IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12-3554

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TIMOTHY G. WHITEAGLE, Defendant-Appellant.	) Appeal from the United States) District Court for the Western) District of Wisconsin)) Case No. 11-cr-65-wmc))) Honorable William M. Conley) Presiding))

BRIEF OF PLAINTIFF-APPELLEE

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STATUTES

JURISDICTIONAL STATEMENT

The jurisdictional statement set forth in the appellant's brief is not complete and correct. Accordingly, pursuant to Circuit Rule 28(b), the United States submits the following jurisdictional statement.

I. District Court Jurisdiction

A. The district court's jurisdiction was based on Title 18, United States Code, Section 3231.

II. Appellate Court Jurisdiction

A. The Appellate Court's jurisdiction is based on 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

B. The appellant was sentenced on October 24, 2012. (R. 209). The judgment was signed by the district court on October 25, 2012, and entered on the district court record that same date. (R. 211; Appellant's Appendix, 101-107).

C. On November 6, 2012, the appellant filed a motion to correct the sentence and for a new sentencing hearing, which was denied on December 5, 2012. (R. 214 & 223; Appellant's Appendix, 136-139).

D. The appellant filed his timely notice of appeal of the judgment on November 7, 2012. (R. 216).

E. This case is not a direct appeal from a decision of a magistrate judge.

STATEMENT OF THE ISSUES

I. Whether the district court correctly denied Whiteagle's motion for judgment of acquittal because, when viewing the evidence in the light most favorable to the government, the government proved beyond a reasonable doubt that Whiteagle conspired to commit bribery, and willfully caused, and aided and abetted, the crime of bribing a public official.

II. Whether the district court correctly denied Whiteagle's motion for a new trial when the court found that evidence related to defendant's submission of false invoices and a co-defendant's false statements was properly admitted at trial.

III. Whether Whiteagle's 120-month sentence was reasonable and based on the correct advisory sentencing guideline section and the correct loss calculation.

STATEMENT OF THE CASE

On June 15, 2011, a federal grand jury sitting in the Western District of Wisconsin returned a 14-count indictment against Timothy G. Whiteagle, Clarence P. Pettibone, and Deborah Atherton, charging them with conspiracy to commit bribery in violation of 18 U.S.C. § 371, and substantive violations of 18 U.S.C. § 666. Whiteagle was also charged with tax-related crimes in violation of 26 U.S.C. §§ 7201 and 7206. (R. 5). On February 23, 2012, the grand jury returned a 15-count superseding indictment against Whiteagle, Pettibone, and Atherton, charging the same conspiracy and bribery counts, adding details to the tax counts against Whiteagle, and charging Whiteagle with witness tampering in violation of 18 U.S.C. § 1512(b)(3). (R. 50).

On April 10, 2012, co-defendant Clarence Pettibone pleaded guilty to Count 5 of the superseding indictment, charging him with being an elected legislator of the Ho-Chunk Nation and corruptly accepting a Pontiac Firebird from Whiteagle and Atherton, intending to be influenced and rewarded in connection with contracts to provide housing to the Ho-Chunk people, in violation of 18 U.S.C. § 666(a)(1)(B). (R. 91 & 50). On July 11, 2012, Pettibone was sentenced to 60 months in prison. (R. 131 & 133).

On July 23, 2012, a jury trial commenced against Whiteagle on the twelve remaining counts in the superseding indictment.[1] (R. 152). On August 1, 2012, the jury returned guilty verdicts against defendant on all twelve counts. (R. 169).

On August 15, 2012, Whiteagle timely filed motions for acquittal and a new trial. (R. 172 & 174). The United States opposed both motions, and on October 24, 2012, the district court denied both motions and proceeded to sentencing. (R. 191, 192, & 208).

Before sentencing, a Presentence Investigation Report (PSR) was prepared. (R. 197). Although the United States had no objections to the advisory guideline calculations in the report, defendant objected to a number of factual statements, as well as the application of USSG § 3C1.1 for obstruction, and the use of USSG § 2C1.1, instead of § 2C1.2, to determine the base offense level. (R. 201, 202, & 203).

At sentencing, the district court adopted the calculations provided in the PSR, applying both the enhancement for obstruction pursuant to § 3C1.1, and using § 2C1.1 to determine the base offense level. (R. 225, 3-6; Supplemental Appendix (SA), 3-6). The court sentenced defendant as follows: Count 1, 60 months in prison; Counts 2-4 and 6-10, 30 months per count to run concurrently with each other, and consecutively to the sentence imposed for Count 1; Counts

[1] Whiteagle was not charged in Counts 5 and 11. (R. 50). Count 12, a tax count, was severed and later dismissed. (R. 58 & 211).

13 and 14, 30 months per count to run concurrently with each other, and consecutively to the sentences imposed for Count 1 and Counts 2-4 and 6-10; and Count 15, 120 months to run concurrently to the other sentences. (R. 211; Appellant's Appendix 102). The result was an aggregate sentence of 120 months. (Id.).

On November 6, 2012, defendant filed a motion to correct the sentence and for a new sentencing hearing, which was denied on December 5, 2012. (R. 214 & 223; Appellant's Appendix 136-139).

On November 7, 2012, defendant filed his timely notice of appeal from the judgment. (R. 216).

STATEMENT OF FACTS

I. Introduction

After an eight-day trial, the jury found Whiteagle guilty of all twelve remaining counts of the superseding indictment. (R. 170). On appeal, Whiteagle challenges his convictions on Counts 1-4 and 6-10, the bribery-related conduct in violation of 18 U.S.C. §§ 371 and 666. He does not challenge his convictions on Counts 13 and 14 for filing false tax returns in violation of 26 U.S.C. § 7206(1), or Count 15 for witness tampering in violation of 18 U.S.C. § 1512(b)(3). In addition, Whiteagle asks this Court to vacate his sentence and remand for resentencing.

II. Background

The Ho-Chunk Nation is a federally recognized Indian Tribe based in the Western District of Wisconsin whose major business is gambling casinos. (R. 176, 1-P-70). The Nation's legislature enters into contracts with corporate vendors for services to operate the casinos and provide services to tribal members, including mortgage services and housing. (R. 176, 1-P-96, 97).

Defendant is a Ho-Chunk Tribal Member who many years ago was on the Nation's Business Committee for approximately 18 months, until he was removed. (R. 189, 6-P-46-47). From 2000 through 2009, Whiteagle worked as a paid "consultant" or "lobbyist" for at least three vendors seeking to do business

with the Nation: two cash-access providers, Cash Systems and Money Centers of America, and one housing developer, Trinity Financial Group. (R. 181, 6-A-59; R. 178, 3-P-49-53; R. 189, 6-P-92; Govt. Ex. 16-20). Whiteagle's consulting company, Wolfbow Big Game Sources, had a bank account through which Whiteagle received many of his fees from these vendors. (R. 189, 6-P-113; R. 178, 3-P-53; Govt. Exs. 16-18, 16-19, & 16-20).

Clarence Pettibone served as a legislator for fifteen years in the Ho-Chunk legislature from 1995 until 2011. (R. 185, 2-A-115). At various times while serving as a legislator, he also served as the Nation's Vice President, chairman of the legislature's Finance Committee, and a member of the legislature's Development Committee. (R. 176, 1-P-85). Defendant and Clarence Pettibone knew each other for decades because their families had a relationship. (R. 189, 6-P-49).

Kristine Fortney met Clarence Pettibone in 1991 when they both worked for the Ho-Chunk Nation. (R. 185, 2-A-113). The two began dating in 1992, and married in 1994. (Id.). After fourteen years of marriage, Fortney filed for divorce, which was final in August 2008. (Id.). Fortney first met Whiteagle in 1995 after Pettibone was elected to the legislature. (R. 185, 2-A-118, 161).

Beginning in the early 2000s, the Pettibone family socialized at times with Whiteagle and his girlfriend, Deborah Atherton. (R. 185, 2-A-119).

III. Cash Systems

From 2002 to 2008, the Nation contracted with Cash Systems to provide its casinos cash-access services. (R. 176, 1-P-100,106, 109). At the time, Whiteagle represented Cash Systems as a behind-the-scenes consultant. (R. 185, 2-A-168). Under his consulting contract, his "confidential" duties included "maintenance" of Cash Systems' relationship with legislators and tribal members "to facilitate maintaining the Ho-Chunk casino contract." (R. 189, 6-P-118; Govt. Ex. 7-2). In Whiteagle's words, when he testified in his own defense, Cash Systems originally contracted him "to lobby, initiate finding a legislator that would be able to bring a - sponsor a proposal to the tribe." (R. 182, 7-A-115, 116). Clarence Pettibone was that legislator. (R. 189, 6-P-113).

Beginning in 2002, Whiteagle signed a contract with Cash Systems, receiving a salary of $22,500 per month. (R. 189, 6-P-56). Between 2002 and 2008, Whiteagle was paid a total of approximately $1,974,436 by Cash Systems related to the Ho-Chunk Nation contract. (R. 182, 7-A-34). During that same time, the Ho-Chunk Nation paid Cash Systems well in excess of $7,000,000. (R. 185, 2-A-165-166).

In May 2002, Clarence Pettibone made a motion in the Ho-Chunk legislature to adopt a resolution selecting Cash Systems as the Nation's cash-access provider, and the motion passed. (R. 176, 1-P-101). To celebrate getting the contract, Cash Systems personnel took Whiteagle and Pettibone to a strip club in Minneapolis where, in the course of a few hours, Cash Systems spent more than $27,000. (R. 185, 2-A-173-74, 176).

