." U.S.S.G. § 2C1.1, comment. (backg'd) (emphasis added). Conversely, the commentary to section 2C1.2 explains that the section "applies to the offering [or] giving … of a gratuity to a public official in respect to an official act." U.S.S.G. § 2C1.2, comment. (backg'd).

In this case, the district court clearly erred in applying section 2C1.1, U.S.S.G., and calculating a base sentence level of 12. (ST 3, 13-21.) The preponderance of the evidence introduced at trial showed that Whiteagle's payments to Petition were more akin to gratuities than bribes. Therefore, the district court should have applied section 2C1.2, U.S.S.G., and calculated a base sentence level of 9. See U.S.S.G. § 2C1.2(a)(2).

There was significant evidence that most of the payments the Government claimed was part of the alleged bribery conspiracy were gratuities – not bribes. Most of these payments came after a legislative action by Pettibone that the Government alleged Whiteagle corruptly influenced. (Doc. 94-1, 11-14.) Examples include: the December 1, 2006 payment of $9,500 from Trinity to Whiteagle, which followed Pettibone's October 19, 2006 motion to evaluate Trinity; the May 15, 2007 transfer of the Pontiac Firebird's title from Whiteagle to Summer Whiteagle, which followed Pettibone's February 21, 2007 motion to pay Trinity $50,000; and the July 18, 2008 payment from MCA, which followed Pettibone's July 16, 2008 legislative motion to pay MCA $4,535,700. (Gov't Exs. 1-2–1-3, 12-2–12-9, 17-2, 19-2.)

However, when determining which sentencing guideline applied, the district court never considered this evidence – or even the conceptual distinction between a bribe and a gratuity. (See ST 3, 13-21.) In deciding to apply section 2C1.1, U.S.S.G., the district court simply stated:

> The evidence at trial established that the defendant funneled money ... to Clarence Pettibone's and his family members and that the defendant solicited his business clients to do the same in order to corrupt Pettibone's actions as an elected official of the Ho-Chunk Nation. Accordingly, the appropriate guideline ... is found at [section] 2C1.1."

In essence, the district court merely recited the elements of the offense. See 18 U.S.C. § 666. More importantly, the district court never addressed defense counsel's argument that Whiteagle's payments were more akin to gratuities. (ST 21, 17-25.)

B. In calculating the enhancement level of Whiteagle's sentence, the district court incorrectly calculated loss.

A district court cannot apply an enhancement level for loss unless it is able to readily calculate the loss attributable to specific bribes. See United States v. Anderson, 517 F.3d 953, 963 (7th Cir. 2008). Under section 2C1.1, U.S.S.G., loss is "the value of the payment, the benefit received or to be received in return of the payment, the value of anything to be obtained by a public official or others acting with the official, or the loss to the government from the offense, whichever is greatest." U.S.S.G. § 2C1.1(b)(2).

A district court cannot determine the "benefit received or to be received" unless it can determine two factors: causation and quantification. Anderson, 517 F.3d at 963. Causation cannot exist unless a specific bribe caused a specific benefit received or to be received. Id. Likewise, quantification cannot exist unless the district court can readily calculate the benefit received or to be received. Id.

In Anderson, the court held that causation cannot exist without evidence that the bribed official's actions were the but-for cause of the benefit received. See id. at 964. In Anderson, the defendant had been convicted of bribing a public official to facilitate three of the defendant's development projects. Id. at 958. The Court found causation in connection with two of those projects specifically because the bribed official's actions were the but-for cause of the benefit the defendant received in connection with the projects. Id. at 963-64. Specifically, the court wrote:

> It is also clear that [the first two properties] benefited from these bribes. Anderson turned to [the bribed official] just as the project stalled in the City Council. Without [the official's] intervention, the project may never have been approved…. Thus, the profits attributable to the project can be included in the benefit calculation.
>
> Id. at 964.

However, regarding the third project, the court found no causation – specifically because there was no evidence that the bribed official's actions were the but-for cause of the benefit the defendant received in connection with the third project. Id. The court wrote:

> There was no evidence to show that the [third] project had encountered obstacles that would have required [the bribed official's] assistance; thus, we have no way to know what [the official] could have done to assist the project…. [The project] must be excluded.
>
> Id.

1. There was no evidence that Whiteagle's conduct was the but-for cause of the benefit Whiteagle's clients received.

In this case, the district court incorrectly determined that loss was the "benefit received or to be received in return of the payment." (ST 3, 22-25.) The district court concluded that loss in this case was the benefit that Cash Systems, MCA and Trinity received or were to receive in exchange for the alleged bribe – which totaled over $2.5 million. (ST 5, 9-13.) Accordingly, the district court applied an excessive 18-level enhancement to Whiteagle's sentence. Id.; see also U.S.S.G. § 2B1.1(1)(b)(1)(J). However, there was no evidence of causation to support the district court's calculation. See Anderson, 517 F.3d at 964.

There is no evidence that Pettibone's actions were the but-for cause of the benefit Cash Systems, MCA and Trinity received. Much to the contrary, there was significant evidence that the Ho-Chunk Nation would have provided those vendors with the exact same benefits without Pettibone's interference. With the exception of the last vote on Trinity's contract, not a single Ho-Chunk legislator opposed Pettibone's motions in favor of Cash Systems, MCA and Trinity. The Ho-Chunk Legislature approved Cash Systems' contract unanimously and MCA's contract with a single abstention. (TT 1-P-103, 142.) The same was true of the preliminary contracts with Trinity. (Gov't Ex. 1-3.) Notably, a Ho-Chunk legislator testified that Pettibone never

attempted to influence any legislators' vote in favor of Trinity or Whiteagle's clients. (TT 5-P-23, 15-25.) More importantly, the Ho-Chunk Nation thoroughly vetted these contracts, and considered them to be in its best business interest. (TT 1-P-133, 1-5; TT 2-P-87, 14-17.)

In determining the 18-level sentencing enhancement, the district court failed to properly address the causation issue, and the evidence related to it. (See ST 8, 8-23.) Explaining the 18-level enhancement in Whiteagle's sentencing hearing, the district court said:

> I think my basis for finding what I did has already been laid out by the Court; that is, that the companies who were involved in this bribery scheme with the defendant did indeed obtain contracts falling within this range [between $2.5 million and $7 million]; in part, contrary to the defendant's position; in part, in the Court's view, because of the efforts of the defendant and the bribes he facilitated.

Id. However, contrary to the district court's explanation, the fact that Whiteagle may have been part of the reason the three vendors received a benefit is not sufficient to show causation. Instead, for causation to exist, the briber's actions must be the but-for cause of the benefit. See Anderson, 517 F.3d at 964. Without evidence of but-for cause, the district court's finding of causation was clear error.

2. There was no evidence that Whiteagle's conduct was the but-for cause of the payments he received from the vendors.

The district court also found that the benefit Whiteagle received from the alleged bribery conspiracy would be sufficient to support an 18-level sentencing enhancement. (ST 8, 15-23.) Specifically, the district court stated:

> It is not unreasonable and I do find that the defendant himself benefited from these – his own contracts with the vendors involved in the amount of three million dollars, at least in part due, and in fairness substantially because of his promised influence and ultimately illegal influence over a tribal official, Mr. Pettibone. And so I do think that the 18-level adjustment is also justified by virtue of the payments that the defendant received directly.

Id. However, once again, the evidence was insufficient to the necessary causation to support the district court's finding.

The evidence introduced at trial showed that Cash Systems, MCA and Trinity were willing and able to pay Whiteagle millions of dollars as a cost of doing business. (TT 1-P-13, 6-9.) Gaming vendors such as Cash Systems and MCA stood to make millions in profit from their exclusive contracts with the Ho-Chunk Nation. (TT 1-P-51, 10-15.) Cash Systems, for example, paid Whiteagle a $22,500 monthly salary to lobby the Ho-Chunk Legislature. (TT 1-P-17, 17-25.) A large portion of the payments Whiteagle received from these vendors amounted to salaries and consulting fees – not "bonuses" paid to incentivize or reward any particular payment he made to Pettibone. See id. In other words, a large portion of these payments consisted of the vendors' cost of doing business – not of a benefit Whiteagle caused by bribery.

