No. 10-10211

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DARREN L. REAGAN, A/K/A/ DARREN L. REAGAN, DR.,
D'ANGELO LEE,
DONALD W. HILL, AND
SHEILA D. FARRINGTON.
Defendant-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
No. 4:09-cr-115(8), Hon. Barbara Lynn, Judge Presiding

BRIEF OF APPELLANT HERBERT DONALD W. HILL

Seth Kretzer
LAW OFFICES OF SETH KRETZER
The Lyric Center
440 Louisiana; Suite 200
Houston, TX 77002

[Tel.] (713) 775-3050
[Fax] (713) 224-2815

COURT-APPOINTED ATTORNEY FOR
APPELLANT DONALD W. HILL

CERTIFICATE OF INTERESTED PARTIES

No. 10-10211

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD W. HILL

Defendant-Appellant.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

1. United States of America—Appellee. It is represented in the Fifth Circuit by:

Ms. Leigha Simonton
United States Attorney's Office
Earle Cabell Federal Building
1100 Commerce Street, Room 300
Dallas, Texas 75242-1699

The United States was represented in the district court proceedings by:

AUSAs Sarah Saldana, Chad Meachum, Leigha Simonton, Marcus Busch, Christopher Stokes, Richard Vance, Stephen Fahey, and Tamara Reno
United States Attorney's Office
Earle Cabell Federal Building
1100 Commerce Street, Room 300
Dallas, Texas 75242-1699

2. Donald W. Hill, Appellant. Anderson is represented in the Fifth Circuit by:

Mr. Seth H. Kretzer

LAW OFFICES OF SETH KRETZER
The Lyric Center
440 Louisiana Street; Suite 200
Houston, TX 77002

Additional counsel who represented Hill in the district court proceedings are:

Mr. Ray Jackson
JACKSON LAW FIRM
2989 N Stemmonss Frwy
Dallas, TX 75247

Mr. Edward Moore
EDWARD MOORE PC
6757 Arapaho Rd.; Suite 287
Dallas, TX 75248

Messrs. James Parkman, Martin Adams, and William White
THE COCHRAN FIRM
505 North 20th St; Suite 825
Birmingham, AL 35203

/s/ Seth Kretzer

Seth Kretzer

STATEMENT REGARDING ORAL ARGUMENT

Appellant Hill requests oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES, RULES, AND GUIDELINES

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. The district court announced sentence on February 26, 2010, and entered its final judgment on March 23, 2010.[1] RE.5. Hill filed his notice of appeal on March 3, 2010. RE.2; FED. R. APP. P. 4(b)(1)(A). The Court has jurisdiction over Hill's appeal under 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

[1] Docket entries 1-1308 comprise the "Record on Appeal." The pagination of the Record begins at page USCA5 1. Documents from the Record are referred to herein as R. [bates number]. However, cites to the trial transcripts are in the form Vol.X.[page number]. Cites to the record excerpts are in the form RE.[tab number].[bates number].

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District court erred when it overruled Hill's written post-verdict Rule 29 motion and there was obviously no legally sufficient evidence to support any count of conviction.

2. Whether a new trial should be granted because the verdict is contrary to the weight of the evidence.

3. Whether the Prosecutor committed egregious prosecutorial misconduct during closing argument.

4. Whether the District Court erred under *Presley v. Georgia* when it sealed the courtroom for *voir dire*.

INTRODUCTION

A. James Fisher Bribed A Councilman Named James Fantroy

On August 27, 2003, a Dallas-based real estate developer named James R. "Bill" Fisher had two affordable housing projects pending for approval at City Council. Vol.5.7-8. One of the City Councilman, James Fantroy, owned a private security company that Fisher had already contracted with to provide security guards for a different property. Vol.20.102-108. Fisher became embarrassed when details of this contract became public shortly before the vote. V.21.71-74. When Mayor Laura Miller called attention to the situation, Fantroy attempted to deflect blame by recusing himself. Vol.21.20-22. However, Fantroy made it clear to other (non-conflicted) Councilmen that he wanted Fisher's project approved. Mayor Miller responded by castigating Fisher in the local press. Vol.20.129-130.

To save himself, Fisher reacted by contacting the FBI claiming to be a victim of public extortion. Vol.4.77. Fisher surreptitiously recorded various people in the Dallas political scene at the direction of the FBI. Vol.4.87. Unfortunately for the FBI, Fantroy died before the prosecution of this case. As a result, the government's fire shifted to Hill even though there was little (if any) evidence connecting him to the machinations of his appointee, D'Angelo Lee.

B. Fisher And Potashnik Wage An Arms Race to Become the Premier Developer of Affordable Housing in South Dallas

In the 1997, Fisher became an employee of a prominent local real estate developer named Brian Potashnik. Vol.23.59. However, in 2003, Potashnik and Fisher parted ways with Fisher being angry Potashnik accusing Fisher of theft of trade secrets. Vol.16.161-166. In the years to follow, the pair was in fierce competition utilizing lawyers, political consultants, and other professionals in an arms race to be the premier developer of affordable housing in South Dallas. Vol.13.511. The competition was so fierce that Fisher's company was buying properties to develop close to Potashnik's creating a high stakes bid for development. Vol.16.165-167.

By all accounts, Potashnik was the better financed of the two and proven to provide housing more attuned to the needs of the low income residents therein. By contrast, Fisher had trouble getting financing for his projects, had a history of not paying vendors, and as a result, was not highly regarded (or even trusted) among the city council and staff. Vol.19.15-21; Vol.20.125-136. Most of the dueling projects endeavored by Potashnik and his erstwhile partner, Fisher, were located in Dallas' District 5.