When the Ho-Chunk legislature occasionally looked into replacing Cash Systems with a competitor, Whiteagle often conferred with Pettibone about how to help Cash Systems keep the contract. (R. 185, 2-A-125, 129). In fact, Kristine Fortney, Pettibone's then wife, overheard more than twenty such conversations, with Whiteagle doing most of the talking and Pettibone agreeing with Whiteagle. (Id., 2-A-123-126). Whiteagle also instructed Pettibone how to help Cash Systems fend off competitors at the Ho-Chunk Nation (Govt. Exs. 3-1(c)-(f)), at one point writing to Pettibone that "we will pay big time" if a Cash Systems competitor was not thwarted. (R. 185, 2-A-128; Govt. Ex. 3-2(b); R. 186, 3-A-8, 14; Govt. Ex. 25-2).

An FBI forensic accountant reviewed Whiteagle's bank accounts, finding that of the nearly $2,000,000 paid by Cash Systems to Whiteagle or his company Wolfbow between 2002 and 2008, very few checks were written on those

accounts, and the bulk of the money was withdrawn as cash or used to purchase cashier's checks. (R. 186, 3-A-22, 42). Agents were able to trace the money that was not withdrawn as cash, and found that Whiteagle used some of the funds from Cash Systems to make substantial payments directly to Pettibone. (R. 186, 3-A-24; Govt. Ex. 16-2). In addition, Cash Systems wrote checks payable to Pettibone's martial arts school, Park Institute Black River Falls. (R. 186, 3-A-22; Govt. Ex. 16-1).

Between September 2002 and May 2006, Cash Systems wrote three checks directly payable to Park Institute Black River Falls or Clarence Pettibone, totaling $14,000. (Id.). After receiving wire-transferred funds from Cash Systems, Whiteagle within days provided cashier's checks or money orders to Clarence Pettibone, totaling $18,000. (R. 186, 3-A-22-32; Govt. Exs. 16-1,2,3,4,5,6,7,8(a) & (b), and 9). In September 2005, Roscoe Holmes of Cash Systems emailed John Glaser, the new Executive Vice President for Sales and Marketing at Cash Systems, relaying Whiteagle's request for a $10,000 contribution to Park Institute, which Holmes described as "a karate school operated by Clearance (sic) Pettibone our allies (sic) political proponents (sic) at Ho-Chunk Nation." (Govt. Ex. 6-1). The purpose of the payment, in Holmes's words, was to "help foster a more direct bond from a mutually gratifying prospective (sic)." (Id.). Three

weeks later, Cash Systems issued a $10,000 check to Park Institute. (Govt. Exs. 16-8(a) & (b)).

In the spring of 2006, Cash Systems unexpectedly lost its contract when the Nation's Executive branch unilaterally signed a contract with a competitor, Certegy. (R. 176, 1-P-102). In an email dated May 2, 2006, Whiteagle wrote to Cash Systems' Brian Johnson, "I talk to our man last night and he will be talking to the prez...but he said the prez couldn't do that.....to sign the contract." (R. 177, 2-P-11-12; Govt. Ex. 9-4). On May 13, 2006, Pettibone negotiated a $1,500 cashier's check from Whiteagle dated April 29, 2006. (R. 186, 3-A-32; Govt. Ex. 16-9). On May 16, Pettibone argued at a legislative session that the new contract with Certegy had been inappropriately signed and should have been brought before the legislature for review. (R.176, 1-P-103-105). Pettibone made motions to terminate the contract with Certegy and reinstate the contract with Cash Systems; both motions carried unanimously. (Id.). The Nation reinstated Cash Systems as the cash-access provider, but only on a month-to-month basis. (Id., 1-P-105).

From then on Cash Systems wanted a long-term contract, and Whiteagle regularly solicited Cash Systems for payments over and above his regular $22,500 per month payment, ostensibly for "political action" and "lobbying" efforts. (R.

189, 6-P-123-124; Govt. Ex. 4-12). Whiteagle repeatedly told Cash Systems personnel, primarily via email, that he needed the funds to pay Pettibone to keep his support for Cash Systems. (R. 189, 6-P-133-134, & 137; R. 182, 7-A-14-15). To support these requests, Whiteagle sometimes fabricated and submitted to Cash Systems patently false invoices for fictitious "advertising" and "travel" costs, along with nonexistent "legal" and "promotion" expenses, all in round dollar amounts. (R. 189, 6-P-127-132; Govt. Exs. 9-5, 9-8, 3-2(c), & 3-2(e)). It became obvious to Brian Johnson, Whiteagle's primary contact at Cash Systems, and other Cash Systems personnel that the invoices were not legitimate; but Cash Systems nevertheless paid Whiteagle the requested funds. (R. 177, 2-P-59-60; Govt. Ex. 4-6).

In December 2006, Whiteagle wrote a proposal to Cash Systems for funds for Pettibone, expressly proposing that Pettibone would get Cash Systems a two-year contract in exchange for a $17,750 payment to cover medical expenses for Pettibone's mother and $14,000 for Pettibone's upcoming political campaign. (Govt. Ex. 3-3(c)). Whiteagle testified that Pettibone never said the things attributed to him in the email, claiming that Whiteagle lied to Glaser. (R. 189, 6-P-134). Cash Systems promptly sent these exact amounts of money to Whiteagle.

(Govt. Exs. 16-17(a) & (b)). Upon receiving the funds, Whiteagle withdrew $1500 in cash. (Id.).

In February 2007, Whiteagle solicited Cash Systems for another campaign contribution for Pettibone, saying Pettibone needs "another $8,500 for his campaign." (R.189, 6-P-137; Govt. Ex. 3-1(i)).[2] Whiteagle noted that the things Pettibone was doing for Cash Systems "cost little money compare (sic) to what he is capable of doing for us," and if Pettibone is out, then Cash Systems is out. (Govt. Ex. 3-1(i)). Whiteagle testified that Clarence Pettibone did not get that money. (R. 189, 6-P-138).

On March 13, 2007, Cash Systems wired Whiteagle $8,500. (R. 189, 6-P-140; Govt. Ex. 16-11). Two days later, Whiteagle withdrew $3,500 in cash. (Id.). And on March 19, 2007, Deborah Atherton placed an order with a promotions company for campaign materials for Pettibone's 2007 re-election campaign -- 250 pocket notebooks and 250 pens engraved with "VOTE Pettibone." (R. 188, 5-A-12-13; Govt. Ex. 22-1; Govt. Ex. 16-14). Whiteagle directed Atherton to buy them. (R. 188, 5-A-45-46; R. 182, 7-A-128; R. 189, 6-P-140).

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[2] During cross-examination, Whiteagle confirmed that in this email, and most of the others, Pettibone is referred to as "C" and Cash Systems is referred to as "CS." (R. 189, 6-P-124, 125, 137; Govt. Ex. 3-1(i)). Pettibone is also referred to as "Mr. C" in many of the emails. (R. 189, 6-P-124).

In a March 21, 2007 email, Whiteagle wrote Glaser, "Its very important that we keep C focus on getting the CS contract done." (R. 177, 2-P-30; Govt. Ex. 4-5). Whiteagle explained that one of the legislators was out due to open heart surgery, resulting in "one less vote for CS and C at the Development committee." (Id.). Whiteagle said, "C wanted to put the contract up for vote" but Whiteagle "asked C to cancel the Development committee meeting so that the Cash Systems contract would not come up for a vote" and potentially lose the contract. (Id.).

Soon afterward, in an email in April 2007, Whiteagle solicited Cash Systems for information for the stated purpose of passing it on to Pettibone to help Cash Systems. The email, entitled "questions that C wanted answered asap!," requested detailed information to make Cash Systems look preferable to one of its competitors - Global. (Govt. Ex. 9-2).

In June 2007, Whiteagle solicited $8,000 from Cash Systems in part to pay Pettibone's legal fees incurred defending a challenge to his election. (R. 182, 7-A-13-18; Govt. Ex. 4-10). Whiteagle again made clear that he was asking for the money at the direction of Pettibone, that Cash Systems' keeping the contract depended on Pettibone's re-election, and that Pettibone will not forget the favor from Cash Systems. (Id.). Whiteagle testified that he lied in the email and that Pettibone did not know of the request, nor make the request. (R. 182, 7-A-14, 17).

A few days later, Cash Systems wired the requested $8,000 to Whiteagle. (Id., 7-A-18; Govt. Ex. 16-12). Whiteagle then withdrew over $3,000 in cash. (Govt. Ex. 16-12).

In July 2007, the FBI began investigating the financial relationship between Cash Systems and Whiteagle, and agents interviewed the Cash Systems employee who worked on the Ho-Chunk Nation account, Brian Johnson. (R.177, 2-P-31). The agents asked Johnson whether he had ever received any money from Whiteagle. (Id.). Johnson lied and told the agents he had not. (Id., 2-P-33).[3] A few days after Johnson's FBI interview, he met with Whiteagle and told him about the interview. (Id.)

In September 2007, Whiteagle caused Cash Systems to buy tickets to a Green Bay Packers' football game for Pettibone and Cash Systems personnel. (R. 177, 2-P-37-38; Govt. Ex. 9-10). Noting that Pettibone was about to make other plans and the only opportunity for Cash Systems to sell themselves would happen before the game, Whiteagle described the purpose to Glaser "to bring the issues to bear and plan the strategy to get CS in by their talking to C personally."

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[3] In fact, in 2006 Whiteagle paid Johnson over $30,000 in kickbacks in exchange for Johnson helping Whiteagle secure extra money from Cash Systems - payments over and above Whiteagle's regular $22,500 monthly payment from Cash Systems. (R. 177, 2-P-13, 34). Johnson pleaded guilty to lying to agents in that first interview. (Id., 2-P-49-50).