3. The appropriate calculation of loss for sentencing enhancement purposes is the value of Whiteagle's payments to Pettibone.

Absent evidence that Whiteagle was the but-for cause of the benefit he or his clients received from the alleged bribery conspiracy, the only proper calculation of loss for sentencing enhancement purposes is "the value of the payment[s]." See U.S.S.G. § 2C1.1. In this case, the total sum of the payments to Pettibone that Whiteagle allegedly caused amounts to $92,500. (See Gov't Exs. 16-1–16-9.) That includes the estimated value of the Pontiac Firebird ($8,000); payments Whiteagle made directly to Pettibone's tae kwon do studio ($16,000); payments Cash Systems made to Pettibone's tae kwon do studio ($13,500); and payments Whiteagle made to a 501(c)(3) that funded Pettibone's tae kwon do studio ($45,000). The applicable sentencing enhancement would then be 8 levels, as opposed to 18. See U.S.S.G. § 2B1.1(b)(1)(E).

CONCLUSION

For the foregoing reasons, Whiteagle respectfully requests that the Court reverse his convictions under 18 U.S.C. §§ 371 and 666. Alternatively, Whiteagle respectfully requests that the Court vacate his sentencing and remand for re-sentencing.

Respectfully submitted,

s/ Glenn C. Reynolds
Glenn C. Reynolds, SBN 1017065
Rebecca A. Paulson, SBN 1079833
REYNOLDS & ASSOCIATES
407 East Main Street
Madison, WI 53703
(608) 257-3621

Attorneys for Defendant-Appellant,
Timothy G. Whiteagle

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(A)(7)

The undersigned counsel of record for the Defendant-Appellant, Timothy G. Whiteagle, hereby certifies that the foregoing Brief of Defendant-Appellant Timothy Whiteagle complies with F.R.A.P. Rule 32(a)(7). This brief contains 11,967 words, including footnotes, as calculated in the word count function of the word processing application Microsoft Word 2010.

Dated: March 4, 2013

REYNOLDS & ASSOCIATES

s/ Glenn C. Reynolds

Glenn C. Reynolds, SBN 1017065
Rebecca A. Paulson, SBN 1079833
REYNOLDS & ASSOCIATES
407 East Main Street
Madison, WI 53703
(608) 257-3621

Attorneys for Defendant-Appellant,
Timothy G. Whiteagle

CIRCUIT RULE 31(E)(1) CERTIFICATION

The undersigned counsel for Defendant-Appellant Timothy G. Whiteagle hereby certifies that virus-free versions of the brief and all appendix items that are available in non-scanned PDF format were filed electronically, pursuant to Circuit Rule 31(E)(1).

Dated: March 4, 2013

REYNOLDS & ASSOCIATES

s/ Glenn C. Reynolds

Glenn C. Reynolds, SBN 1017065
Rebecca A. Paulson, SBN 1079833
REYNOLDS & ASSOCIATES
407 East Main Street
Madison, WI 53703
(608) 257-3621

Attorneys for Defendant-Appellant,
Timothy G. Whiteagle

PROOF OF SERVICE

The undersigned counsel for Defendant-Appellant Timothy G. Whiteagle hereby certifies that on March 4, 2013, two copies of the Brief and Required Short Appendix of Appellant, as well as a digital version containing this brief, were served by mail on Plaintiff-Appellee United States of America at the following address:

Stephen P. Sinnott
Assistant United States Attorney
660 West Washington Avenue, Suite 303
Madison, WI 53703

Dated: March 4, 2013

REYNOLDS & ASSOCIATES

s/ Glenn C. Reynolds
Glenn C. Reynolds, SBN 1017065
Rebecca A. Paulson, SBN 1079833
REYNOLDS & ASSOCIATES
407 East Main Street
Madison, WI 53703
(608) 257-3621

Attorneys for Defendant-Appellant,
Timothy G. Whiteagle

CIRCUIT RULE 30(D) STATEMENT

The undersigned counsel for Defendant-Appellant Timothy G. Whiteagle hereby certifies that pursuant to Circuit Rule 30(d), all materials required by Circuit Rule 30(a) and (b) are included in the appendix.

Dated: March 4, 2013

REYNOLDS & ASSOCIATES

s/ Glenn C. Reynolds

Glenn C. Reynolds, SBN 1017065
Rebecca A. Paulson, SBN 1079833
REYNOLDS & ASSOCIATES
407 East Main Street
Madison, WI 53703
(608) 257-3621

Attorneys for Defendant-Appellant,
Timothy G. Whiteagle

APPENDIX

United States District Court

Western District of Wisconsin

UNITED STATES OF AMERICA

V.

TIMOTHY G. WHITEAGLE

JUDGMENT IN A CRIMINAL CASE
(for offenses committed on or after November 1, 1987)

Case Number: 11-CR-65-WMC-01

Defendant's Attorney: Glenn C. Reynolds

The defendant, Timothy G. Whiteagle, was found guilty on counts 1-4, 6-10, and 13-15 of the superseding indictment.

The defendant has been advised of his right to appeal.

ACCORDINGLY, the court has adjudicated defendant guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Commit Bribery, a Class D felony	12/31/09	1
18 U. S. C. § 666(a)(2)	Bribery, a Class C felony	1/11/07, 3/13/07, 5/15/07 7/2/07, 7/18/08, 7/15/08	2-4, 6, 9, 10
18 U.S.C. § 666(a)(1)(B)	Aiding and Abetting the Solicitation of a Bribe, a Class C felony	3/10/08, 8/18/08	7, 8
26 U.S.C. § 7206(1)	Filing a False Tax Return, a Class E felony	12/31/2003, 12/31/2004	13, 14
18 U.S.C. § 1512 (b)(3)	Witness Tampering, a Class C felony	12/31/2008	15

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Date of Birth: [redacted] 1951

Defendant's USM No.: 07435-090

Defendant's Residence Address: [redacted]
Fairchild, WI 54741

Defendant's Mailing Address: [redacted]
Fairchild, WI 54741

October 24, 2012
Date of Imposition of Judgment

/s/ William Conley
William M. Conely
District Judge

October 25, 2012
Date Signed:

IMPRISONMENT

As to count 1 of the superseding indictment, the defendant is hereby committed to the custody of the Bureau of Prisons for a term of 60 months. On counts 2-4 and 6-10, the defendant is committed to the custody of the Bureau of Prisons for additional terms of 30 months per count to run concurrent with each other but consecutive to the sentence imposed for count 1. On counts 13 and 14, the defendant is committed to the custody of the Bureau of Prisons for terms of 30 months per count to run concurrent to each other but consecutive to the sentences imposed for count 1 and counts 2-4 and 6-10. As to count 15, the defendant is committed to the custody of the Bureau of Prisons for a term of 120 months to run concurrently to the other sentences. This results in an aggregate sentence of 120 months imprisonment.

I recommend that the defendant be afforded prerelease placement in a residential reentry center with work release privileges. I also recommend that the defendant receive placement in a BOP facility that will address his medical problems. Finally, I recommend that the defendant be afforded the opportunity to participate in substance abuse treatment and vocational training and that he be afforded prerelease placement in a residential reentry center with work release privileges.

The defendant is neither a flight risk nor a danger to the community. Accordingly, execution of the sentence of imprisonment is stayed until November 26, 2012, between the hours of noon and 2:00 p.m., when the defendant is to report to an institution to be designated by further court order. The present release conditions are continued until November 26, 2012.
The U.S. Probation Office is to notify local law enforcement agencies and the state attorney general of the defendant's release to the community.