C. The Troubled History of South Dallas

South Dallas has long been among the most economically and socially disadvantaged areas in the Metroplex. Vol.38.9, 17-18, 22. In 1999, District 5 elected as its councilman Don Hill, who made it the defining theme of his term in office to promote his constituency's overlooked, but palpable, benefits to investors and businessmen alike. Vol.38.23-24. Because of this desire, Hill was not as inimical to Fisher as was Mayor Miller. To the contrary, Hill was receptive to Fisher's business proposals and voted in Fisher's favor while also voting in Potashnik's favor, when doing so was not mutually exclusive. Vol.23.86 (Fisher explains that he had Hill's "complete support" as late as May 2004).

D. Figures in the South Dallas Political Firmament

Among the targets of Fisher's clandestine recordings were D'Angelo Lee (Hill's appointee to an unpaid position on the City and Planning Zoning Commission); Darren Reagan (a community activist that Fisher himself had agreed to pay $100,000 in a contract signed on the trunk of Reagan's car in the City Council parking lot), Vol.9.110, and Ricky Robertson (a used car dealer and aspiring general contractor whose previous involvement with Hill was limited to repossessing his car for non-payment). As he repeatedly dangled the prospect of contracts to these men, Fisher tried to insinuate into the conversations that Hill would somehow receive a portion of the funds. Vol.24.60. Even though Lee,

Reagan, and Robertson were adamant that Hill had no involvement with their private sector building and development activities, Fisher nonetheless convinced the FBI that the contrary situation was true. Vol.25.29 (Fisher concedes that he does not know if any money was paid to Hill).

E. Undisputed That Hill Was Aloof To His Friends' Business Activities and Was the Most Impecunious Member of the Dallas City Council

The investigation revealed that Farrington had formed a company called Farrington and Associates, which served as the basis for her professional consulting activities. The services she provided were assisting in the community development social services component of affordable housing projects, as well as giving input on problem solving at properties, i.e. public safety, and reviewing other possible opportunities for redevelopment. One of the hallmarks of Potashnik's affordable housing projects was the provision of onsite social services. Having hired numerous politically inclined people to work in his corporate family in the prior decade, it was rather unsurprising that Potashnik hired Farrington at the rate of $175,000/year. While no doubt a handsome sum, because this was the same rate Potashnik paid to other consultants in the past the law firm of Fish & Richardson blessed the contract with a comfort letter. Vol.15.84.

While there was no doubt that Hill fervently promoted the use of minority owned businesses by developers working in his District, it was undisputed that Hill

did not have direct knowledge (or care) what any individual firm was charging or earning in profit. While Lee, Reagan, and Robertson liberally used Hill's name with developers, Hill had no direct knowledge as to how others represented their relationships with him. Moreover, while these others earned substantial money on real estate deals, Hill remained rather poor throughout his term of public service, to the point lost his car while running for reelection and could maintain his law practice only while apprenticing to a lawyer younger than himself.

F. Longest Sentence for Public Corruption in American History

To put the severity of the sentences meted out in this case into perspective, it should be noted that Hill's sentence of 18 years is four years longer than Governor Blagojevich received for trying to sell the Senate seat held by the President-elect of the United States. Similarly, Sheila Farrington's sentence is nearly twice as long as Jack Abramoff received for defrauding Indian tribes for millions of dollars used to bribe members of Congress and Executive Branch officials.

Hill's sentence was derived by scoring his offense under the rubric of money-laundering rather than bribery. The resulting 18-year sentence was imposed because it correlated to millions of dollars in attributed loss most of which never came into the hands of any alleged conspirator and not a penny of which ever reached Hill's personal fisc. Vol.25.29 (Fisher admits he does not know if

any money was paid to Hill); Vol.34.149 (FBI's forensic accountant acknowledges no case can be traced to Hill).

At most, the government proved sloppy bookkeeping and campaign finance violations.

STATEMENT OF THE CASE

A. Indictment

On September 27, Don Hill and thirteen co-defendants were charged in an Indictment with thirteen counts of public corruption and money laundering in violation of various statutes. RE.3.

1. Bribery Counts

a. Conspiracy

Count Ten charged Hill, Lee, Farrington, Brian and Cheryl Potashnik, Robertson, Spencer, and Slovacek with conspiracy to commit bribery concerning a local government receiving federal benefits, in violation of 18 USC §371 (§§666(a)(1)(B) and 666(a)(2)). RE.3.96.

b. Underlying Bribery Offenses

Counts Eleven and Twelve charged Hill, Lee, and both Potashniks with substantive violations of §§666(a)(1)(B) and (2) for years 2003 and 2004, respectively. *Id*. at 138. Additionally, Farrington, both Potashniks, Spencer, and

Slovacek were charged with aiding and abetting. *Id*. at 1389. Counts Thirteen and Fourteen charged Hill, Lee, and both Potashniks with aiding and abetting each other with a "series of transactions… with intent to influence and reward Hill and Lee…". *Id*. at 140.[2] Hill, Farrington, Lee, Spencer, and Slovacek were additionally charged with aiding and abetting each other. *Id*. at 140-141.

2. Extortion Counts

Count Fifteen charged Hill, Lee, Reagan, McGill, Rashad, Robertson, Spencer, Slovacek, Dean, and Lewis with conspiracy to commit extortion, in violation of 18 USC §1951. *Id*. at 142. Count Sixteen charged Hill and Lee with extortion by public officials of $22,500 from an affordable housing developer, in violation of 18 USC §1951 and 2. *Id*. at 174. Farrington, Reagan, and McGill were additionally charged with aiding and abetting. *Id*. Count Seventeen charged Hill with extortion of $50,000 from an affordable housing developer, in violation of 18 USC §1951 and 2. *Id*. at 175. Reagan, Dean, and Lewis were additionally charged with aiding and abetting. *Id*.