(Govt. Ex. 9-10). Whiteagle also wrote, "Send out my funds today as I need to make sure C is well taken care of...its not against the law to buy dinner for one's cousin." (Id.) Glaser approved Johnson's purchase of ten tickets at $170 each. (R. 177, 2-P-40; Govt. Ex. 9-12).

In November 2007, Whiteagle sent an email to Cash Systems detailing Pettibone's efforts on Cash Systems' behalf and threatening to make Cash Systems lose its contract if Whiteagle did not receive "very favorable terms." (R. 177, 2-P-36; Govt. Ex. 9-3).

In February 2008, Whiteagle asked Glaser for more money "to maneuver politically . . . . to get the support for Mr. C." (R. 177, 2-P-41-42; Govt. Ex. 9-13). Whiteagle wrote that he needed $7,500 immediately to stop the legislature from voting against Cash Systems, claiming "I need to do my work. . . . Each day gets worse as Mr. C is only one man and he is doing his best." (Id.). In April, Whiteagle emailed Cash Systems and -- noting that Pettibone still wanted to continue to support Cash Systems, even though Pettibone had been "blasted" at the Nation for that support -- asked for a new contract and $9,500 to "turn this around." (R. 182, 7-A-30-31; Govt. Ex. 9-16). Regarding Pettibone's desire to continue to support Cash Systems, Whiteagle claimed that too was a lie that he included in the email to get money for himself. (Id., 7-A-31-32). Cash Systems

responded that there would be no more money and that Cash Systems expected Whiteagle to live up to his agreement. (R. 182, 7-A-32-33).

In the summer of 2008, Cash Systems lost the cash-access contract with the Nation to Money Centers of America (MCA). (R. 177, 2-P-47). Whiteagle, as it turned out, had been working for years behind the scenes, with Pettibone, to help MCA get the Ho-Chunk contract. (R.178, 3-P-12, 16, 18, & 47; R. 182, 7-A-29).

IV. Money Centers of America

MCA was a competitor of Cash Systems, and, like Cash Systems, was a cash-access vendor seeking to do business with the Nation. (R. 178, 3-P-16-17, & 49). In 2005, Whiteagle was introduced to Chris Wolfington, the CEO of MCA, as someone who could assist in getting contracts with the Nation. (R. 178, 3-P-47). Wolfington arranged to pay Whiteagle through a company called Support Consultants, a casino gaming consulting business owned and operated by Kevin McDonald. (R. 178, 3-P-42, 50). After reviewing related Support Consultants bank records and payments, McDonald confirmed that MCA paid Whiteagle over $650,000 between July 2008 and September 2009. (R. 178, 3-P-53; Govt. Ex. 16-20).

As he did with Cash Systems, Whiteagle communicated extensively with Wolfington via email. The emails usually mentioned Pettibone and what

Pettibone needed to get MCA a contract with Ho-Chunk. Eventually, in 2008, Whiteagle and Pettibone delivered exactly that. (R. 176, 1-P-109; Govt. Ex. 1-2).

In April 2006, MCA paid for Whiteagle to travel from Wisconsin to MCA headquarters in Pennsylvania. (R.178, 2-P-11; Govt. Ex. 26-1). In September 2006, Whiteagle sent Wolfington inside information that Whiteagle had obtained from Cash Systems, and Whiteagle relayed to Wolfington a request from Pettibone that MCA try to do better than a competitor's bid. (Id., 3-P- 15-17; Govt. Ex. 3-4(b)). Regarding his own compensation, Whiteagle wrote, "Personally - I am asking for a sum which your CFO knows about. Ask him again.....and then send me a email of what you are going to do for me? I won't ask again. Your numbers keep changing and that makes me very uncomfortable. I told your CFO what I needed for stock too. I want this issue resolved today." (Id.). MCA did not get the contract in September 2006, but Wolfington kept dealing with Whiteagle – and with Pettibone.

On February 25, 2007, Whiteagle emailed Wolfington, soliciting $40,000 for Pettibone and indicating "C needs cash now not promises." (Govt. Ex. 4-2). There was no evidence of any MCA payment in response to this email; however, in December 2007, Whiteagle relayed Pettibone's phone number to Wolfington, warning Wolfington, "Mr. C. won't call you as they or the tribe tracks his and all

legislators for abuse on out-going calls...but there is no record of incoming calls....." (R. 182, 7-A-49-51; Govt. Ex. 4-18). MCA had not yet paid any commission to Whiteagle. (Govt. Ex. 16-20).

On March 10, 2008, Whiteagle sent an email to Wolfington, with a copy to Pettibone at his Park Institute BRF email account so that Pettibone would know what Whiteagle was saying to Wolfington about the MCA deal. (R. 182, 7-A-53, 54). Whiteagle knew he was also letting Wolfington know that a copy of the email was going to Pettibone. (Id.). In the email to Wolfington, Whiteagle spoke for himself and for Pettibone, stating, "Altho its been a while for you to get in the door with the HCN we have kept our word, you are in!! We have devoted many months to prepare your way into the HCN without pay and be assured the next 5 days will determine what we do next with you with the HCN. Mr. C and I have discussed this thoroughly too that if what you say changes and it's a continued pattern we will need to review our relationship." (Govt. Ex. 4-20 (underlining in original email)).

In this same March 10 email, Whiteagle recommended that MCA insist on an up-front $2.5 million dollar fee from the Nation for licensing proprietary software known as "ONswitch," designed to allow the Nation to eventually take over and conduct its own cash-access services. (Id.). Whiteagle essentially told

Wolfington that Pettibone and Whiteagle recommended MCA get $2.5 million up front from the Nation while it had the chance. (R. 182, 7-A-58,59). Nine days after this email, 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. (R.176, 1-P-107-108).

On March 18, 2008, Whiteagle wrote an email to Wolfington stating he was relaying a request from Pettibone, who wanted Wolfington to hire Pettibone's cousin, Jon Pettibone, and pay him $50,000 per year. (R. 182, 7-A-68-69; Govt. Ex. 4-39). On March 21, Whiteagle sent another email to Wolfington, this time regarding the financial expectations of Whiteagle and Pettibone stating in part: "Of course we know our brother will make it right and we trust you. But I think we should have a reasonable portion of a (sic) everything in cash [from the increase in the value of MCA resulting from the Ho-Chunk contract] What is your suggestions ????????? . . . I strongly suggest we are treated well. HOWEVER..... If you aren't going to do anything we need to know that now ..and soon too. Your silence we will take as a NO." (Govt Ex. 4-22). Wolfington replied to this by suggesting they continue the conversation on the phone. (Govt. Ex. 4-23).

In early April 2008, as MCA came closer to getting a contract, Whiteagle informed Wolfington that Pettibone "still is the key" to getting MCA in at the Nation. (R. 185, 2-A-64; R. 177, 2-P-156; Govt. Ex. 4-25).

By June 2008, there was still no word about hiring Jon Pettibone, and Whiteagle sent two more emails. The first indicated that Clarence Pettibone (referred to as "Rocco" in these emails) "wanted to know ASAP when John P..or JP will be hired," and the other asked for Wolfington's decision on John Pettibone so that Whiteagle could relay that information to Clarence Pettibone. (Id., 7-A-70-72; Govt. Exs. 4-32 & 4-33). Whiteagle testified that he lied again and that Clarence Pettibone made no such request. (Id., 7-A-71). After that last email, MCA hired Jon Pettibone at a salary of $50,000 per year. (R. 178, 3-P-20-21). While MCA commonly hired some employees of predecessors when it took over a contract, according to Wolfington's assistant at MCA, hiring Pettibone appeared to make no sense, as his job seemed unnecessary and duplicative. (Id., 3-P-21-24).

On July 12, 2008, Whiteagle reported to Wolfington by email that a special legislative meeting regarding the MCA contract would likely be held on the following Tuesday. Whiteagle asked for any negative information on MCA's

competitor so Pettibone could get the information to the legislature before the meeting. (Govt. Ex. 4-37).

On July 16, 2008, Pettibone seconded a motion in the Nation's legislature to pay MCA $4,535,700. The motion carried, and the Nation made the payment. (R. 176, 1-P-109; Govt. Ex. 1-2). On July 18, 2008, MCA wired $309,600 to Support Consultants and the next day, Support Consultants wired $261,900 to Whiteagle. (R. 178, 3-P-53-54; Govt. Ex. 16-20). Whiteagle acknowledged that he received these funds and that he knew the source was MCA. (R. 182, 7-A-74). The same day Whiteagle received the $261,900 from MCA, he caused his bank to issue a $45,000 cashier's check payable to "Park Institute BRF." (R. 182, 7-A-77; Govt. Ex. 16-16(b)).[4] Payments from MCA to Whiteagle continued regularly until the last payment on September 1, 2009, just after the Nation terminated MCA's contract. (R. 176, 1-P-110; Govt. Ex. 16-20).

V. Trinity Financial Group

[4] After search warrants were executed, Whiteagle held the $45,000 check payable to Park Institute BRF for months before finally depositing it in December 2008, in a newly established bank account. (R.182, 7-A-77-79; Govt. Ex. 16-16(a)). That same month Whiteagle incorporated "Park Institute Black River Fund, Ltd."as a new company, negotiated the check by depositing it in the new account, and then withdrew most of it in cash. (Id., 7-A-80-81; Govt. Exs. 16-16(b) & (c)).