The U.S. Probation Office is to notify local law enforcement agencies, and the state attorney general, of defendant's release to the community.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy Marshal

SUPERVISED RELEASE

The term of imprisonment is to be followed by a three-year term of supervised release on counts 1-4, 6-10 and 15. One year terms of supervised release in counts 13 and 14 are also ordered. Terms of supervised release are to run concurrently.

Defendant shall report to the probation office in the district to which defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

If defendant has been convicted of a felony, defendant shall not possess a firearm, destructive device, or other dangerous weapon while on supervised release.

Defendant shall cooperate with the collection of DNA by the U.S. Justice Department and/or the U.S. Probation and Pretrial Services Office as required by Public Law 108-405.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth on the next page).

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

In light of the nature of the offense and the defendant's personal history, I adopt the special conditions set out in the presentence report. Neither party has raised objections to the proposals.

As special conditions, defendant is to:

1) Provide the supervising U.S. probation officer any and all requested financial information, including copies of state and federal tax returns;

2) Cooperate with the Collection Division of the IRS in the payment of all taxes, interest and penalties due and owing and allow unrestricted communication between the Collection Division and the probation office to monitor compliance;

3) Refrain from seeking or maintaining any employment that includes unsupervised financial or fiduciary-related duties, without the prior approval of the supervising U.S. probation officer;

4) Abstain from the use of alcohol; and

5) Submit his person, property, residence, office, or vehicle to a search, conducted by a U.S. probation officer at a reasonable time and in a reasonable manner whenever the probation officer has reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be a ground for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have had read to me the conditions of supervision set forth in this judgment, and I fully understand them. I have been provided a copy of them. I understand that upon finding a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant Date

U.S. Probation Officer Date

STANDARD CONDITIONS OF SUPERVISION

1) Defendant shall not leave the judicial district without the permission of the court or probation officer;

2) Defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) Defendant shall support his or her dependents and meet other family responsibilities;

5) Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) Defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

Count	Assessment	Fine	Restitution
1-4, 6-10, 13-15	$400.00 $500.00 $300.00	$0.00	$162,854.00
Total	$1,200.00	$0.00	$162,854.00

It is adjudged that the defendant is to pay a $1,200 criminal assessment penalty to the Clerk of Court for the Western District of Wisconsin immediately following sentencing.

The defendant does not have the means to pay a fine under § 5E1.2(c) without impairing his ability to support himself upon release from custody.

RESTITUTION

In addition, the defendant is ordered to pay restitution in the amount of $162,854.00 to the Clerk of Court for the Western District of Wisconsin for disbursement to the Internal Revenue Service - RACS, Attn: [redacted] Kansas City, Missouri, 64108, as a special condition of supervision. The defendant apparently does not have the economic resources to allow him to make full payment of restitution in the foreseeable future under any reasonable schedule of payments. Pursuant to 18 U.S.C. § 3664(f)(3)(B), he is to begin making nominal payments of a minimum of $250 each month, beginning within 30 days of his release from custody.

The defendant shall notify the court and the Attorney General of any material change in his economic circumstances that might affect his ability to pay restitution.

No interest is to accrue on the unpaid portion of the restitution.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:

(1) assessment;
(2) restitution;
(3) fine principal;
(4) cost of prosecution;
(5) interest;
(6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Unless the court has expressly ordered otherwise in the special instructions above, if the judgment imposes a period of imprisonment, payment of monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

In the event of a civil settlement between victim and defendant, defendant must provide evidence of such payments or settlement to the Court, U.S. Probation office, and U.S. Attorney's office so that defendant's account can be credited.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY WHITEAGLE,

Defendant.

OPINION & ORDER

11-cr-65-wmc

On August 1, 2012, after an eight-day trial, a jury found defendant Timothy G. Whiteagle guilty of twelve counts relating to bribing Clarence Pettibone, a legislator and agent of the Ho-Chunk Nation. The defendant has now filed motions for new trial and acquittal. (Dkt. ##172, 174.)[1] For the reasons that follow, the court will deny both motions.

OPINION

I. Motion for New Trial

The defendant raises several challenges to certain evidentiary rulings made by the court. The court will address each in turn.

A. False Invoices

The defendant argues that the government impermissibly used Whiteagle's false invoices to Cash Systems as propensity evidence, prejudicing him. (Def.'s Br. (dkt. #173) 1-2.) The false invoices were admitted, however, not as propensity evidence, but

[1] As both parties point out, the titles of defendant's original briefs in support of these respective motions appear to be switched. Despite the titles, dkt. #175 is defendant's brief in support of the motion for acquittal and dkt. #173 is defendant's brief in support of the motion for new trial.

as evidence of acts in furtherance of the conspiracy and to show that Whiteagle was trying to disguise illicit activity by submitting false invoices for work never performed. Whiteagle's counsel was the first to argue that these payments were evidence of Whiteagle's independent plan to defraud Cash Systems and Money Centers, rather than to facilitate bribes to Pettibone. Only in rebuttal, did the government's counsel point out the absurdity of this defense: Whiteagle was engaged in fraud, just not bribery.

Even if such an argument were objectionable, Whiteagle's counsel did not do so. Indeed, at no time during the trial did Whiteagle ask for a curative instruction admonishing the jury not to treat any finding of fraudulently obtained payments as proof of Whiteagle's propensity to commit other crimes.

Moreover, assuming this evidence could be considered propensity evidence, its inclusion was harmless error because it tended to *support* Whiteagle's own version of events -- that his solicitations of bribery money from Cash Systems was actually a fraudulent scheme to extract the money for himself alone.

B. Pettibone's False Statements

The defendant also argues that the court erred in admitting Pettibone's hearsay statements to the FBI denying knowledge of: (1) what Whiteagle did for a living; and (2) Whiteagle's involvement with tribal vendor Cash Systems and would-be vendor Trinity Financial Group. The court already ruled on this argument in rejecting defendant's motion in limine, concluding that these false statements were not hearsay because they were not being offered to prove the truth of those statements. (7/20/12 Order (dkt. #148) 4-5.) On the contrary, the statements were offered because the statements were

in fact false. The defendant again cites *Lyle v. Koehler*, 720 F.2d 426 (6th Cir. 1983), for the proposition that such statements are hearsay, and the court will again reject its application for the same reason: these statements were admissible under a plain reading of Federal Rule of Evidence 801(c)(2). *See Anderson v. United States*, 417 U.S. 211, 219-20 (1974) (holding that false, out-of-court statements made by defendants are not hearsay).

C. Preclusion of Exculpatory Arguments

Finally, the defendant contends that the court erred in prohibiting him from making two supposedly-exculpatory arguments to the jury. First, Whiteagle argues he should have been permitted to assert that Cash Systems was at least partly responsible for Whiteagle's giving things of value to Pettibone. Whiteagle points to *Holmes v. South Carolina*, 547 U.S. 319 (2006), for the proposition that evidence of third-party guilt is probative of a defendant's innocence. This would, of course, be true when only *one* person could have committed the crime. In *Holmes*, a murder defendant attempted to submit evidence that somebody else committed the crime. *Id.* at 323.

In contrast, Whiteagle merely asserted that Cash Systems "created and funded Whiteagle's practice of giving things of value to Pettibone," ostensibly for a legitimate business reason. Obviously, this is not an "either/or" situation. On the contrary, this argument would appear to be entirely consistent with the government's position before the jury that Whiteagle conspired with Cash Systems and Atherton to bribe Pettibone. In this way, Cash Systems' guilt reinforces Whiteagle's guilt as the middleman.

More importantly, Whiteagle was never prevented from pursuing this line of argument. Indeed, Whiteagle's theme throughout the trial and closing argument was that he was doing nothing wrong in passing on payments and other gifts to Pettibone and was, if anything, used as a pawn by Cash Systems. Obviously, the jury disagreed.