3. Honest Services

Count Eighteen charged Hill, Lee, Farrington, Spencer, and Slovacek with conspiracy to deprive the city of Dallas of the honest services of Hill and Lee by

[2] Counts 13 and 14 were dismissed and not submitted to the jury.

wire fraud, in violation of 18 USC §§1343 and 1346. This count trained on multi-faceted efforts to redevelop the Lancaster Kiest shopping center. *Id*. at 176-201.

4. Money Laundering

Count Nineteen charged Hill, Lee, Farrington, Robertson, Spencer, and Slovacek with conspiracy to commit money laundering, in violation of 18 USC §1956(h). *Id*. at 202. This "proceeds" in this count were tied to the §666 violations alleged in Counts 13-14.

Count Twenty charged Hill, Reagan, Dean, and Lewis with conspiracy to commit money laundering in violation of 18 USC §1956(h). *Id*. at 205. The "proceeds" in this count were tied to the §1951 violations alleged in Counts 16-17.

5. Tax Evasion

Count Twenty-Six charged Hill with tax evasion in violation of 26 USC §7201. *Id*. at 209. Some of the facts alleged in support of this count long pre-date Hill's service on City Council, claiming that Hill avoided taxes in 1996 and 1997 when his service on City Council did not begin until 1999. The District Court stayed Count Twenty-Six pending resolution of the other counts in the indictment.[3]

6. Forfeiture

Count 31 contained forfeiture allegations.

[3] The tax counts were later dismissed by the government.R.1559-1561.

B. Trial

Jury trial was long set to begin on Monday, June 22. On June 21, 2009, the Court opened for a special Sunday session to conduct Potashnik's rearraignment. Notwithstanding this paradigm shift in the government's case, Hill, Lee, Farrington, Reagan, and Robertson began trial on June 22. R.904. After thirty-seven days of trial , the government's case-in-chief ended on September 2, 2009. Vol.37.52.

Immediately thereafter, Hill made an oral Rule 29 motion. Vol.37.99-102. This motion was denied. Vol.37.107. Hill's defense began that same day. Vol. 37.109. Hill rested on September 18, 2009. Vol.43. The government rested its rebuttal case on September 18, 2009. Vol. 44.204. On September 21, the District Court heard argument on the renewed Rule 29 motions before denying these motions. Vol. 45.22.

After two days of closing argument, jury deliberations began on the 47th day of trial, June 23. R.1409. After six days of deliberation, the jury returned its verdict on October 5. RE.4.

C. Jury Verdict

1. Bribery Counts

The jury found Hill, Lee, and Farrington guilty on Count One; only Robertson was acquitted. RE.4.1452. Hill and Lee were found guilty on Count

Eleven; Farrington was acquitted of aiding and abetting. *Id*. at 1453. Hill and Lee were found guilty on Count Twelve; additionally, Farrington was found guilty of aiding and abetting. *Id*. at 1454.

2. Extortion Counts

Hill, Reagan, Robertson, and Lee were found guilty on Count Fifteen. *Id*. at 1455. Hill and Lee were found guilty on Count Sixteen. *Id*. at 1457. Additionally, Hill and Reagan were found guilty of aiding and abetting. *Id*. at 1458. Hill and Reagan were found not guilty on Count 17. *Id*. at 1459.

3. Honest Services

Hill, Lee, and Farrington were found guilty on Count 18. *Id*. at 1460.

4. Money Laundering

Hill, Lee, Farrington, and Robertson were found guilty of Count Nineteen. *Id*. at 1462. Hill and Reagan were found not guilty of Count Twenty. *Id*. at 1463.

D. Post-Verdict Motions

On October 29, 2009, Hill submitted a written Rule 29 motion. RE.X.1470-1478. Hill also joined in Farrington's written motion to dismiss Count 19. On November 30, 2009, the Court heard argument on the defendants' motions for acquittal, denying all motions for new trial except: (1) The Court reserved under advisement the honest services issue (Count 18) as to all defendants and (2) the

Court reserved under advisement the merger and "proceeds" issues as to the money laundering count (Count 19) as to all defendants.

On March 19, the Court entered a written order granting acquittal for all defendants as to Count 19. R.1554-1556. Originally, the Government cross-appealed this acquittal, R.1569, but later dismissed its appeal. At sentencing, the Court denied the Rule 29 motion as to Count 19's proceeds issue.

E. PSR

1. All Counts Grouped and Analyzed Under §2S1.1

The PSR began its analysis by grouping all counts of conviction pursuant to §3D1.2(c). (PSR; ¶111). Next, the PSR noted that because §2S1.1 yields a higher offense level than §2C1.1 , the former "is the guidelines to be used in computing the guidelines because it produced the greater offense level." (PSR; ¶112).

2. Intended Loss

Varying intended loss amounts were assessed for three clusters of counts.

a. Paragraph 103

Paragraph 103 identified 5 sums germane to Counts 10-12. First, Farrington and Associates received a $175,000 contract for the years 2004-'05, and tried to renew this contracts in 2006. So the intended loss was pegged at $350,000 ($175,000*2). Second, under the terms of Southwest Housing's contract with

Bright III, Southwest Farrington and Associates was set to receive $25,000 for three consecutive years. Even though no money was expended by Bright III, an additional $75,000 was assessed ($25,000*3). Similarly, the Urban League was also supposed to pay Farrington $5,000 for each of three years, for a total of $15,000.