In 2006, a Kentucky company known as Trinity Financial Group sought a multi-million dollar contract to provide mortgages and housing to Nation members. (R. 187, 4-A-110-112, 129-130). Deborah Atherton, doing business as Thoroughbred Business Solutions, offered to represent Trinity in its dealings with the Nation and entered into a multi-year consulting agreement, drafted with Whiteagle's help. (R. 187, 4-A-113-115; R. 182, 7-A-87; Govt. Ex. 20-3). Atherton agreed, among other things, to "identify a tribal legislator" who would help sponsor a tribal legislative motion or resolution for the housing program. (Govt. Ex. 20-3; R. 189, 6-P-92; R. 182, 7-A-85-87). Trinity agreed that if it were to do business with the Nation, Atherton would receive up to $650,000 in consulting fees, a figure Whiteagle suggested. (Id.; R. 182, 7-A-87-88).

In the spring of 2006, Trinity's CEO met with Atherton and Whiteagle in Kentucky. (R. 187, 4-A-120). Whiteagle insisted his involvement be kept secret, explaining that if certain people in the Nation found out Whiteagle was involved with Trinity, then Trinity might not even get in the door. (R. 187, 4-A-121; R. 179, 4-P-17). Later, in April 2006, Trinity's representatives met with Whiteagle and Atherton in Wisconsin. (R. 187, 4-A-123; Govt. Ex. 20-5). Whiteagle introduced the Trinity representatives to Pettibone, who then asked Whiteagle, "Are these the ones you want me to pick?" (R. 188, 5-A-25-28). Whiteagle replied, "Yes,

these are the ones I want you to pick." (Id.). Whiteagle told the Trinity representatives that Pettibone had the votes in the legislature "to get it pushed through with his people." (R. 188, 5-A-28-29).

In the fall of 2006, Kristine Fortney, Pettibone's then wife, heard Atherton, Whiteagle, and Pettibone talking generally about the Trinity housing program. (R. 185, 2-A-129-130). On one occasion, Atherton told Fortney that Whiteagle and Atherton wanted to give $100,000 to Pettibone "if everything goes through with the legislature getting Trinity in." (Id., 2-A-134-135). Atherton asked Fortney not to tell Pettibone, but she did tell him, and Pettibone had no response at all. (Id.).

During that same time period, Dave Payne of Trinity had conversations with Whiteagle and Pettibone about the need for Trinity's CEO to meet directly with Pettibone. (R. 188, 5-A-32-34). In November 2006, Pettibone met privately with Trinity's CEO and suggested a smaller contract to assess the Nation's housing needs. (R. 187, 4-A-139,140; R. 179, 4-P-32-36). Pettibone asked Trinity's CEO whether Trinity could perform that task for $250,000, and the CEO agreed. (R. 187, 4-A-141).

On November 21, 2006, Pettibone made a motion in the Ho-Chunk legislature for the Nation to enter into a $250,000 contract with Trinity for a preliminary housing study. (R. 187, 4-A-141; Govt. Ex. 1-3). The motion passed,

with Pettibone voting in favor of it, and the Nation entered into the contract with Trinity. (Id.) In light of the smaller scope of the contract, Trinity negotiated reduced consulting fees for Atherton and Whiteagle. (R. 187, 4-A-142-147; R. 182, 7-A-94, 99).

On December 1, 2006, the Nation made an initial payment of $125,000 to Trinity. (R. 188, 5-A-127; Govt. Ex. 16-19). Trinity then promptly paid $19,000 of those funds to Atherton, who in turn immediately wired half, $9,500, to Whiteagle. (R. 187, 4-A-147; R. 188, 5-A-128; Govt. Ex. 16-19**)**.

That same month, Whiteagle and Atherton solicited Trinity to contribute $6,000 toward a Pontiac Firebird for Pettibone. (R. 187, 4-A-148-153; R. 188, 5-A-38-39). Whiteagle had purchased the 1989 Firebird earlier in 2006 for about $8,000. (R. 187, 4-A-85-87; Govt. Ex. 17-1).) Atherton explained to Payne that Trinity needed to pay money to Whiteagle so he could give the Firebird to Pettibone as a way of showing respect for Pettibone getting the deal through. (R. 188, 5-A-38). When Payne replied that Atherton's proposal was "total bribery" and was not going to happen, Atherton said, "Well, Tim is going to be mad. We need to do this." (Id.). Whiteagle phoned Trinity's CEO to ask him to contribute money for the vehicle and, in an angry and threatening tone, told the CEO, "Pay it." (R. 187, 4-A-149-150).

Around this same time, on December 18, 2006, Atherton sent an explicit follow-up email to Trinity's CEO and simultaneously sent a "cc" copy of the email to Whiteagle, who received it that same day:

> . . . please call me today as we need to discuss Tim [Whiteagle]'s request for assistance on the Firebird for Clarence [Pettibone]. If memory serves me correctly, Tim adamantly from the beginning, told all of us, we need to keep Clarence happy, whatever stage of progress we are in, to keep his support. Keeping Clarence happy, keeps Tim happy . . .
>
> I spoke to Tim this morning and believe I have worked out a compromise that can be acceptable to both of you. Tim will accept $3000 now, and the balance in February as discussed between you and Dave [Dave Payne, a Trinity consultant]. Obviously, no funds/gifts can be directly given to Clarence, but they can be channeled through Thoroughbred Business Solutions, LLC [Atherton's company], as a bonus. There must be $3000 somewhere in that first payout that can be used to compensate Tim's request. The next scheduled payout by the HCN [Ho-Chunk Nation] is to be January 15, 2007. Out of a total of $250,000 for the housing assessment, there has to be a budget for the "bonus." Bottom line is, it has to be done. . . .
>
> I know you have issues with the structure and implications of such a bonus, and from my understanding, you were totally unaware of its' existence. I also understand this assessment is not a part of the existing contract between TFG [Trinity] and TBS [Thoroughbred Business Solutions, LLC], but . . . . . Brent, we give a little, we get alot . . . . . We do NOT want this project to go to a bid process . . . . ALL of us, and I mean ALL of us, have worked our hineys off to keep this housing program in the forefront of the Legislature

> and to keep Clarence's support . . .Tim has been critical in getting us this far. If you adhere to Tim's direction, even if you have questions/disagreements, you will be more successful than you can imagine . . . . But you have to follow his lead . . . Tim is NOT going to ask Trinity to be involved with anything illegal.
>
> Since Trinity Financial and Thoroughbred Business Solutions, LLC, have business accounts at National City Bank, the $3000 can be immediately transferred today.
>
> Please call me today. . . . There may be other creative ideas how to implement a solution that is agreeable to all involved.

(R. 187, 4-A-151; R. 188, 5-A-38-40; Govt. Ex. 21-1(b)).

Trinity's CEO was shocked by the email and angry about it. (R. 187, 4-A-151). Believing Whiteagle and Atherton were requesting a bribe, he declined the request and told Atherton he would in the future communicate with her and Whiteagle only in writing. (R. 187, 4-A-153; R. 179, 4-P-24, & 26-27). Trinity's CEO never again spoke with Whiteagle. (R. 179, 4-P-25). Atherton later emailed Payne, informing him that Whiteagle had told Pettibone he did not like the behavior of Trinity's CEO to "steer Clarence's allegiance away from Trinity. . ." (R. 188, 5-A-41-45; Govt. Ex. 21-2). At the end of the email, Atherton wrote, "As always, please delete this email." (Id.).

Trinity never contributed money toward the Firebird, but the car ended up in Pettibone's possession, with title passing to Pettibone from Whiteagle through

his adult daughter. (Govt. Ex. 17-2). Pettibone brought the car home in the summer of 2007, telling his family the car was a gift from Whiteagle. (R. 185, 2-A-137,138). Pettibone's wife reacted angrily and told Pettibone the car could be construed as a bribe. (Id.). Pettibone kept it. (R. 188, 5-A-56-57). It was later found, during the execution of a search warrant at Pettibone's storage locker. (R. 188, 5-A-130-131).

Meanwhile, Trinity performed the study (R. 179, 4-P-37-38; Govt. Ex. 20-10), and the Nation made additional payments to Trinity in January and March 2007, totaling $125,000. (R. 187, 4-A-154; R. 188, 5-A-125-130; Govt. Ex. 16-19). Trinity then paid $38,000 to Atherton, who promptly split the money with Whiteagle. (Id.; Govt. Ex. 16-19). In 2007, Pettibone tried unsuccessfully to help Trinity get more of the Nation's business. (R. 176, 1-P-93; Govt. Ex. 1-3).

By August 2007, Payne had hit hard times financially, and Whiteagle offered to employ him as a personal assistant at Whiteagle's ranch. (R. 188, 5-A-49 -52; Govt. Ex. 4-14). One day, in Whiteagle's kitchen and in the presence of Atherton, Whiteagle asked Payne to deliver cash in a brown paper bag to Pettibone. (R. 188, 5-A-58). Payne said, "I can't do that, Tim . . . It's wrong. It's bribery. I can't do it." (R. 188, 5-A-59). Whiteagle said, "That's how deals are done here," and walked away. (R. 188, 5-A-60). Soon after that, Whiteagle and

Payne had a falling out, and Payne left Whiteagle's employment. (R. 188, 5-A-60 to 61; 5-A-99-116, 5-A-121-123).

Meanwhile, in 2007 and 2008 Atherton, with Whiteagle's knowledge, kept trying to put together a Trinity deal through Pettibone. (R. 188, 5-A-61; Govt. Exs. 4-11, 4-13, 21-1(c), 21-1(d)).