Second, Whiteagle contends that the court erred in foreclosing argument that his actions do not constitute bribery under the Ho-Chunk Nation's Code of Ethics. Again, this was not the court's ruling; both sides were allowed to discuss the Ethics Code, as well as cultural norms, with the understanding that this was for context, background and (perhaps) state of mind, but that the applicable federal criminal statutes ultimately controlled, not the Ho-Chunk Nation's Code of Ethics. (7/20/12 Order (dkt. #151).)

The only piece of evidence excluded from evidence was plaintiff's proffer of an email purporting to provide the Nation's interpretation of its Code of Ethics, which *post*-dated all of Whiteagle's relevant actions in this case. Not only could this later interpretation have informed Whiteagle's earlier actions, but the email appeared to be a *post hac,* legal interpretation issued for Whiteagle's benefit, which had no relevance to the actual factual and legal issues the jury was asked to decide.

II. Motion for Acquittal

The defendant also argues that there was insufficient evidence to convict him of numerous counts of conviction. When a court evaluates a defendant's sufficiency-of-the-evidence argument, it "consider[s] the evidence in the light most favorable to the prosecution, making all reasonable inferences in its favor, and affirm[s] the conviction so long as any rational trier of fact could have found the defendant to have committed the

essential elements of the crime." *United States v. Hassebrock*, 663 F.3d 906, 918 (7th Cir. 2011) (citation omitted). The court will overturn the guilty verdict "only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* Thus, a defendant who moves for a judgment of acquittal "faces a nearly insurmountable hurdle." *Id.* Whiteagle falls far short of that standard.

A. Count 1: Conspiracy

To sustain a conviction of conspiracy, the government was required to prove that the charged conspiracy existed, that Whiteagle knowingly became a member, and that a member committed an overt act in furtherance of the committee. (Jury Instructions (dkt. #110-3) 7.) As Whiteagle acknowledges, "the government need not establish that there existed a formal agreement to conspire; circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and the totality of their conduct may serve as proof." *United States v. Redwine*, 715 F.2d 315, 320 (7th Cir. 1983). Nevertheless, Whiteagle argues that the government failed to prove the conspiracy count in the indictment.

As an initial matter, the government asserts that "[t]he jury was not required to find that Pettibone was a member of the conspiracy." (Pl.'s Opp'n (dkt. #191) 3.) Instead, the government maintains that the jury could find that Deborah Atherton was a member of the conspiracy with Whiteagle, making proof of Pettibone's membership unnecessary. In reply, the defendant appears to concede Pettibone need not have *participated* in the conspiracy, but must at least have *known* the payments he received

constituted a bribe. Whether or not this is an accurate statement of the law, there was ample evidence of Pettibone's knowledge: (1) of Whiteagle's and Atherton's activities on behalf of tribal vendors, (2) that those vendors provided large sums of money to be forwarded to Pettibone, and (3) that these payments were intended to influence Pettibone, indeed insure his support, as a tribal legislator of the vendor's proposed contracts with the Ho-Chunk Nation.

More importantly for purposes of the pending motion for judgment of acquittal, there was substantial direct and circumstantial evidence for the jury to find Pettibone's membership in the conspiracy itself. Whiteagle attacks certain, specific pieces of evidence as being insufficient -- standing alone or in combination -- to support the jury's finding that Pettibone was a member of the conspiracy. *First*, the defendant takes issue with the relevance of testimony by Pettibone's ex-wife Kristine Fortney that Pettibone had "no facial reaction" when she told him that Atherton intended to give $100,000 to his tae kwon do studio. Given the size of this donation and the fact that Pettibone wholly-owned the studio, as well as controlled how all funds were used, this alone would be at least some evidence of Pettibone's knowledge of Atherton's and Whiteagle's plan to unduly influence his vote.

Whiteagle, however, materially mischaracterizes Fortney's actual testimony. Fortney testified that Atherton told her that if the deal with Trinity went through the Ho-Chunk Legislature, then Whiteagle and Atherton wanted to give $100,000 to Pettibone personally, not to his tae kwon do business. (Dkt. #185, pp.2-A-157, 158.) Moreover, Fortney testified that when she relayed this conversation to Pettibone, "he didn't say anything. He didn't have any comment. He didn't have any response at all."

(*Id.* at 134, 135.) Certainly from this testimony, Pettibone's nonchalance to this arguably remarkable news is evidence of his prior knowledge that the success of Trinity's proposal before the Ho-Chunk Legislature would be of substantial remunerative value to Pettibone personally.

Second, the defendant challenges the relevance of Pettibone's statement to Fortney that his Pontiac Firebird was a gift from Whiteagle. (Dkt. #185, pp.2-A-137, 138.) Whiteagle argues that the evidence proves nothing more than that Pettibone and Whiteagle had a close relationship, the gift of the Firebird simply being a reflection of that relationship. Whiteagle made this very argument to the jury, which it was free to and obviously did reject. When coupled with Atherton's December 18, 2007, email to Trinity's Frederick *with a copy to Whiteagle* -- indicating that Whiteagle was giving Pettibone the car to reward him for his support of Trinity -- *and* evidence that Whiteagle attempted to "launder" the title of the car through his daughter Summer before giving it to Pettibone, the jury was certainly permitted to infer the worst: that Whiteagle gave the car with strings attached and that Pettibone knew the car was a bribe for his support of Trinity.

Third, the defendant challenges the relevance of Fortney's testimony that Whiteagle and Pettibone often talked about the Ho-Chunk Nation's contracts and vendors, once again mischaracterizing her testimony. (Def.'s Br. (dkt. #175) 4.) Fortney actually testified that Whiteagle would call Pettibone and instruct him as to what he needed to do whenever Cash System was on the legislative agenda. (Dkt. #185, pp. 2-A-125, 129.) While not definitive proof of Whiteagle's orchestrating Pettibone's actions as a legislator, this was certainly relevant testimony.

Fourth, and meritless on its face, the defendant asserts that any references in Whiteagle's emails to vendors regarding Pettibone's knowledge of the conspiracy were false, therefore preventing a jury finding that Pettibone was a member of the conspiracy. Ultimately, the jury simply rejected Whiteagle's story that he was lying in his emails, but telling the truth on the stand. Moreover, the jury's obvious rejection of Whiteagle's testimony is wholly consistent with other evidence that Whiteagle (1) caused certain vendors to offer bribes to Pettibone; and (2) gave money and other valuables to Pettibone in exchange for his support of these vendors.

Lastly, the defendant challenges the relevance of Pettibone's false statements to the FBI as support for the jury's finding that Pettibone was a member of the conspiracy. Specifically, Whiteagle challenges the relevance of Pettibone's statements claiming not to know what Whiteagle did for a living or what his business relationship was with Cash Systems. The defendant erroneously contends that Pettibone simply refused to provide the FBI with information. In response, the government argues that if Pettibone had declined to be interviewed, perhaps the jury could infer that he simply did not want to provide the FBI with information. Instead, Pettibone provided *false* statements and those, now-proven lies, along with the other evidence permitted the jury to infer that Pettibone hoped to cover up his role in a conspiracy with Whiteagle. *See United States v. Carter*, 130 F.3d 1432, (10th Cir. 1997) (holding that a reasonable jury may infer the defendant had a "general awareness of both the scope and the objective of the conspiracy" based, in part, on evidence that he had lied to DEA officers).

The fundamental problem with defendant's challenges to discrete pieces of evidence, however, is not their own lack of merit; it is his failure to consider the evidence

presented at trial as a whole. The entire trial record includes a larger mosaic of circumstantial evidence of a defendant who saw lots of money being made by non-tribal members on the tribe's gaming activities; who saw a way to get a percentage of that money by selling his influence over Pettibone and others in the tribal legislature; and who enlisted and bribed Pettibone to deliver results. This circumstantial proof is bolstered by direct evidence of Whiteagle's motives, plans and execution of his bribery scheme. In short, the record as a whole supports the jury's finding of a conspiracy involving Whiteagle, Pettibone, Atherton and others. *See generally United States v. Hickok*, 77 F.3d 992, 1005 (7th Cir. 1996) (holding that proof of the first element of a conspiracy claim "may rest upon circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and the totality of their conduct" (internal quotations and citation omitted).