Fourth, $79,500 was attributed to the Arbor Woods contract; a requested $1.2 million was keyed to the Scyene and Laureland contracts. Fifth, the donations to Hill's birthday party was assessed at $9,950. In total, Paragraph 103 recommended an intended loss amount of $1,729,450 ($350,000+$75,000+$15,000$+$79,500+$1.2 million+$9,950).

b. Paragraph 104

Paragraph 104 identified 4 sums germane to Counts 15 and 16. First, two contracts between Fisher and BSEAT at $1.4 million each yielded $2.8 million. Second, Reagan gave Hill $10,000 at Friendship West. Third, Robertson and Rashad requested $180,000 from Fisher in their "plan B" to do no work. Lastly, the five $50,000 payments intended to be paid under the guise of legal payments to John Lewis summed to $250,000. In total, Paragraph 104 recommended an intended loss of $3.24 million ($2.8 million+$10,000+$180,000+$250,000).

c. Paragraph 105

Paragraph 105 assessed two different sums attributable to the honest services count, Count 18. $8,500,000 in loss was attributed to the Lancaster Kiest shopping center and $1,048,250 was attributed to the Cedar Crest Square Development.

3. Base Offense Level

PSR Paragraph 113 volunteered a XX-fold calculation of the Base Offense Level. First, §2S1.1 imports the base offense level from the Guidelines germane to the underlying convictions, which in this case was §2C1.1. Section 2C1.1(a)(1) provides for a base offense level of 14 because Hill was a public official. Second, a two-level increase applied under §2C1.1(b)(1) because the offense involved more than one bribe/extortion. Third, the intended loss was keyed at $14,517,000 which corresponded to a 20-level increase under 2B1.1(b)(1)(K). A 4-level increase was assessed under §2C1.1(b)(3) because Hill was deemed to occupy a "high-level decision-making position." The Base Offense Level was therefore 40 (14+2+20+4).

4. Specific Offense Characteristics and Role Adjustments

A two-level specific offense characteristic under §2S1.1(b)(2)(B) was assessed because Hill was convicted under §1956(h). (PSR; ¶114). Hill was deemed to be an organizer/leader, so a 4-level adjustment was applied. (PSR; ¶115).

The Total Offense Level was therefore 46 (40+2+4). However this was automatically scaled back to the Guidelines' maximum, 43. (PSR; ¶118).

5. Alternative Calculations

Since the Court had taken both the honest services and money laundering counts under advisement, the PSR offered alternative calculations in the event either or both Counts 18 and 19 were dismissed. (PSR; ¶¶119-122). The intended loss appurtenant to Count 18 ($8,500,000) was responsible for an incremental 2-levels. By contrast, dismissal of Count 19 would shift the calculation from §2S to §2C. Since Hill's Total Offense Level 46, a mere 2-level reduction would be edentulous; dismissal of both counts would be necessary to move the Guidelines range.

6. Objections

The government filed a host of objections, most of which nonmaterial changes adopted by the Probation Officer but which did not move the Guidelines range. (See Addendum to PSR; (Doc. No. 1332, p. 43). Significantly, however, the PSR accepted the Government's assertion that Hill obstructed justice by perjuring himself during trial. Doc. No. 1332, p. 47. The PSR was also revised to convey that the Court could still consider the $9.5 million attributed to the honest services count even if it granted acquittal. Doc. No. 1332, p. 51.

Hill objected to the speculative nature of the intended loss amounts urged. For example, BSEAT would receive at most $650,000 rather than $2,800,000; the Laureland and Scyene contracts were never awarded. Doc. No. 1332, p. 60-74. Probation rejected these objections.

F. Sentencing

Sentencing was held February 26, 2010. The Court sustained the government's objection concerning Hill's perjury, but assessed a total loss amount of $5,071,950, inclusive of the $250,000 paid to John Lewis. Hill's Total Offense Level of 43 suggested a life punishment, but the court gave a downward variance to 216 months, or 18 years. (Statement of Reasons, Doc. No. 1332, p. 84).

This sentence consisted of 60 months on Count 10, 120 months on each of Counts 11 and 12, and 216 months on each of Counts 15, 16, and 19, all to run concurrently. RE.5.1564. Additional punishments included Supervised Release of 3 years, *id*. at 1565, restitution of $112,500 to Bill Fisher, *id*. at 1566, and a Special Assessment of $600, *id*. at 1567.

STATEMENT OF FACTS

I. Affordable Housing Act of 1986

A. Tax Credits

In 1986, Congress created the Low-Income Housing Tax Credit Program under Section 42 of the Internal Revenue Code. Vol.11.172. The tax credit

program was a means of directing private capital toward the creation of affordable rental housing. Vol.11.172. Housing tax credits, which provided a dollar-for-dollar reduction of federal income tax liability, created an incentive for owners and investors to make an equity contribution to the development of rental units for low-income households. Vol.11; 171-173.

B. A Governing Set of Rules Known As "QAP"

Each state awards their respective credits through a designated housing credit agency governed by a Qualified Allocation Plan and Rules ("QAP") approved by the governor's office. Vol.11.181. The Texas Department of Housing and Community Affairs ("TDHCA") is responsible for administering this tax credit program. Two different kinds of tax credits are awarded; 9% credits are awarded for developments that were not federally subsidized; 4% credits are awarded for developments financed with tax-exempt private activity bonds. The sale of the 9% credits, standing alone, and the sale of the 4% credits, in combination with low-interest, long-term tax exempt bonds, provided the necessary equity to build, equip, lease and operate affordable rental communities for low-income households. The QAP capped tax credit allocations at $1.2 million per development and $2 million per applicant, developer, related party, or guarantor in any application round. Vol.11.181.

II. Competitive Point-Scoring System for the 9% Credits Required That Developers Preen For Endorsement of Elected Officials

A. Role of Community Support

The TDHCA awarded 9% tax credits through a competitive application process using a point-based scoring system. Vol.11.185. As an initial matter, a development had to meet all QAP threshold criteria. There is also a statutory requirement in Texas that neighborhoods were to be given the opportunity to give input either as support or opposition if a tax credit development is being placed near their area. Vol.11.185. There was natural competition for high point-scores on certain selection criteria. Among the most subjective were quantifiable "community participation" with respect to the development. Vol.11.184-185; Vol.13.34-35.