In June 2008, Atherton offered Pettibone an expense-paid Kentucky vacation for Pettibone's family. (Govt. Ex. 21-1(f)). A short time later, on July 15, 2008, Atherton sent another explicit email to Pettibone, offering to give Pettibone "personal compensation" for helping Trinity by making payments to a martial arts studio operated by Pettibone – a Tae Kwon Do school known as "Park Institute Black River Falls." (R. 188, 5-A-64-68; Govt. Ex. 10-1). The email stated:

> Clarence, if personal compensation was/is a concern for you, let me put your mind at ease... We cannot compensate you outright, as in a direct payment, however, Trinity can pay me, then I can compensate you, we must be careful to protect your position as paying you directly is a criminal offense... What ever arrangement you have with anyone else, I can assure you, the Trinity team will beat.... Would $5000 to $7000 a month contribution to T.K.D. [a reference to Pettibone's Tae Kwon Do school] be satisfactory? Dave [Payne] will personally see to this... And another thing.... you would have never been out of the loop for supporting elder housing with the Trinity team... you were and still are always included... in compensation.

(Govt. Ex. 10-1).

In an August 2008 email, Atherton outlined possible compensation to Whiteagle, telling him, "Sandwiched in between the compensation for all parties involved, Mr. C [Pettibone] will be 'taken care of' discretely." (Internal quotation marks in original email.) (R. 182, 7-A-102-104; Govt. Ex. 4-38). Despite these efforts, the Nation did not contract further housing business. (R. 187, 4-A-161).

On August 5, 2008, federal agents executed a search warrant at Whiteagle's residence, and recovered the Firebird from Pettibone's storage locker. (R. 188, 5-A-130-132; Govt. Ex. 24-1). On that same day, the agents also interviewed Pettibone, who professed to have no knowledge of what Whiteagle did for a living, no knowledge of Whiteagle having any business relationship with Cash Systems, no knowledge of Whiteagle receiving any money from Cash Systems, and no knowledge of either Whiteagle or Atherton being involved with Trinity. (R. 188, 5-A-135-139).

VI. Sentencing Facts

Before sentencing, Whiteagle objected to the use of USSG § 2C1.1, instead of § 2C1.2, contending that his conduct in this case was more akin to paying gratuities than paying bribes. (R. 203, 3-4). In sentencing defendant, the district court rejected this challenge and applied USSG § 2C1.1 finding that defendant's actions were intended to corrupt Pettibone's actions as an elected official of the

Nation. (R. 225, 3; SA 3). The district court calculated the loss as between $2.5 million and $7 million, based both on the value of the contracts obtained by Whiteagle's clients, and the amount of money those clients paid Whiteagle for his services. (Id., 5 & 8; SA 5 & 8). The court found the accurately calculated advisory guideline imprisonment range was 235-292 months, and sentenced defendant to 120 months, well below the range. (R. 225, 7; R. 212, 2; SA 7).

SUMMARY OF ARGUMENT

Defendant argues here, as he did below, that the evidence at trial was insufficient to support his convictions for conspiracy to commit bribery, bribery, aiding and abetting the solicitation of bribes, and causing bribes to be made. The United States introduced overwhelming evidence at trial, consisting largely of emails that defendant himself sent during the course of the charged conspiracy that supported the jury's guilty verdicts. In his defense, defendant testified that he lied in those emails and that he did not bribe anyone, but rather, kept all the money for himself or used it for gifts to others. The jury rejected defendant's trial testimony, as it was entitled to do. Viewing the evidence in the light most favorable to the government, as this Court must, the United States clearly proved defendant's guilt beyond a reasonable doubt.

Alternatively, defendant argues that he is entitled to a new trial because certain evidence was admitted in error, thereby violating his right to due process. Specifically, defendant argues that the false invoices that he submitted to one of the vendors he represented were improperly admitted propensity evidence. To the contrary, the invoices were direct evidence of defendant's attempt to hide the bribes, and because defendant testified, were also introduced to challenge his credibility, pursuant to Fed.R.Evid. 608(b). Under both theories, the evidence of

the false invoices was properly admitted. Defendant also challenges the admissibility of his co-conspirator's lies to the FBI when questioned about his relationship with defendant. Because these statements were not offered for the truth, they were not hearsay. The statements were relevant to prove that the co-conspirator and defendant were involved in the conspiracy and the co-conspirator was attempting to cover it up. Finally, in light of the overwhelming evidence the United States introduced during the trial, even if the challenged evidence was admitted in error, any error is harmless.

Lastly, defendant maintains that he was sentenced under both the wrong guideline section and the wrong loss amount, and accordingly his ten-year sentence is unreasonable. Because the United States proved that the conspiracy involved bribes and the jury found that defendant caused bribes to be made and aided and abetted the solicitation of bribes, the guideline section for bribery was correctly applied. The loss amount was accurately calculated using two alternative, but equally applicable, theories. The court properly considered the benefits Whiteagle received from the vendors, and the benefits the vendors received from the contracts with the Ho-Chunk Nation - both in excess of $2.5 million. There was nothing erroneous or unreasonable about Whiteagle's sentence.

ARGUMENT

I. Viewed In The Light Most Favorable To The Government, The Evidence Is More Than Sufficient To Prove Beyond A Reasonable Doubt That Defendant Conspired To Bribe A Public Official, And Caused, And Aided And Abetted, The Crime Of Bribing A Public Official.

A. Standard of Review

The district court denied Whiteagle's motion for a judgment of acquittal based on alleged insufficiency of the evidence on Counts 1-4 and 6-10. (R. 208; Appellant's Appendix, 108-123). This Court reviews *de novo* a district court's denial of a motion for judgment of acquittal, but reviews the evidence in the light most favorable to the prosecution and asks whether any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *United States v. Doody*, 600 F.3d 752, 754 (7th Cir. 2010), citing *United States v. Hach*, 162 F.3d 937, 942 (7th Cir. 1998).

A guilty verdict may not be overturned unless "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Hassebrock*, 663 F.3d 906, 918 (7th Cir. 2011)(citation omitted). A defendant who moves for a judgment of acquittal "faces a nearly insurmountable hurdle." *Id.* (citations omitted).

B. Argument

Whiteagle argues again in this appeal that the evidence was insufficient to support his convictions on the conspiracy count, as well as on the substantive bribery counts. (Defendant's Brief, 19). Specifically, defendant maintains the United States failed to prove: (1) Pettibone knew about the conspiracy alleged in Count 1; (2) Whiteagle acted with corrupt intent in connection with Counts 2, 3, and 5 (the substantive bribery counts); (3) Pettibone solicited specific cash payments as alleged in Count 6; and (4) there was corrupt intent in hiring Jon Pettibone as alleged in Counts 7 and 8.

In making these arguments, Whiteagle ignores the applicable standard of review and instead suggests that if the Court determines that 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." (Defendant's Brief, 18). Whiteagle relies on *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010), but that reliance is misplaced. *Johnson* holds very clearly that this Court will overturn a conviction on sufficiency-of-the-evidence grounds only if no rational jury could have found the essential elements of the crime beyond a reasonable doubt, and in making this determination, views all evidence and draws all reasonable inferences in the light most favorable to the prosecution. *Johnson*, 592 F.3d at 754.

The language defendant relies on in *Johnson* discusses the government's failure to distinguish a drug conspiracy from a simple buyer-seller drug relationship. *Id.* at 755. In other words, the government in that case failed to prove the "agreement" element of the drug conspiracy, regardless of how the evidence was weighed. Here the government introduced overwhelming evidence to prove an agreement: Whiteagle's own words in the many emails he sent to the vendors (R. 189, 6-P-133-134, & 137; R. 182, 7-A-14-15); Whiteagle's email to MCA, copied to Pettibone, indicating financial expectations (Govt. Ex. 4-20); Pettibone's meeting with Trinity representatives where Pettibone asked Whiteagle specifically whether Trinity was the vendor Whiteagle wanted Pettibone to choose (R. 188, 5-A-28-29); Pettibone's votes in the legislature in favor of the vendors Whiteagle represented (Govt. Exs. 1-1, 1-2, & 1-3); and direct payments made to Pettibone and his tae kwon do school. (R. 186, 3-A-22-32). This evidence, viewed in the light most favorable to the government, unequivocally proves the conspiracy beyond a reasonable doubt.

1. Count 1 - Conspiracy

Defendant first argues that the government failed to prove Pettibone knew about the conspiracy. The jury was not required to find that Pettibone was actually a member of the conspiracy, but rather that the charged conspiracy

existed, that Whiteagle knowingly became a member, and that a member of that conspiracy committed an overt act in furtherance of the conspiracy. (R. 110-3, 7). 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)(citations omitted). In any event, the jury was presented with overwhelming evidence of Pettibone's membership in the conspiracy.

The government's proof consisted largely of emails between Whiteagle and his vendor clients, indicating that the money being requested was to keep Pettibone happy and in fact, that Pettibone was requesting the money. (R. 189, 6-P-133-134, & 137; R. 182, 7-A-14-15). Whiteagle argues, as he testified, that his emails to the vendors about bribing Pettibone and influencing the legislature were all lies -- part of an elaborate and long-running con game in which Whiteagle scammed $3,000,000 from successful vendors -- and that no rational jury could believe them. (R. 189, 6-P-134, 138; R. 182, 7-P-14, 17). He ignores all the evidence that shows he caused Pettibone to support the vendors, gave money and valuables to Pettibone to influence and reward him, and solicited bribes and caused others to agree to offer bribes to Pettibone. (R. 185, 2-A-125-129, 134-138;

Govt. Exs. 1-1, 1-2, 1-3, & 3-1(i)). In short, there was plenty of evidence showing that Whiteagle was telling the truth to the vendors and that Pettibone was, in fact, on the take.