B. Counts 2, 3 and 5: Bribery

In counts 2, 3 and 5 of the indictment, the government charged Whiteagle with bribery pursuant to 18 U.S.C. § 666. Whiteagle argues that the government failed to prove he intended to use Cash Systems' payments to influence or reward Pettibone, rather than just to enrich himself. In support, Whiteagle again argues he lied in his emails to Cash Systems' Glaser that requested money was intended for Pettibone. As explained already, however, the jury's rejection of Whiteagle's testimony that he was lying then -- rather than on the witness stand at trial -- has ample support in the record.

There is also sufficient, specific evidence to support counts 2, 3 and 5, at least when viewed against other evidence undermining Whiteagle's assertions of alternative

explanations. Count 2 charged Whiteagle with causing Glaser to agree to bribe Pettibone in December 2006 and January 2007. In a December 2006 email, Whiteagle proposed that Cash Systems pay $17,750 to cover medical expenses for Pettibone's mother and a $14,000 campaign contribution for Pettibone in exchange for his support of a two-year contract with the Ho-Chunk Nation. The government also submitted bank records showing that Cash Systems wired $14,000 to Whiteagle on January 8, 2007, and $17,750 on January 11, 2007. Combined with other evidence of Whiteagle claiming to exert influence over Pettibone, the jury could reasonably have found Whiteagle had caused Glazer to do exactly what appears: funnel bribes to Pettibone through Whiteagle.

Count 3 charged Whiteagle with causing Glaser to agree to give a bribe to Pettibone in February and March 2007. On February 21, 2007, Whiteagle sent an email to Glaser in which he stated that "the things C is doing cost little money compare[d] to what he is capable of doing for us. C needs another $8,500 for his campaign . . . . If C is out[,] CS is out." (Govt. Ex. 3-1(I).) In an email dated March 7, 2007, Whiteagle wrote that "C said the CS contract should be for three years." (Govt. Ex. 4-3.) Again, in a March 12, 2007, email, Whiteagle inquired as to the "status of the political campaign funds coming along.....I meet with C in 2 hours?" (Govt. Ex. 4-4.) The next day, Cash Systems wired $8,500 to Whiteagle and on March 15, 2007, Whiteagle withdrew $8,500 in cash. On March 19, 2007, Atherton placed an order with a promotions company for campaign materials for Pettibone's 2007 re-election campaign. Whiteagle admitted that some of the money from Cash Systems was used to buy campaign materials for Pettibone. Again, the jury could reasonably believe that these contributions were made in furtherance of a larger bribery scheme.

Count 5 charged Whiteagle with causing Glaser to agree to bribe Clarance Pettibone in 2007 in the amount of $8,000. On June 28, 2007, Whiteagle sent Glaser and email soliciting $8,000 to cover Pettibone's legal fees:

> C wanted me to tell you that he will need some funds for his legal defense against Greg Black Deer Cuz if C loses that C will have to go thru another election which we don't want. I would carry that expense for a atty and wire $8,000 out of my August payment. There is no doubt that CS will be in for another 3 to 6 months…..C implied that your present contract albeit it is only for a 30 day or month to month agreement is a SOLID contract. . . I will need lobbying funds to stop Willie out of the $8,000 too. I think you know while I may have a lot of voters behind C IF we don't have C we don't have a man inside to protect and promote our interests . . . Plus if we help C then that's all the more C would help CS. C doesn't forget a favor . . . ever!!!! As I see it this another year and why am I being penalized from CS for asking about lobbying funds?? I will help CS and myself and take the $8000 out of my August payment but I can't do this every month…..Send fund out Friday and thank you….I hope we win. . . Tim . . . P.S. we always win!

(Govt. Ex. 4-10.) On July 2, 2007, Cash Systems wired $8,000 to Whiteagle; Whiteagle then withdrew $3,000 in cash. Against the larger background, this, too, could reasonably be seen as payments to keep Pettibone's support of Cash Systems' contract with the Ho-Chunk Nation.

C. Count 6: Aiding and Abetting

Count 6 charged Whiteagle with aiding and abetting Pettibone's solicition of a bribe by sending an email to Money Centers of America on March 10, 2008. Whiteagle argues that the government failed to prove that Pettibone solicited this bribe, as required before Whiteagle could be found guilty of aiding and abetting Pettibone's solicitation.

Specifically, Whiteagle contends that the evidence supported an inference that Pettibone had *no* knowledge of Whiteagle's dealings with Money Centers. Unfortunately for Whiteagle, there is substantial evidence to the contrary.

The government's evidence demonstrated that Pettibone was aware of Whiteagle's work with Money Centers, including Whiteagle's interactions with Money Centers' Chris Wolfington. Indeed, Whiteagle instructed Wolfington to reach out affirmatively to Pettibone about the proposed agreement, noting that Pettibone would not call Wolfington on his work phone number out of fear of creating a record of the call, but that the Ho-Chunk Nation did not track incoming calls. On March 10, 2008, Whiteagle also copied Pettibone on an email to Wolfington about the MCA contract, because (the jury could reasonably infer): (1) he wanted Pettibone to know what he was saying to Wolfington about the MCA deal; and (2) he wanted Money Centers to know he had Pettibone's ear. On March 19, 2008, Pettibone made a motion in the Ho-Chunk Legislature to agree with the recommendation of the Nation's business department to enter into a contract with MCA. On March 21, 2008, Whiteagle also emailed Wolfington requesting specific details on the financial aspects of the deal with MCA. After additional exchanges with Whiteagle on June 17, 2008, MCA signed a contract with the Ho-Chunk Nation. Whiteagle then emailed Wolfington telling him to send the contract with signatures *and* cash consistent with the agreement.

From these email exchanges -- as well as Whiteagle's acknowledgement that he copied Pettibone on at least some of these emails so that Pettibone would know about the exchanges -- the jury could infer that Pettibone had knowledge of the MCA arrangement and that he participated in the solicitation of a bribe from MCA.

D. Counts 7 and 8:

Counts 7 and 8 charged Whiteagle with violating sections 666(a)(2) and 666(a)(1)(B) in connection with MCA's hiring of Clarence Pettibone's cousin, Jon Pettibone. Count 7 alleged that Whiteagle aided and abetted Pettibone in "corruptly solicit[ing] and demand[ing] for the benefit of a relative that [MCA] employ the relative . . . intending to be influenced and rewarded." (Dkt. #94-1 at p.18.) Count 8 alleged that Whiteagle "corruptly caused an offer of [MAC] to agree to employ . . . a relative of Clarence P. Pettibone, with intent to influence or reward Pettibone."

The defendant argues that the government failed to prove that either Pettibone or Whiteagle acted "corruptly" or "with intent to influence or reward" in connection with his cousin's employment. The defendant also argues that these counts are "multiplicitous," by which he apparently means they constitute a single offense under *Blockburger v. United States*, 284 U.S. 299 (1932), because the government relied on the exact same facts to prove both counts; indeed, needed no additional fact to prove either count. The court rejects both arguments.

1. "Corruptly" requirement

In a March 18, 2008, email, Whiteagle sent Money Center's Wolfington a request from Clarence Pettibone that MCA hire his cousin and pay him $50,000 a year.

> I talked to Mr. C… Mr. C. also wanted [Jon] Pettibone would continue to work for the new booths along with Roxanne Choka. The wage for Jon Pettibone would be $50,000 per year with Roxanne Choka getting $40,000 per year. They are verrry valuable to you as they can do things politically that I could not do and they would be very loyal. [Cash Systems] will fire them soon.

(Govt. Ex. 4-39.) Whiteagle contends that this email simply suggests -- but does not demand -- that MCA hire Jon Pettibone. Indeed, Whiteagle contends that the email shows a legitimate business rational for his hiring suggestion -- that Jon Pettibone is politically savvy and loyal.