B. Import of Letters from Elected Officials

Even more key was the level of community support for the application, evaluated on the basis of written statements from the elected officials. Vol.11.222. The QAP awarded three points for each letter of support from a state elected official who represented constituents in the area where the development was located. Vol.11.223. Conversely, the QAP deducted three points for each letter of opposition. Vol.11.223. Due to strong competition for the 9% credits, the

TDCHA awarded or refused credits on a narrow margin of points. Accordingly, points for support letters from state and local officials were often determinative.

III. Non-Competitive Lottery For 4% Tax Credits

By contrast, the TDHCA awarded 4% tax credits through a non-competitive application process using a lottery. Vol.11.173-174. To obtain the credits, a developer had to finance a portion of its development with tax-exempt private activity bonds. A state ceiling limited the amounts of bonds each state could issue in a year. In response, Texas created the Bond Review Board ("BRB") to allocate the amount in an equitable and efficient way. Vol.11.191-194.

IV. A Brief Overview of Dallas City Government

A. *Ancien Régime* Embedded Systematic Neglect of South Dallas

Political and economic capital has long flowed more towards Dallas's northern sectors than its southern sectors. Vol.38.9-10. A resulting vicious cycle of crime and poverty ensued. Exacerbating this problem was a system of at-large City Counsel representation. In a paradigm shift, since 1991 the Dallas City Council has been comprised of 15 members elected by voters in non-partisan elections, 14 members (Places 1 through 14) were elected from single-member districts and served two-year terms. Vol.20.58;Vol.38.10. The mayor (Place 15) was elected at-large and served a four-year term. Vol.20.58.

B. Majority Rule With Embedded Focus on Parochial Interests

The Dallas City Council is a majority rule governmental body; full votes must occur at plenary sessions before official policy changes take effect. However, the political reality is that the opinions and recommendations of individual council members carry a great deal of weight with other council members. Vol.38.32-35. For example, if a project in a given district was up for a zoning change vote, and the respective council member has a concern about some aspect of the project, it was not uncommon for council members to agree to postponing a vote until the council member's concerns were addressed. Vol.38.32-35.

It was not uncommon for council members to meet with their constituents and developers and lobbyists who wanted to build a project in their district. Vol.38. 36-38. Developers knew that support from both the council member and the community was critical. An important aspect of the council member's job was to ensure that projects in their community would be a net positive to the revitalization of the community in their district. Vol.38.82-83.

V. Tax Credit Are An Unalloyed Economic Benefit to the Developers Which Can Fatten Their Profit Margins But the Investment Decision Remains Theirs Alone

General obligation bond funds were raised from the sale of bonds approved in local elections, which were then paid off with property tax revenues. Vol.38.257-258. The City of Dallas had a large bond election in 2003 and as such, the City had locally voted bond money, as well as federal money through HUD, to subsidize the development or improvement of certain areas in the city. *Id*.;Vol.18.249-250. In addition, a residential development loan program existed and was a subsidy to provide gap funding for the purchase and development of residential real estate. *Id*.

A developer had to obtain approval on various matters to receive tax credit financing. By the time a tax credit project reached the City Council for final approval, the developer typically had invested a substantial amount of its own money into the project. Vol.11.192-194. But this investment would have been made anyway; a developer was free to build at a quality-point enabled by the subsidized profit margins or to take remove these costs with lower quality materials still well above the legal minimums under the health and safety codes. Vol.11.193-194.

VI. Competition for Tax Credits Awarded By The City of Dallas

Developers relied on tax-exempt bonds and housing tax credits to fatten their profit margins. To enjoy this public largesse, developers were required to file financial pro forma statements with the TDHCA. The financial pro formas were a projection of the expected development costs, and thereafter, the income and expenses for the operation of the completed project. Vol.23.109-111; Vol.33.119-121.

VII. A Duopoly In the Affordable Housing Market Was Exacerbated By An Artificial Constraint on Supply

A. One-Year/One-Mile Rule

The catalytic event which elevated the contest for housing credits to its fever pitch was the change made to the rule in 2004 known as the "one-mile/one-year rule." In 2004, the Qualified Allocation Plan and Rules (QAP) promulgated by the Federal government was changed to provide that the Texas Department of Housing and Community Affairs (TDHCA), which administered the QAP, could only allocate tax credits to more than one development in the same calendar year ***if*** the developments were, or would be, located more than one linear mile apart. Vol. 11. 182-183.

B. The Ballad of Fisher and Potashnik

There were two major affordable housing developers seeking approval for their projects in the Southern Sector and benefiting from the available tax credit program for such developments administered by the Dallas City Council. The innovative market-leader in affordable housing development was Brian Potashnik who owned and operated Southwest Housing; SWH and its affiliates were for-profit corporations that developed, built and managed affordable housing projects in South Dallas. When Laura Miller became Dallas's mayor, Potashnik's reputation had become such that she appointed him to an official Housing Committee and wrote letters of recommendation for his burgeoning business efforts in Austin and San Antonio. Vol.20.221.

Potashnik's aspiring competitor was his former employee, Bill Fisher, who was regarded as undercapitalized and producing a lower quality product. These two developers were often at odds seeking approval from the Dallas City Council for their respective ventures. *See, e.g.*, Vol. 20.130 (Mayor Miller testifies on direct examination that Potashnik gave her copies of tax liens filed against Fisher so she would militate against his applications. "I had a list of tax liens against him. I had gotten from Mr. Potashnik.").

C. Competing Projects

By October 2004, each developer was promoting rival projects. Potashnik was promoting Laureland at Rosemont for zoning change; Fisher was promoting Dallas West Village. The votes were originally set for October 13, 2004. Both votes were reset. On October 27, 2004, Hill moved the Council to support tax credit financing for Potashnik's two affordable housing developments, Rosemont and Scyene and Rosemont at Laureland; Hill also moved to reject the tax credit financing for two of Fisher's projects, Dallas West Village and Memorial Park Townhomes.