In addition to emails between the vendors and Whiteagle, there was a lengthy, early email Whiteagle sent to MCA CEO Chris Wolfington and copied to Pettibone where Whiteagle laid out the expectations for payment that both he and Pettibone had. (Govt. Ex. 4-20). This email was sent shortly before MCA secured its multi-million dollar contract with the Ho-Chunk Nation, before Pettibone seconded a motion to pay MCA over $4,000,000 on the contract, before payments started flowing to Whiteagle, and before MCA hired Jon Pettibone. Whiteagle acknowledged in cross-examination that his purpose in copying Pettibone on the email was to make sure Pettibone knew what was happening with the MCA deal. (R. 182, 7-A-53-54). This email alone proves beyond a reasonable doubt that Pettibone knew of the conspiracy and was in fact a member of it, and knew that Whiteagle represented MCA as a client.

Kristine Fortney's testimony also supports the strong inference that Pettibone was a member of the conspiracy. (R. 185, 2-A-125-138, 158). Defendant downplays the importance of her testimony and in fact, misstates that testimony in his brief. In doing so, he claims that Fortney testified "that Pettibone had no

reaction when [she] told him that Whiteagle intended to donate $100,000 to Pettibone's tae kwon do studio." (Defendant's Brief, 23). Fortney actually testified that Atherton told her that Whiteagle and Atherton wanted to give $100,000 to Clarence personally, if everything went through with the legislature approving Trinity, and she testified specifically that they did not say anything about a donation to the tae kwon do school. (R. 185, 2-A-158). This testimony was powerful direct evidence of the plan of Atherton and Whiteagle to reward Pettibone for his work on the Trinity project, and Pettibone's lack of a reaction, coupled with his later support of Trinity, was strong circumstantial evidence of his membership in the conspiracy.

Whiteagle also contends Fortney's testimony regarding the Firebird did not show Pettibone's membership in the conspiracy. Again, defendant is wrong. Fortney testified that when she asked Pettibone in the summer of 2007 where he got the Firebird, he told her that Tim gave him the car and she then became mad and told Pettibone that it was not right for him to take the car because, Pettibone being a legislator, "people could see that as being a bribe." (R. 185, 2-A-137-138). From this evidence, viewed in the context of all the other evidence in the case, the jury was entitled to draw several inferences: first, that Whiteagle was giving the car to Pettibone to reward him for his support of Trinity, as Atherton had

indicated in her December 18, 2006 email to Trinity's Brent Frederick (with a copy to Whiteagle) (Govt. Ex. 21-1(b)); second, that Whiteagle laundered the title through his daughter Summer in an effort to disguise a bribe (Govt. Ex. 17-2); and third, that Pettibone knew Whiteagle was the source of the Firebird and that it appeared to be a bribe. (R. 185, 2-A-138).

Finally, Whiteagle argues that Fortney did not overhear Whiteagle and Pettibone discuss anything that made her suspicious of illegal activity. (Defendant's Brief, 24). Again, Whiteagle mischaracterizes Fortney's testimony. She testified that she overheard more than twenty conversations about Cash Systems, with Whiteagle doing most of the talking and Pettibone agreeing with Whiteagle. (R. 185, 2-A-123-126). She also testified that when the legislature talked about replacing Cash Systems, Whiteagle would get "worked up" and give Pettibone instructions on how to keep Cash Systems in place. (Id., 2-A-129).

Whiteagle also discounts the value of Pettibone's false statement. Pettibone, when interviewed by the FBI, claimed to have no knowledge of what Whiteagle did for a living, no knowledge of Whiteagle having any business relationship with Cash Systems, no knowledge of Whiteagle receiving any money from Cash Systems, and no knowledge of either Whiteagle or Atherton being involved with Trinity. (R. 188, 5-A-135-139). Whiteagle argues this testimony

"equally supports the inference that Pettibone was lying for a variety of other reasons" including tribal politics and protecting Whiteagle's identity as a lobbyist. (Defendant's Brief, 25). It makes little sense that Pettibone would lie to the FBI because of tribal politics. Pettibone did not refuse to provide information. He did not decline to be interviewed. He lied to protect himself and Whiteagle.

All of the evidence and the fair inferences drawn from the evidence, showed that Pettibone: knew Whiteagle represented the vendors; followed Whiteagle's instructions about how to advance the interests of Whiteagle's clients; took official steps to help Whiteagle's clients obtain and keep business with the Ho-Chunk Nation; knew that Whiteagle was asking for money and things of value from the clients on Pettibone's behalf, and allowed Whiteagle to do so; knew that Whiteagle and Atherton were offering and giving him money and things of value to reward him for his support of the clients; and, accepted money and things of value from Whiteagle and the clients. Viewing this evidence in the light most favorable to the government, a rational trier of fact could have readily found the elements of the crime beyond a reasonable doubt.

2. Counts 2, 3, and 5 - Bribery

As to the substantive bribery offenses charged in Counts 2, 3 and 5, Whiteagle argues there was insufficient evidence to show that Whiteagle ever

intended that Pettibone know of the requests for payments, or that Whiteagle ever actually relayed to Pettibone payments Whiteagle solicited from Cash Systems.

As to the first point, the email to MCA outlining the financial expectations of Whiteagle and Pettibone, sent just over a week before Pettibone voted to approve the MCA contract, and copied to Pettibone, shows that he knew exactly what Whiteagle was up to. (Govt. Ex. 4-20). In addition, the meeting with Whiteagle, Pettibone, and the Trinity representatives, where Pettibone asked Whiteagle, "Are these were the ones you want me to pick?," followed by Whiteagle's affirmative response, again shows Pettibone's knowledge. (R. 188, 5-A-28-29).

With respect to whether payments were relayed to Pettibone, the government also introduced extensive evidence of Whiteagle's own words in his emails to Glaser of Cash Systems showing that Whiteagle intended to relay the money to Pettibone. (Gov. Exs. 3-1(i), 3-3(c), & 4-10). Whiteagle testified that he never gave anything to Pettibone, and that he was lying when he said the money was for Pettibone. (R. 189, 6-P-134, 138; R. 182, 7-A-14, 17). Unfortunately for Whiteagle, the jury was not required to accept his testimony. It was entitled to believe Whiteagle was telling the truth when he told Cash Systems what he

intended to do with the money, and also to conclude he lied when he denied that on the stand.

Count 2 charged Whiteagle with causing Glaser of Cash Systems to agree to bribe Pettibone in December 2006 and January 2007. The evidence showed that in December 2006, Whiteagle wrote a proposal for funds from Cash Systems for Pettibone, proposing that Pettibone would get Cash Systems a two-year contract in exchange for a $17,750 payment to cover medical expenses for Pettibone's mother and a $14,000 campaign contribution for Pettibone. (Govt. Ex. 3-3(c)). The bank records showed Whiteagle got what he asked for. (Govt. Exs. 16-17(a) & (b)). The emails to Glaser sent a clear message that the contract was dependant on the payments, and Cash Systems promptly sent these exact amounts of money to Whiteagle.

Similarly, Count 3 charged Whiteagle with again causing Glaser to agree to bribe Pettibone. In February and March 2007, Whiteagle solicited Cash Systems for another campaign contribution for Pettibone, this time for $8,500. On February 21, 2007, Whiteagle emailed Glaser, soliciting "another" $8,500 for Pettibone. (Govt. Ex. 3-1(i)). Whiteagle noted that the things Pettibone was doing for Cash Systems "cost little money compare (sic) to what he is capable of doing

for us," that if Pettibone is out, then Cash Systems is out, and that Pettibone needs "another $8,500 for his campaign." (Id.).

In later emails, Whiteagle made it clear that Pettibone knew of his efforts, and Whiteagle tied his request for money to the Cash Systems contract. In a March 7, 2007 email, Whiteagle bragged about getting Ona Garvin, a rival legislator, out of the way writing to Glaser, "So it is very vital we get C [Clarence Pettibone] in as legislator. With [two rival legislators] discredited and soon gone.....that two year contract looks great.....C said the CS contract should be for three years." (Govt. Ex. 4-3). A few days later, in a March 12 email recovered from Whiteagle's laptop, Whiteagle wrote to Glaser: "John, next week then ok when can you meet with C..... ?? What is the status of the political campaign funds coming along.....I meet with C in 2 hours?" (R. 185, 2-A-64-65, 188; Govt. Ex. 4-4).

The very next day, March 13, 2007, Cash Systems gave Whiteagle the $8,500 he asked for. (Govt. Ex. 16-11). Two days later, Whiteagle withdrew $3,500 in cash. (Id.). A few days later, on March 19, 2007, Atherton placed an order with a promotions company for campaign materials for Pettibone's 2007 re-election campaign -- 250 pocket notebooks and 250 pens engraved with "Ho-Chunk Nation" and "VOTE Pettibone." (Govt. Ex. 16-14). Whiteagle testified that either

he or Atherton wanted to buy the materials for Pettibone, and that he believes he directed Atherton to buy the materials. (R. 189, 6-P-140). Whiteagle also admitted in his testimony that some of the money from Cash Systems was used to buy promotional materials for Pettibone. (R. 182, 7-A-128).

Count 5 charged Whiteagle with again causing Glaser to agree to bribe Pettibone -- this time an $8,000 payment in the summer of 2007. The evidence showed that in June 2007 Whiteagle solicited Glaser to pay $8,000 to Pettibone for legal fees. (Govt. Ex. 4-10). Once again, Whiteagle made it clear to Cash Systems that: he was asking on behalf of Pettibone; that Cash Systems' keeping the contract depended on Pettibone's re-election; and that Whiteagle would be letting Pettibone know the money was from Cash Systems. (Id.). Whiteagle's work bore fruit. A few days after this solicitation, on July 2, 2007, Cash Systems wired the $8,000 to Whiteagle. (Govt. Ex. 16-12). Whiteagle then withdrew over $3,000 in cash. (Id.).