Even if Whiteagle's interpretation of this email was plausible -- an interpretation he already argued, apparently unsuccessfully, to the jury -- the emails sent by Whiteagle before and after March 18th support the jury's finding of guilt on counts 7 and 8. Specifically, in other emails around the time of the March 10th email, Whiteagle pressed for details on the financial component of a deal with MCA. The placement of the March 10th email in the midst of negotiations with MCA about its financial contributions supports a finding that Whiteagle and Pettibone were leveraging MCA's hiring of Jon Pettibone as part of their compensation for backing MCA's proposed contract with the Ho-Chunk Nation.

In June 2008, Whiteagle again pushed for Jon Pettibone's hiring. On June 20, 2008, Whiteagle emailed Wolfington: "[Clarence Pettibone' wanted to know ASAP when Jon Pettibone will be hired." (Govt. Ex. 4-32.) On June 22, 2008, Whiteagle again emailed Wolfington, "Call me so I can relay the message to [Clarence Pettibone].....what your decision is on Jon Pettibone.....I believe he is your man in the Business department and can get things done for you quicker." (Govt. Ex. 4-33.) Following that email, MCA hired Jon Pettibone at an annual salary of $50,000. These emails support the jury finding as to count 7 that Clarence Pettibone solicited the hiring of Jon Pettibone as a bribe, with corrupt intent to be influenced or rewarded in connection with

the Nation's business and that Whiteagle knowingly helped Clarence Pettibone by sending emails to Wolfington.

For the same reasons, the evidence also supports the jury's finding as to Count 8 that Whiteagle corruptly caused Wolfington to agree to hire Jon Pettibone with the intent to influence or reward Clarence Pettibone in connection with the Ho-Chunk Nation's business.

2. Separate Offenses

Whiteagle contends that counts 7 and 8 are "multiplicitous" because they both rely on the March 18, 2008 email seeking Jon Pettibone's hiring. Counts are not separate, however, simply because they share some of the same elements. *See Blockburger*, 284 U.S. at 304 ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). Count 7 required proof that Whiteagle *aided and abetted Clarence Pettibone* in his solicitation and demand. Count 8 required proof that *Whiteagle caused MCA* to agree to hire Jon Pettibone. The fact that both counts relied on overlapping evidence does not render them the same offense.

ORDER

IT IS ORDERED that:

1) Defendant Timothy G. Whiteagle's motion for acquittal (dkt. #172) is DENIED; and

2) Defendant's motion for new trial (dkt. #174) is DENIED.

Entered this 24th day of October, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* *

UNITED STATES OF WISCONSIN,

Plaintiff,

-vs- Case No. 11-CR-65-WMC

TIMOTHY WHITEAGLE, Madison, Wisconsin
October 24, 2012
Defendant. 1:05 p.m.

* *

STENOGRAPHIC TRANSCRIPT OF SENTENCING HEARING
HELD BEFORE CHIEF JUDGE WILLIAM M. CONLEY,

APPEARANCES:

For the Plaintiff: Office of the United States Attorney
BY: STEPHEN SINNOTT
LAURA PRYBYSINSKI FINN
Assistant United States Attorneys
660 West Washington Avenue
City Station, Ste. 303
Madison, Wisconsin 53703

For the Defendant: Reynolds & Associates
BY: GLENN REYNOLDS
407 East Main Street
Madison, Wisconsin 53703

Also appearing: Timothy Whiteagle, defendant
Rich Williams, U.S. Probation Agent
Marcel Oliveira - law clerk

Lynette Swenson RMR, CRR, CBC
Federal Court Reporter
U.S. District Court 120 N. Henry St., Rm. 520
Madison, WI 53703 (608) 255-3821

(Call to order)

THE CLERK: Case Number 11-CR-65-WMC-1. *United States of America v. Timothy G. Whiteagle* is called for sentencing. May we have the appearances, please.

MR. SINNOTT: Stephen Sinnott and Laura Przybylinski Finn on behalf of the United States.

MR. REYNOLDS: Good afternoon, Your Honor. Glenn Reynolds on behalf of Timothy Whiteagle, who is present, and Marcel Oliveira, my law clerk.

THE COURT: Very good. We're here for the sentencing of Timothy G. Whiteagle. Mr. Whiteagle, my first responsibility is to ask you whether you've had sufficient time to read and discuss with your counsel the pre-sentence report and the addendum to that report.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Very good. Because the defendant exercised his right to trial, there is no plea agreement in the case. In determining a reasonable sentence, I will take into consideration the advisory sentencing guidelines, as well as the statutory purposes of sentencing that are set forth at Sec. 3553(a) of Title 18.

As is my practice, I will first set forth the sentencing guidelines and then hear from counsel and the defendant as to an appropriate sentence. The

defendant's clarifications to the pre-sentence report are reflected in the addendum but do not affect the offense conduct section of the pre-sentence report which accurately sets forth the conduct for which the defendant was convicted by a jury and is the basis for calculating the guideline range applicable here.

Specifically, the jury found the defendant conspired to commit bribery; that he did, in fact, commit and caused others to commit several acts of bribery; that he did, in fact, aid and abet the solicitation of bribes, as well as filed false tax returns and tampered with a witness.

The evidence at trial established that the defendant funneled money and other items of substantial value to Clarence Pettibone and his family members and that the defendant solicited his business clients to do the same in order to corrupt Pettibone's actions as an elected official of the Ho Chunk Nation. Accordingly, the appropriate guideline for the conduct charged in Counts 1-4 and 6-10 of the superseding Indictment is found at Sec. 2C1.1.

Because the defendant and others conspired to provide financial inducements to Clarence Pettibone, a legislator for the Ho-Chunk Nation, the amount of the contracts is appropriately used to calculate the offense

level. The probation office has prepared the advisory guideline calculations correctly using the current guideline manual, taking into account all relevant conduct pursuant to Sec. 1B1.3.

Specifically, the defendant was convicted of Count 1 of the superseding Indictment charging conspiracy to commit bribery under Sec. U.S.C. -- Title 18, U.S.C. Sec. 371, 666(a)(2) and 666(a)(1)(B). The convictions for Counts 1-4 and 6-10 were grouped for purposes of the guideline calculations pursuant to Sec. 3D1.2(b) and (d) because they involved two or more acts of transactions connected by a common criminal objective and because the offense level is largely determined on the basis of the total loss.

The guideline for counts of conviction conspiracy to commit bribery, bribery, and aiding and abetting is found at Sec. 2X1.1. Pursuant to subsection (1)(a), the base offense level is determined by the substantive offense level plus any other adjustments that can be established within a reasonable certainty. According to 2C1.1(a)(1), the guideline for bribery, the base offense level is 12 because the defendant was not a public official.

According to subsection (b)(1) of that same section, a two-level increase is warranted because the

defendant facilitated bribes on a number of occasions to Pettibone. Pursuant to subsection (1)(b)(2) if either the loss from the offense or the value of the payment, the benefit received or to be received or anything obtained or to be obtained by a public official or other acting with a public official exceeds $5,000, an increase by the number of levels from the loss table in Sec. 2B1.1 also applies.

The benefits received by the companies involved in the present offense exceeds 2 .5 million dollars but is less than 7 million dollars, therefore pursuant to subsection (1)(b)(1)(J), an 18-level adjustment is warranted.

Because the offense involved the bribery of an elected official, a four-level increase also applies under Sec. 2C1.1(b)(3), therefore the offense level is 36 under Sec. 2X1.1(a).

No other specific offense characteristics are applicable, although a two-level increase under Sec. 2C1.1 is also appropriate because the defendant testified falsely under oath on events that form the basis of the offenses of conviction.

The guidelines for Counts 13 and 14 and for Counts 15 are set out in the pre-sentence report.