On November 10, 2004, the Dallas City Council was set to vote on a Fisher project, Homes at Pecan Grove. Hill moved to approve the resolution. The City Council adopted Hill's motion. While Potashnik had ample financing and community support for Rosemont at Scyene, Fisher's concept was far less firm in its foundation. Nevertheless, Hill voted for BOTH of these projects.

VIII. Actors on the Dallas Political Stage

A. Don Hill

Don Hill was well-known in Dallas politics. He was elected to the Dallas City Council in 1999, served as mayor pro-tem, and also ran an unsuccessful campaign for Mayor in 2007.

B. Sheila Farrington

Sheila Farrington was a campaign consultant for Don Hill and was also a community activist who wanted to see the underprivileged citizens of South Dallas improve their socio-economic status and have a chance at a better life and better opportunities. She also served on the board for the NAACP, had worked for Hill on his political campaigns, had an affair with Hill, and later married.

C. D'Angelo Lee

In 2003, Hill appointed D'Angelo Lee to represent District 5 on the CPC. Hill's decision to appoint Lee was understandable, as Lee had some prior experience with real estate. Since Lee's service on the CPC was unpaid, it was also understandable that Lee, given his entrepreneurial ambition, sought to use his real estate development background to work as a broker to help various minority contractors get the opportunity to bid on some of the work for the affordable housing projects that he became aware of while serving on the CPC. (HILL)

Unfortunately, Lee was not well-versed on the ethical prohibitions concerning his votes as a CPC member on matters in which he had any financial interest. Hill made clear to Lee that such prohibitions were important, needed to be followed, and that Lee should recuse himself in the event that such a conflict arose. However, Lee disregarded Hill's explicit instructions to abide by the Dallas

City ethics requirements and conform his personal conduct to these important dictates.

Lee had an eye for identifying entrepreneurial opportunities. He effectively assisted others in getting various contracts, but left the execution of those contracts to those who were granted them. Lee identified established subcontractors based in the Southern Sector whose business operations had not yet reached the scale or critical mass necessary to compete for major projects, such as the affordable housing developments being brought to market by Potashnik and Fisher. The relative diminutiveness of the subcontractors identified by Lee was unsurprising given the historical neglect of the Southern Sector by the elite real estate developers in northern Dallas.

D. Darren Reagan

Darren Reagan was the head of the Black State Employees Association of Texas ("BSEAT"). Reagan was a long and established figure in Dallas. For example, Mayor Miller testified that during her 2003 reelection campaign she called upon Reagan to organize a fence-mending meeting with a disaffected minister. Vol.20.97. In the summer of 2004, Reagan authored a letter on BSEAT stationary and spoke out against new affordable housing projects.

E. Allen McGill

Allen McGill was Reagan's *aide de camp* in BSEAT.

F. Ricky Robertson

Rickey Robertson was an automobile dealer doing business as Millennium Investment Group and also a principal of RA-MILL.

G. Andrea Spencer

Andrea Spencer was RA-MILL's business manager and was a principal of Article IV Development and the LCG Development Group, also known as the Lynnea Consulting Group ("LCG"). LCG was a minority-and woman-owned business enterprise ("M/WBE") that sought construction subcontracts on SWH affordable housing projects in District 3, 5, and 8. Spencer was also a partner with Lee and Ronald W. Slovacek in Kiest General, LLC, Kiest Blvd., LP, and the LKC Dallas, also known as the The LKC Consulting Group (collectively known as "Kiest entitites.")

H. Ronald Slovacek

Ronald Slovacek was a real estate developer and a principal of RON-SLO, Inc. ("RON-SLO") and Millenium Land Development, LLC ("Millenium Land Development"). He sought construction subcontracts on SWH affordable housing projects in Districts 3, 5 and 8. He was also a partner with Spencer in Kiest entities.

IX. RA-MILL

In approximately December 2004, Robertson and Rashad entered into a development partnership known as RA-Mill. Lee promoted the RA-MILL to various developers who were interested in hiring minority subcontractors. Vol.24.64.

X. Farrington Contracts

On October 22, 2004, there was a contract entered into between Southwest Housing and Farrington and Associates for consulting services. Vol.5, 65-66; Vol.7.16). The contract was signed by Sheila Farrington and Brian Potashnik and was worth $175,000.00 per year. Vol.5.66-67; Vol.16. Farrington and Associates received a check for $14, 583.00 a month for a one year period and Farrington paid herself $2,500.00 a month. Vol.7.28. The balance was paid to Lee.

Farrington also received contracts from a CDO known as Bright III and the Dallas Urban League.

XI. Arbor Woods Subcontract

On December 22, 2004, and again on January 7, 2005, Spencer signed contracts with Potashnik in the amounts of $741,000 and $58,500 to perform concrete work at Arbor Woods. Ten percent of this amount was paid to Lee.

XII. Hoped-For Subcontracts on Rosemont and Scyene

In the Spring of 2005, Spencer and Slovacek tried to get much larger subcontracts on two other Potashnik developments, Rosemont and Scyene. However, Potashnik did not award these contracts in lieu of a lower bidder.

XIII. Farrington Gives Hill A Used BMW After His Own Car is Repossessed

In February 2005, Farrington bought Hill a used BMW through Robertson's car dealership. In March, Hill was recorded as saying that if ever asked Farrington should say that the car was "a retainer" for legal services.

XIV. RA-MILL and Fisher

Through RA-MILL, Robertson and Rashad sought subcontracts on two of Fisher's developments. Over a period of weeks, Fisher determined Robertson and Rashad were not qualified to do the work and refused to award RA-Mill the contracts. Fisher inquired if Robertson and Rashad had a "plan B," to which they requested a monetary payment of $180,000 to do little if any meaningful labor.