Whiteagle was charged in Count 2, 3, and 5 with causing Glaser to agree to offer bribes. Regardless of whether money ended up in Pettibone's pocket, Whiteagle caused Glaser to agree to offer the bribes. Given all the evidence in this case showing that Whiteagle was in fact relaying bribes to Pettibone, the jury was not required to accept Whiteagle's self-serving story that he was only a

con-man, not a bribe-payer. Instead, the jury was entitled to conclude that Whiteagle acted with corrupt intent to influence or reward Pettibone when he caused Glaser to agree to offer the bribes.

3. Count 6 - Aiding & Abetting Pettibone's Solicitation of a Bribe

Whiteagle next claims there was insufficient evidence to show Pettibone solicited a bribe from Money Centers of America (MCA), as charged in Count 6, alleging that on March 10, 2008, Whiteagle aided and abetted Pettibone in soliciting a bribe by sending an email to MCA.

Whiteagle was introduced to Chris Wolfington, the CEO of MCA, in 2005, and began working with Wolfington in 2006 to help MCA get the Ho-Chunk Nation's cash-access contract. Between 2006 and March 10, 2008, Whiteagle kept in contact with Wolfington via email. (See e.g. Govt. Ex. 4-2). In these emails, Whiteagle referred to Pettibone as "our man," and gave Wolfington Pettibone's personal cell phone number. (Id.). In relaying the number, Whiteagle wrote, "Mr. C. won't call you as they or the tribe tracks his and all legislators for abuse on out-going calls...but there is no record of incoming calls....." (Govt. 4-18). The clear inference from Whiteagle's warning to Wolfington is that Whiteagle knew that Pettibone would be engaging in a corrupt conversation with Wolfington, and

Whiteagle wanted to cover their tracks. It is also clear that Whiteagle was not trying to keep Pettibone out of the loop -- quite the contrary.

On March 10, 2008, Whiteagle sent an email to Wolfington and copied Pettibone on his Park Institute BRF account. Tellingly, this email was not "blind copied" to Pettibone, nor sent to Pettibone at his official Ho-Chunk Nation account. Whiteagle admitted on cross-examination that he copied Pettibone on the email because he wanted Pettibone to know what he was saying to Wolfington about the MCA deal. (R. 182, 7-A-53, 54). Whiteagle also acknowledged that because he did not "blind copy" Pettibone on the email, he knew he was also letting Wolfington know that a copy of the email was going to Pettibone. (Id.).

In the email to Wolfington, Whiteagle spoke for himself and for Pettibone when he wrote, "Altho its been a while for you to get in the door with the HCN we have kept our word, you are in!! We have devoted many months to prepare your way into the HCN without pay and be assured the next 5 days will determine what we do next with you with the HCN. Mr. C and I have discussed this thoroughly too that if what you say changes and it's a continued pattern we will need to review our relationship." (Govt. Ex. 4-20).

Nine days later, 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. (Govt. Ex. 1-2). On July 16, 2008, Pettibone seconded a motion to pay MCA over $4,000,000 for the contract. (Id.). And, on July 18, 2008, MCA paid Whiteagle $261,900. (Gov. Ex. 16-20). That same day, Whiteagle cut a check for $45,000 to Park Institute BRF, Pettibone's martial arts school. (Gov. Ex. 16-16(a)).

4. Count 7 and 8 - Hiring of Jon Pettibone

Counts 7 and 8 are based on Whiteagle's efforts to get MCA to hire Clarence Pettibone's cousin. Count 7 charged Whiteagle with aiding and abetting Clarence Pettibone in soliciting the job as a bribe. In other words, by relaying Pettibone's demand to Wolfington, Whiteagle allegedly helped Pettibone ask for the bribe. Count 8 charged Whiteagle with causing Wolfington to agree to employ Jon Pettibone, again, by virtue of Whiteagle's repeated demands.

The evidence showed that on March 18, 2008, a month before the contract with MCA was even negotiated, Whiteagle wrote an email to Wolfington, stating he was relaying a request from Clarence Pettibone, who wanted Wolfington to hire Pettibone's cousin, Jon Pettibone, and pay him $50,000 per year. (Govt. Ex. 4-39). Whiteagle sent two more emails in June 2008, requesting MCA's decision

on hiring Jon Pettibone. (Govt. Exs. 4-32 & 4-33). Both suggested that Clarence Pettibone was making the request. (Id.). After those June emails, MCA hired Jon Pettibone, at the requested salary of $50,000. (R. 178, 3-P-20-21). This evidence, viewed in the light most favorable to the government, proves both Counts 7 and 8 beyond a reasonable doubt.

II. The District Court Properly Denied Defendant's Motion for a New Trial Because Evidence Of False Invoices Submitted By Defendant And Pettibone's False Statements To The FBI Was Properly Admitted.

A. Standard of Review

Whiteagle argues that the district court erred in admitting certain evidence offered by the government. The district court has broad discretion to control the admission of evidence. *United States v. Ozuna*, 561 F.3d 728, 738 (7th Cir. 2009)(citation omitted). This Court reviews the district court's decision to exclude the evidence or limit its use for an abuse of discretion, but reviews its interpretation of the rules *de novo*. *United States v. Rogers*, 587 F.3d 816, 819 (7th Cir. 2009).

B. Argument

Evidentiary determinations are reversed "only when no reasonable person could take the view adopted by the trial court." *Ozuna*, 561 F.3d at 738 (citation omitted). When considering allegations of erroneous evidentiary rulings, a new

trial is warranted "only if any evidentiary errors are not harmless." *United States v. Boros*, 668 F.3d 901, 911 (7th Cir. 2012). In determining whether an error is harmless, a court should "consider whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded." *Id.* (citations omitted). "An error is harmless if the untainted incriminating evidence is overwhelming." *United States v. Loughry*, 660 F.3d 965, 975 (7th Cir. 2011)(citations omitted).

1. The False Invoices

Whiteagle argues that the district court erred in admitting his false invoices to Cash Systems. This evidence was properly admitted, both as direct evidence of the conspiracy, and evidence of defendant's dishonest acts pursuant to Rule 608(b), Federal Rules of Evidence. (R. 181, 6-A-146-147).

The evidence showed that from 2006 to 2008, Whiteagle regularly solicited Cash Systems for payments over and above his regular $22,500 per month, ostensibly for "political action" and "lobbying" efforts. To support these requests, Whiteagle sometimes fabricated and submitted to Cash Systems patently false invoices. It became obvious to Cash Systems personnel that the invoices were not legitimate. (R. 177, 2-P-59, 60).[5]

[5] During cross-examination of Cash Systems' employee Brian Johnson, the defense asked him why he would "chuckle" at some of defendant's reasons for

This evidence was properly admitted as direct evidence of the charged conspiracy. The conspiracy count charged that Whiteagle and his co-conspirators "took various steps to hide and disguise their actions." (R. 50, Count 1, ¶ 4(h)). If Whiteagle's claimed expenses were legitimate, there would have been no need to fabricate invoices; indeed, the invoices could not very well say "money to bribe Pettibone." And because the invoices were obviously false, they show that both Whiteagle and Cash Systems knew the payments to Whiteagle were not for a legitimate purpose. The fair inference is that the falsified invoices were Whiteagle's effort to disguise the real purpose of the money - bribery. The evidence is, therefore, directly relevant to the charged conspiracy and shows defendant's consciousness of guilt. The district court agreed, when it admitted the evidence over defendant's objection and found that to say the false invoices "had nothing to do with these transactions is simply false. It bore directly on charges that he was claiming with the alleged violations here." (R. 181, 6-P-146).

Alternatively, the evidence was properly admitted under Fed.R.Evid. 608(b). Once Whiteagle testified, his other acts of dishonesty -- including his creation of false invoices -- were fair topics for cross-examination.

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requesting money. (R. 177, 2-P-60). Johnson replied that some of the requests were "farfetched." (Id.). On redirect, the court ruled that by that line of questioning, the defense opened the door to the government asking questions regarding the false invoices. (Id., 2-P-98).

Finally, assuming, only for the sake of argument, that the district court erred in admitting the invoices in evidence, any error was harmless. Whiteagle defended the bribery charges by testifying that his repeated solicitations of bribes for Pettibone from Cash Systems and MCA were part of a scheme to defraud the companies. Having chosen to defend the case by saying he fraudulently lied to the vendors to extract money from them, he cannot reasonably complain that he was somehow harmed by the introduction in evidence of his false invoices that accompanied his requests for money.

2. Pettibone's False Statements

At trial, the government introduced evidence that when interviewed by the FBI, Pettibone claimed to have no knowledge of what Whiteagle did for a living, no knowledge of Whiteagle having any business relationship with Cash Systems, no knowledge of Whiteagle receiving any money from Cash Systems, and no knowledge of either Whiteagle or Atherton being involved with Trinity. (R. 188, 5-A-135-139). Other evidence showed Pettibone's statements to be false.

Whiteagle now argues, as he did before trial, that the trial court erred in admitting Pettibone's statements because they were inadmissible hearsay. He is wrong. Hearsay is defined in the Federal Rules of Evidence as a statement, other than one made by the declarant while testifying at the trial or hearing, "offered in

evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Pettibone's statements were not offered for the truth of the matter asserted. In fact, they were offered for just the opposite -- as false statements. A false statement is not offered for its truth and is, therefore, not hearsay. *Anderson v. United States*, 417 U.S. 211, 219-20 (1974). Pettibone's statement was properly admitted in evidence to prove the existence of the bribery conspiracy. *See Anderson*, 417 U.S. at 221. In *Anderson*, the false prior testimony, not hearsay because not offered for the truth, was admissible against all defendants to prove the charged conspiracy. *See also United States v. Hackett*, 638 F.2d 1179, 1186-87 (9th Cir. 1980).