As for filing a false tax return in violation of

Secs. -- of Sec. 7206(1) of Title 26, the guideline provides under Sec. 2T1.1 the base offense level under subsection (1)(a) of that provision corresponds to the tax not collected or accounted for and paid. Here the tax not paid was $162,854. According to subsection (1)(F), offenses involving tax loss of more than $80,000 but not more than $200,000 have a base offense level of 16. A two-level adjustment is applicable under Sec. 3C1.1 and results in a total offense level of 18.

As to Count 15, a violation of Sec. 1512(b)(3) of Title 18 for witness tampering is found at Sec. 2J1.2 of the guidelines. According to subsection (2)(a), the base offense level is 14, with a two-level adjustment applicable under subsections 3C1.1 for a total offense of 16.

All this alphabet soup of guideline provisions results here in a total for the multiple count adjustment under Sec. 3D1.1 of the highest offense of 38, making the adjusted offense level 38 without an adjustment for acceptance of responsibility under Sec. 3E1.1 because the defendant put the government to its burden of proof at trial by denying the essential factual elements of the guilt.

With a total offense level of 38 and a criminal history category of 1, the defendant therefore has an

advisory guideline imprisonment range of 235 to 292 months, which the Court acknowledges is a staggering guideline range but for the seriousness of the charges that he was found guilty for.

With that said, I have read all of the materials that the parties provided, as well as the letters written on behalf of the defendant by his sister, two of his children, and a few others and am still considering the appropriate sentence given all factors in this case. And I will hear first from the government as to any additional comments the government wishes to make.

MR. SINNOTT: Yes, Your Honor. If I may, if I could ask the Court to make a supplemental finding for the record to support its 18-level adjustment under 2C1.1(b)(2) under the bribery guideline. The Court has, I submit, appropriately determined that it's an 18-level increase based on a 2.5 million to 7 million dollar benefit to the companies. I think the evidence at trial was clear that the companies received well in excess of 10 million dollars. But alternatively, that same range is justified because Mr. Whiteagle himself received 3 million dollars.

Looking at the guideline, it talks about the Court should look to the greater of these variables, one of which is the value of anything obtained or to be

obtained by a public official or others acting with a public official. Mr. Whiteagle falls into that category and the 3 million dollars that he received pursuant to this scheme, I submit, was received by him acting with Clarence Pettibone and is an alternative basis for a range of 2.5 to 7 million dollars under that guideline and I would ask the Court for the record to so find.

THE COURT: I think my basis for finding what I did has already been laid out by the Court; that is, that the companies who were involved in this bribery scheme with the defendant did indeed obtain contracts falling within this range; in part, contrary to the defendant's position; in part, in the Court's view, because of the efforts of the defendant and the bribes he facilitated. It is not unreasonable and I do find that the defendant himself benefited from these -- his own contracts with the vendors involved in the amount of 3 million dollars, at least in part due, and in fairness substantially because of his promised influence and ultimately illegal influence over a tribal official, Mr. Pettibone. And so I do think that the 18-level adjustment is also justified by virtue of the payments that the defendant received directly.

Anything further for the government?

MR. SINNOTT: With that, Your Honor, I'm

prepared to address the factors to be considered by the Court in determining the appropriate sentence, if I may. Having -- all of us were at the trial, and also having reviewed the materials submitted by the defense in connection with this sentencing, it's apparent that he's continuing the same tactic of concealment and blame that he used as his defense at trial. The evidence showed at trial that the defendant engaged in many different ways of trying to conceal his activity and I submit that his position now as he stands being ready to be sentenced by the Court is more of the same.

He says that he's sorry for his disgrace, but it's apparent that he's not sorry for his disgraceful conduct. He continues now, as he did at trial, to blame everyone but himself for the reason why he's here today. He blames Cash Systems for what he refers to as throwing money at him. He blames an addiction to money, for being dazzled by money, and attracted to the millions of dollars that he received. He blames the United States for not deferring to the Ho-Chunk Nation's judicial court rather than bringing a criminal prosecution. He blames the government for wrongly criminalizing his conduct, and then he turns around and blames the government for not prosecuting others for that same conduct.

He blames the email evidence in this case as being confusing and ambiguous and not disclosing the truth of what happened. He blames the witnesses by calling them liars, saying that they wrongly incriminated him. He blamed at trial his tax preparer for telling him allegedly to report zero on his tax returns, although he is back pedaling from that position now.

And finally, I think the most audacious blame that he tries to -- the most audacious thing that he tries to do is he tries to hide behind the gift-giving traditions of the Ho-Chunk Nation. I say audacious because I think it took audacity for Timothy Whiteagle to try to hide behind the noble traditions of the very people whose trust he violated, the very people from whom he stole. He is not the victim that he has really so desperately tried to portray himself as before the jury and even now. He is not a victim. All of this evidence shows they are the cowardly actions of someone who is trying to hide his crimes; a manipulative, deceitful person willing to say anything to avoid responsibility for his actions.

Regarding his sentence, the defense argues in its submission that the Court should give Mr. Whiteagle the same sentence it gave Mr. Pettibone, and I submit that the sentence should be substantially higher. It's true

that Mr. Whiteagle has significant health concerns, and I don't mean to minimize them. But they are not so serious as to warrant a lower prison time. His own doctor's notes indicate that good diet and exercise are what's called for for Mr. Whiteagle.

Mr. Whiteagle doesn't deserve the sentence that Mr. Pettibone got because Mr. Pettibone accepted responsibility for his conduct. Mr. Whiteagle deserves more of a sentence than Mr. Pettibone because Mr. Whiteagle, unlike Mr. Pettibone, obstructed justice repeatedly. And Mr. Whiteagle was the, contrary to his contention in his submissions that somehow the vendors were the driving force behind the scheme, it's obvious from the evidence that Mr. Whiteagle was the architect of this scheme. Mr. Whiteagle was the mover and shaker of this operation. And for all of those reasons, the Court should sentence him to a sentence substantially higher after considering the 3553(a) factors. Thank you.

THE COURT: Thank you, Mr. Sinnott. Mr. Reynolds.

MR. REYNOLDS: Well, thank you, Judge. The trial is over and Mr. Sinnott's comments seem like he's still in the trial mode. I mean --

THE COURT: Well, in fairness, so did some of

THE COURT: But that isn't what we have here, Counsel, and to continue to try to paint it like that really does a disservice. The fact is he gave money directly to an individual. He gave cash -- he made cash payments to that individual.

MR. REYNOLDS: There were no cash payments, Judge.

THE COURT: No, there were cash payments. The jury certainly had more than enough basis to believe, given the timing of payments to your client, the cash withdrawals that he made within a similar period and the cash deposits by Mr. Pettibone into his account, that there were cash payments. The fact that we can't trace them to a ne'er-do-well doesn't mean that there wasn't beyond a reasonable doubt proof that monies were being changed hands.

MR. REYNOLDS: There was no reason from Mr. Whiteagle's point of view, Judge, to hide these payments.

THE COURT: Well, there was every reason for him to hide the payments, just as there was every reason for him to hide the substantial sums of money that he was receiving under the table from vendors who were seeking to do business with Mr. Pettibone and the tribe.

MR. REYNOLDS: But it was all -- the payments

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

OPINION & ORDER

Plaintiff,

v. 11-cr-65-wmc

TIMOTHY WHITEAGLE,

Defendant.

Before the court is defendant Timothy Whiteagle's motion to correct the sentence and for a new sentencing hearing (dkt. #214), both of which the court will deny. Even construing these motions as a request for reconsideration -- as recently suggested by the Seventh Circuit Court of Appeals and as defense counsel now represents was his unstated intent -- the court finds such a motion to be meritless and will deny it.[1]

BACKGROUND

On August 1, 2012, after an eight-day jury trial, the defendant was found guilty of one count of conspiracy to commit bribery, six counts of bribery, two counts of aiding and abetting the solicitation of a bribe, two counts of filing a false tax return and one count of witness tampering. (Dkt. #170.) On October 24, 2012, the court sentenced defendant to ten years in prison. Thirteen days later, defendant filed the present motions purporting to challenge certain facts pursuant to Fed. R. Crim. P. 35(a) that the court relied upon in sentencing, but which he claims were not supported by the record.