XV. Meeting at Friendship West Baptist Church

Hill was a vocal opponent of the "Strong Mayor Initiative", a key plank in the agenda of Mayor Miller's administration. Hill was not alone in principled opposition to this agenda, as it was ultimately rejected by the voters.

On February 25, 2005, Hill attended a meeting at Friendship West Baptist Church. Reagan attended the meeting and gave Hill $10,000; half of this was later

given to Farrington and the other misreported as donations to the campaign opposing the initiative.

SUMMARY OF THE ARGUMENT

Sufficiency of the Evidence

Even when viewed in the light most favorable to the government's theory of this case, there is no legally sufficient evidence to sustain any count of conviction.

STANDARDS OF REVIEW

Sufficiency of the Evidence

Challenges to the sufficiency of the evidence are reviewed de novo. *United States v. Wise*, 221 F.3d 140, 154 (5th Cir. 2000). In reviewing the sufficiency of the evidence, the Court examines whether "a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Klein*, 543 F.3d 206, 212 (5th Cir. 2008). In undertaking this review, "all reasonable inferences are drawn in the light most favorable to the prosecution." *Id*.

Prosecutorial Misconduct During Closing Arguments

Hill objected to certain of the Prosecutor's objectionable comments during closing argument. The trial court's admission of objected-to comments are

reviewed for abuse of discretion, which involves two steps: (1) whether the prosecutor made an improper remark and (2) if an improper remark was made, whether the remark affected the substantial rights of the defendant. *United States v. Fields*, 483 F.3d 313, 358 (5th Cir. 2007).

Contrariwise, Hill did not object to certain other improper comments made by the Prosecutor during closing arguments. Plain error review governs statements to which no objection was made. To demonstrate reversible plain error, *Hill* must show that (1) there is error; (2) it is plain; and (3) it affected his substantial rights. *United States v. Gracia*, 522 F.3d 597, 600 (5th Cir. 2008). *Accord United States v. Miller*, 2011 U.S. App. LEXIS 26072**,** *2 (5th Cir. 2011) ("Although Miller preserved her claims to some of the alleged prosecutorial misconduct, she did not object to all of it or to the challenged jury instruction. Insofar as she failed to raise these claims in district court, they receive plain error review.").

Closed Proceedings During Voir Dire

"Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Co. v. Superior Court of California, Riverside . . .* , 464 U.S. 501, 509, 104 S.Ct. 819, 823, 78 L.Ed.2d 629 (1984).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN CONVICTIONS FOR EITHER CONSPIRACY TO COMMIT EXTORTION (COUNT 15) OR THE SUBSTANTIVE OFFENSE (COUNT 16)

A. Introduction: This Case is the First Prosecution in History Where the Putative Extortion Began *After* A Business Relationship Has Already Begun

1. Subject Matter of the Counts

Count 15 alleges conspiracy to commit extortion; Count 16 alleges a discreet act of extortion on February 22, 2005. Both counts train on the alleged extortion of Fisher rather than Potashnik.

2. No Allegation That Potashnik Was An Extortion Victim Because He Perceived No Fear From the Same People Who Allegedly Extorted Fisher

The decision not to include Potashnik as an extortion victim is unsurprising given that his testimony was clear that "I looked the other way. I put my head in the sand, did not ask the right questions" (Vol. 14.15) and "had come to realize that what was being done to me was wrong and ***what I was doing was wrong***" *Id*. at 104 (emphasis added) but never conveyed this emotion to anyone else at the time and continued to do so with aplomb even after the FBI raid in June 2005. Vol.15.84 (Fish & Richardson law firm told Potashnik to keep paying Farrington's contract because it was unproblematic).

3. The Concept of Fisher as an Extortion Victim is Absurd

However, the alleged extortion of Fisher is even more intractable since enthusiastically played the political game. In response to a question on cross about the consultants he hired, Fisher asked rhetorically:

> Q. During this time frame of October 2004, what other consultants, if any, did you hire?
>
> A. I would say the opposite. ***Who didn't I hire?***

Vol.123.66 (emphasis added); *See also* Vol. 23.168 (Fisher explains that in addition to hiring consultant Kathy Nealy after she had done similar lobbying work for Potashnik, he hired the law firms of Jackson Walker, Hayne & Boones, and Shackelford Melton & McKinley to work on his City Hall issues.)

More significant is that Fisher voluntarily associated himself with Reagan and paid him well over $100,000 before even mentioning him to the FBI weeks after their initial meeting at Haynes & Boone. No other Hobbs Act case in history has been predicated on the contention that a putative victim began receiving abuse well after he voluntarily went into partnership with his (latent) extortionist.

B. Elements of the Offense

Extortion under the Hobbs Act is specifically defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or

threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). The Fifth Circuit's pattern jury instructions for Hobbs Act extortion require that the jury find that the defendant obtained the property of another with that person's consent through the "wrongful use of actual or threatened force, violence or fear," or that the defendant "wrongfully" obtained such property "under color of official right." 5th Cir. Pattern Jury Instructions (Criminal) 2.73, 2.74 (West 2001).

The right to make business decisions free from wrongful coercion is a protected property right. *United States v. Brecht*, 540 F.2d 45, 52 (2d Cir. 1976) (fear of loss of business); *United States v. Zamek*, 634 F.2d 1159, 1174 (9th Cir. 1980) (same).

C. Bribery and Extortion Overlap But Remain Analytically Distinct Offenses

This Court has long held that "merely accepting a bribe… does not constitute extortion or violate the Hobbs Act." *United States v. Duhon*, 565 F.2d 345, 351 (5th Cir. 1978). The distinction between extortion and bribery is the essence of a Hobbs Act violation. Professor James Lindgren analyzed the paradigm shift embedded in term "under color of official right" and the separation it cleaved from the common law unity of the concepts of bribery and extortion: "Coercion is often present in common law extortion cases, but at other times it

seems that bribery or false pretenses may have been the mode of taking." James Lindren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 849 (1988).