Whiteagle argues that the district court should have excluded the evidence as hearsay, pursuant to the reasoning of *Anderson* and the majority opinion in *Lyle v. Koehler*, 720 F.2d 426 (6th Cir. 1983).[6] But, as the district court noted in rejecting Whiteagle's pretrial argument to exclude the evidence, the mere fact that inferences harmful to Whiteagle can be drawn from Pettibone's false statements does not make them "offered for their truth" for purposes of the hearsay rule. (R.

[6] Defendant incorrectly relies on *Anderson v. United States,* 417 U.S. 211, 219-20 (1974), in support of his argument that "[t]he fact that a co-conspirator's out-of-court statement is false does not exempt the statement from hearsay rules." *Anderson* actually states the opposite, that is, "[o]ut-of-court statements constitute hearsay only when offered into evidence to prove the truth of the matter asserted." *Id.*

148, 5). The court observed that even if it were to accept the *Lyle* majority's attempt to distinguish *Anderson*, the distinction was that the prosecutor wanted to introduce statements in *Lyle* that essentially represented a confession of guilt by virtue of one defendant attempting to get others to agree on a false alibi. (Id.). As the district court found, the facts of the present case are much closer to *Anderson*, where the statements at issue were statements of individual conspirators lying to authorities about their conduct. (Id.).

Assuming, only for the sake of argument, that the district court erred in admitting the evidence of Pettibone's statements, here too any error was harmless. The test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded. *Boros*, 668 F.3d at 911. "An error is harmless if the untainted incriminating evidence is overwhelming." *Loughry*, 660 F.3d at 975. Putting aside Pettibone's statements, the prosecution's case would not have been any less persuasive. The rest of the evidence establishing the conspiracy and Pettibone's membership in it was overwhelming.

III. Whiteagle's Below Guideline Sentence Of 120 Months, Using The Bribery Guideline And A Properly Calculated Loss Amount Was Reasonable.

A. Standard of Review

Finally, defendant challenges his sentence, arguing that it was calculated using the wrong guideline section and an improperly calculated loss amount. Accordingly, he argues, his sentence is unreasonable and should be vacated. This Court reviews the legal interpretation of the Guidelines *de novo*. *United States v. Earls*, 704 F.3d 466, 473 (7th Cir. 2012)(citation omitted). A district court's loss calculation is reviewed for clear error, and will be reversed only if this Court is "left with a definite and firm conviction that a mistake has been made." *United States v. Love*, 680 F.3d 994, 999 (7th Cir. 2012)(citations omitted). For a defendant to successfully challenge loss, he "must show that the court's loss calculations were not only inaccurate, but outside the realm of permissible computations." *Id.* (citations and quotations omitted).

B. Argument

1. Bribe vs. Gratuity

Defendant's primary contention is that he should have been sentenced pursuant to USSG § 2C1.2, covering gratuities, rather than § 2C1.1, covering bribes. He also argues that the district court did not adequately explain its selection of the bribery guideline. Because the government introduced overwhelming evidence at trial that Whiteagle was engaged primarily in bribery - that is providing money and other things of value with the corrupt intent to

influence the future actions of Pettibone - the appropriate guideline section is § 2C1.1.

The district court acknowledged defendant's objections to the presentence report, then provided a detailed explanation as to why the court rejected those objections. In finding that the correct guideline was for bribery, the district court specifically determined the jury found that defendant conspired to commit bribery and that he did in fact commit and caused others to commit several acts of bribery, as well as aid and abet the solicitation of bribes. (R. 225, 3; SA 3). The district court further concluded that "the defendant funneled money and other items of substantial value to Clarence Pettibone and his family members and that 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." (Id.). This explanation was adequate to support the court's application of the bribery guideline.

This determination is further supported by the background commentary to § 2C1.1, which states "[t]his section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence such individual's official actions, or to a public official who solicits or accepts such a bribe." USSG § 2C1.1, comment. (backg'd). In *United States v.*

Anderson, 517 F.3d 953, 961 (7th Cir. 2008), this Court relied on that commentary and distinguished gratuities from bribes in the following way: "If the payer's intent is to influence or affect future actions, then the payment is a bribe. If on the other hand, the payer intends the money as a reward for actions the payee has already taken, or is already committed to take, then the payment is a gratuity." *Id.* (citation omitted).

Based on the emails requesting payments, Whiteagle's cash withdrawals, and payments made to Pettibone and Park Institute, the bribery conspiracy was ongoing and continuous. When Whiteagle caused Cash Systems to buy tickets to a Green Bay Packers' football game for Pettibone and Cash Systems personnel, he did so saying that Pettibone was about to make other plans and that the only opportunity for Cash Systems to sell themselves would happen before the game. (R. 177, 2-P-37-38; Govt. Ex. 9-10). The only reason for Cash Systems to have to sell themselves was to get Pettibone to act on their behalf in the future.

In another email to Cash Systems, Whiteagle noted that the things Pettibone was doing for Cash Systems "cost little money compare (sic) to what he is capable of doing for us," and that if Pettibone is out, then Cash Systems is out. (Govt. Ex. 3-1(i)). Again, this email discusses the future, it does not thank Pettibone's past actions. The requests for money, the funneling of money and

gifts, specific requests for campaign funds, and a job for Jon Pettibone, were all designed to consistently influence Pettibone's future official actions and clearly support the application of the bribery guideline.

2. Loss Calculation

Whiteagle argues that neither the $3,000,000 paid to him by his clients, nor the millions paid to his clients by the Ho-Chunk Nation are properly included in the calculation of loss amount under the guideline, because, he argues, Whiteagle's illegal activity was not the "but-for cause" of those payments. Because there is no such requirement, defendant's argument should be rejected.

In determining the loss calculation, USSG § 2C1.1 provides that:

> If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

Here, the district court concluded that the loss for purposes of the guideline exceeded $2.5 million dollars for two separate reasons, both of which were supported by the evidence.

First, the district court found that "[b]ecause 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." (R. 225, 3-4; SA 3-4). The court then determined that the "benefits received by the companies . . . exceeds 2.5 million dollars but is less than 7 million dollars." (Id. at 5; SA 5). The court further found that the contracts were obtained in part "because of the efforts of the defendant and the bribes he facilitated." (Id., 5 & 8; SA 5 & 8).

The second basis the court used to support the loss calculation was the amount that Whiteagle himself benefitted. Section 2C1.1 indicates that in determining loss, a court is to consider the "value of anything obtained or to be obtained by a public official or others acting with a public official." Specifically, the court found "the defendant himself benefitted 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." (Id. at 8, SA 8). Later, the court addressed defendant directly stating "you made millions of dollars in the transactions here and you promised companies that you could influence Mr. Pettibone. In fact, you told companies that you needed more money to give to Mr. Pettibone. You wrote that in emails." (Id. at 25; SA 25).

In response to these findings, Whiteagle maintains that the payments he received were for legitimate work that he performed. But, Whiteagle was not a lobbyist; no one at the Ho-Chunk Nation, other than Pettibone, knew he was helping vendors and that is the way he wanted it. In fact, he told John Glaser of Cash Systems that if Cash Systems mentioned Whiteagle's name to the Nation, Cash Systems would likely lose its contract. (R. 182, 7-A-32-33; Govt. Ex. 4-29). Similarly, he told Trinity's Brent Frederick that his involvement had to be kept secret from the Nation or Trinity may not even get in the door. (R. 187, 4-A-121; R. 179, 4-P-17). Whiteagle ran a secret, covert operation. He received the money because of his "connection" to Pettibone.

Whiteagle claims that this Court in *United States v. Anderson*, 517 F.3d 953, 964 (7th Cir. 2008), held that a benefit is not attributable to a bribery scheme unless a bribe was the but-for cause of the benefit. That, however, is not the holding of *Anderson*; in fact, the phrase "but-for" is nowhere to be found in the Court's opinion. Instead, the Court looked to whether the bribes were "connected" to a given project. *Anderson*, 517 F.3d at 964. Even then, the Court recognized that "it goes without saying that a sentencing court may consider benefits that flow directly from the counts of conviction," noting that the

"relevant conduct" in *Anderson* was the cause of the controversy. *Anderson*, 517 F.3d at 963.

Here, Whiteagle was convicted of all bribery counts related to all three vendors and their contracts with the Ho-Chunk Nation. The value of those contracts is undisputed. Further, and also undisputed, is the fact that Whiteagle received over $3 million from those vendors to use his influence on Pettibone to inure to their benefit. And influence he did - corruptly with the intent to affect future actions of Clarence Pettibone. Accordingly, the advisory guideline imprisonment range of 235-292 months was appropriately calculated under § 2C1.1, using a loss figure between $2.5 million and $7 million. The district court's sentence of 120 months, well below the advisory guideline range, is not unreasonable.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the judgment and conviction order of the district court be affirmed.

Dated this 13th day of May 2013.

Respectfully submitted,

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United States Attorney

By: /s/

LAURA A. PRZYBYLINSKI FINN
Assistant U. S. Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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CERTIFICATE OF COMPLIANCE

The United States of America, by Assistant United States Attorney Laura A. Przybylinski Finn, hereby certifies, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), that the attached brief complies with the type volume limitation. This brief contains 13,572 words. This document has been prepared using WordPerfect 12.

Dated this 13th day of May 2013.

Respectfully submitted,

JOHN W. VAUDREUIL
United States Attorney

By: /s/

LAURA A. PRZYBYLINSKI FINN
Assistant U.S. Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2013, I electronically filed the BRIEF OF PLAINTIFF-APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ LeLoni Broesch

SUPPLEMENTAL APPENDIX

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