[1] The court also is in receipt of the United States' motion for leave to file a supplemental brief (dkt. #221), which the court will deny grant in part for purposes of taking note of the jurisdiction question in the Seventh Circuit, and otherwise deny as moot.

OPINION

I. Motions to Correct the Sentence and for New Sentence

Rule 35(a) provides:

> **Correcting Clear Error.** Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

This rule is intended to address "only those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court." *United States v. Clark*, 538 F.3d 803, 809 (7th Cir. 2008) (quoting Fed. R. Crim. P. 35 advisory committee's note to 1991 Amendments). Defendant's motion does not raise the type of errors or mistakes which fall within the narrow scope of Rule 35(a). Rather, defendant attempts to challenge findings of the court based on the evidence presented during trial and in anticipation of sentencing. As the Seventh Circuit has explained, "[t]he Rule does not give the district court a second chance to exercise its discretion with regard to the application of the sentencing guidelines, nor does it allow for changes to a sentence based on the court's change of mind." *Clark*, 538 F.3d at 809 (internal quotation marks and citation omitted).

In addition, Rule 35(a) allows for a narrow timeframe in which a court may *correct* any error or mistake. Indeed, the fourteen-day time limit is jurisdictional, *United States v. Wisch*, 275 F.3d 620, 626 (2001), so that even if defendant had identified an error or mistake contemplated by the rule, defendant effectively foreclosed any relief from this court by waiting until the penultimate day of the allowed time-frame to file this motion and by failing to alert the court to its urgency.

II. Motion to Reconsider

Even if properly construed as a motion for reconsideration, this court finds ample evidence in the record for each of the three challenged findings:

1. Defendant Whiteagle directly benefited from a scheme to bribe and corruptly influence a key legislator, Clarence Pettibone, in the form of payments from those seeking to do business with the Ho-Chunk Nation exceeding $2.5 million. The contracts defendant Whiteagle helped facilitate through bribery of Pettibone resulted in private, third parties receiving in excess of $7 million dollar in payments for services rendered the tribe. While those companies *may* have received contracts without the defendant's corrupt influence, the evidence (including Whiteagle's own and his co-conspirator's e-mails) support the finding that without *Pettibone's* leadership those contracts would have gone to others. Moreover, *overwhelming* evidence established that Whiteagle would not have received under-the-table payments exceeding $2.5 million except for his ability to deliver Pettibone's support, which was accomplished in substantial part through ongoing bribery.

2. The court finds based on the evidence at trial and in the presentence report (e.g., the timing of Whiteagle's cash withdrawals and Pettibone's cash deposits; e-mails between Atherton, Pettibone, Whiteagle and/or others; large, unaccounted for contributions to Pettibone's wholly-controlled karate studio; and other, documented sizable payments and gifts to Pettibone) that it was substantially more likely than not cash payments and other bribes were made to Pettibone in addition to those the government proved beyond a reasonable doubt at trial.

3. Based on the testimony at trial and common sense, the court finds that the private vendors involved in this bribery scheme with the defendant included as part of their initial contract (and follow up) pricing a sizable profit over and above their expected costs of doing business, that part of this pricing scheme accounted for monthly five-figure payments to the defendant, and that the pricing would have been lower (whether as a percentage of cost or in profit) but for the corruption and lack of competition resulting from under-the-table dealings with Whiteagle, including advance signaling of prices and terms to be offered and, as was made plain at trial, by extension to Pettibone.

Moreover, none of these three findings, separately or in combination, caused the court to view this case differently or to exercise its discretion in sentencing differently, except that number 1 above (if not accurately stated) *may* have caused the court to begin at a different advisory guideline range.

ORDER

IT IS ORDERED that:

1) defendant Timothy G. Whiteagle's motion to correct the sentence and for a new sentencing hearing (dkt. #214) is DENIED;

2) defendant's constructive motion to reconsider (dkt. #214) is DENIED; and

3) plaintiff United States's motion for leave to file a supplemental report (dkt. #221) is GRANTED IN PART AND DENIED AS MOOT IN PART.

Entered this 5th day of December, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

TIMELINE OF TAE KWON DO EVENTS

DATE	Cash Systems $	Tae Kwon Do Events	Whiteagle $	Pettibone's acts	Exhibit
2002					
Jan. 12, 2002		Rochester tourn.			def. 52-4
Feb. 16, 2002		Wisconsin Rapids tourn.			def. 52-5
Mar. 2, 2002		St. Paul tourn.			def. 52-6
May 3, 2002		Black River Falls demos			def. 52-7
May 20, 2002				Moved for Cash Systems contract	gov't 1-1
May 22, 2002		Detroit tourn.			def. 52-6
May 25, 2002		Memorial Day Pow Wow			
June 27, 2002		Recognition Banquet			def. 52-8
June 30, 2002		Minneapolis jr. olympics			def. 52-6
Aug. 31, 2002		Labor Day Pow Wow			
Sept. 30, 2002	$500				gov't 16-1
2003					
Feb. 26, 2003		Black River Falls demos			
May 5, 2003			$4,000 ($6,000)		gov't 16-2
May 15, 2003				Signed Cash Systems contract	def. 37
May 23, 2003		Detroit, MI tourn.			
May 24, 2003		Memorial Day Pow Wow			
Aug. 30, 2003		Labor Day Pow Wow			
Oct. 27, 2003			$5,000 ($7,000)		gov't 16-3
2004					
Jan. 8, 2004			$2,500 ($4,267)		gov't 16-5
Feb. 14, 2004		Wisconsin Rapids tourn.			def. 52-10
Mar. 27, 2004		Rochester tourn.			def. 52-10
May 8, 2004		Fitness Expo			def. 52-12
May 29, 2004		Memorial Day Pow Wow			
June 8, 2004	$3,500				gov't 16-6
July 16, 2004			$5,000 ($8,000)		gov't 16-7
July 24, 2004		Indigenous Games (Canada)			
Sept. 4, 2004		Labor Day Pow Wow			
2005					

TIMELINE OF TAE KWON DO EVENTS

DATE	Cash Systems $	Tae Kwon Do Events	Whiteagle $	Pettibone's acts	Exhibit
May 28, 2005		Memorial Day Pow Wow			
Sept. 3, 2005		Labor Day Pow Wow			
Oct. 7, 2005	$10,000				gov't 16-8(a)
Oct. 8, 2005		Wisconsin Rapids tourn.			def. 52-13
Nov. 6, 2005		Lac du Flambeau tourn.			def. 52-13
2006					
Feb. 11, 2006		Wisconsin Rapids tourn.			def. 52-14
Mar. 25, 2006		Baraboo Fitness Expo			def. 52-15
April 8, 2006		Rochester tourn.			def. 52-13
April 29, 2006			$1,500 ($22,500)		gov't 16-9
May 16, 2006				Moved to reinstate Cash Systems	gov't 1-1
May 27, 2006		Memorial Day Pow Wow			
July 26, 2006		Denver tourn.			def. 52-17
Sept. 2, 2006		Labor Day Pow Wow			
Nov. 21, 2006				Moved for Trinity contract	gov't 1-3
2007					
Feb. 10, 2007		Wisconsin Rapids tourn.			def. 52-18
May 26, 2007		Memorial Day Pow Wow			
Aug. 23, 2007				Moved for Trinity contract	gov't 1-3
Sept. 1, 2007		Labor Day Pow Wow			
2008					
Mar. 19, 2008				Moved for MCA contract	gov't 1-2
May 24, 2008		Memorial Day Pow Wow			
Aug. 30, 2008		Labor Day Pow Wow			
2009					
May 23, 2009		Memorial Day Pow Wow			
Sept. 5, 2009		Labor Day Pow Wow			