D. Hobbs Act Liability Is Generally Inapposite To the Withdrawal of Community Opposition

1. Legitimate Reasons for Community Opposition to New Development *Writ Large*

Substantial evidence that there existed a myriad of various legitimate reasons to oppose new affordable housing applications: Mayor Miller testified on direct examination that, "[o]ne of the significant problems that we faced at the City was that in boom times in the '70s sometime, the early '80s, there were a lot of apartment complexes built in one area" and "there was concern among a number of the council members that we be cautious about the balance between home ownership and apartment construction.". Vol.20.94.

2. Legitimate Reasons for Opposing Fisher's Projects in Specific

Mayor Miller testified on cross-examination that Fisher's erstwhile business partner, Leon Backes, personally told her that Fisher "was not financially able to complete his projects." Vol 20.195. Similarly, Jerry Killingsworth explained on direct examination why a developer's financial situation is a public concern:

> The concern for the City of Dallas if the project doesn't make sense financially is that the project gets started, it doesn't get completed, and

then you're having to deal with getting it completed, or sitting there with a half-constructed project.

Vol.18.184

3. Even Viewed in the Light Most Favorable to the Government, the Evidence Does Not Establish that Reagan Extorted Fisher

Viewed in light most favorable to the government, the evidence established that Reagan opposed Fisher's projects (against a backdrop of general opposition to new housing development and Fisher's abilities in particular) and then withdrew his opposition in exchange for an ongoing business relationship whereby he would advocate on Fisher's behalf.

Judge Posner has explained that "blackmail means the attempt to trade silence for money." Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1818 n.1 (1993). Reagan did not attempt to trade his silence; contrariwise, he sought to trade his advocacy for money. Moreover, it is striking that even in the light most favorable to the government, the evidence did not establish that Reagan sought a one-time payoff but rather an ongoing business relationship.

These dual characteristics (political clout; track record over time) were amply supported by evidence at trial. It was undisputed that BSEAT had been open for a long time. Vol.18.179 (Killingsworth testifies that he was known

Reagan for 20 years). Mayor Miller testified that during her 2003 reelection campaign she called upon Reagan to organize a fence-mending meeting with a disaffected minister. Vol.20.97.

It necessarily follows that Fisher did not find Reagan and BSEAT wholly illegitimate. Considering the enthusiasm in which Fisher entered into his agreement with Reagan (signing the contract in the City Hall parking lot) it cannot be said that he entered into the arrangement out of fear.

4. In its Vanguard *Albertson* Opinion, the Third Circuit Found No Hobbs Act Liability in A More Egregious Instance of the Withdrawal of "Community Opposition" in Exchange For Money

At most, Reagan's conduct in dropping his opposition in exchange for money is distasteful. This is legally insufficient evidence for a Hobbs Act violation. *United States v. Albertson* is the hallmark case on the subject of community opposition viz. the standards for extortion. 971 F. Supp. 837 (D. Del. 1997), *aff'd without opinion* 156 F.3d 1225 (3d. Cir. 1998).

Kirk Albertson moved for Rule 29 relief after conviction for a Hobbs Act violation; the District Court limned the factual background as follows:

> Albertson does not deny he offered, among other things, to drop his opposition to the Applewood Farms project and exert Machiavellian influence over Camden Town Council members to do the same in exchange for a $ 20,000 donation to his football team.

Id. at 841.

Granting Albertson's Rule 29 motion, the Court concluded:

> Albertson's 'proposition' was disgraceful, offensive, and ethically repugnant. But the Hobbs Act does not police all disgraceful, offensive, and ethically repugnant behavior; it only prohibits the 'wrongful' use of economic fear. Because Corrado stood to receive something 'of value' in return for his $20,000 sponsorship, Albertson's economic threats were not wrongful and not violative of the Hobbs Act.

Id. at 850.

The Third Circuit affirmed without opinion. 156 F.3d 1225 (3d. Cir. 1998). Whatever else may be said about Reagan's conduct, the fact that Fisher bargained for some reciprocal benefit *ab initio* removes it from the ambit of Hobbs Act liability.

E. Hobbs Act Liability Is Generally Inapposite When the Putative Extortionist Is Simply Trying to Arrogate An Economic Advantage From His Competitor

1. Fisher and Potashnik Detested One Another

By all accounts, Fisher and Potashnik detested one another. *See, e.g.*, Vol. 20.130 (Mayor Miller testifies on direct examination that Potashnik gave her copies of tax liens filed against Fisher so she would militate against his applications. "I had a list of tax liens against him. I had gotten from Mr. Potashnik.").

2. Hallmark Case of *United States v. McFall*

While Hill recognizes that neither Fisher or Potashnik were charged with a Hobbs Act violation, it is important to note that at least one Court of Appeals has held that Hobbs Act liability is generally ill-fitted to a duopoly where the actors can generate public opposition to advance their business interests at the expense of a competitor. In *United States v. McFall*, the Ninth Circuit overturned the conviction of a consultant who organized opposition by public officials to a company's power plant project in order to force it to drop a bid for a contract to build another plant that the defendant's client also was bidding for. 558 F.3d 951, 957 (9th Cir. 2009). The government alleged that the property extorted was the right to bid on the second plant contract, but the Court held that "decreasing a competitor's chances of winning a contract, standing alone, does not amount to obtaining a transferable asset for oneself (or one's client)." *Id*. ("It is not enough to gain some speculative benefit by hindering a competitor.").

F. The Economics of Affordable Housing Tax Credits Confine The Classification of Monies Paid by Fisher To the Bribery Context

1. Cases in Which the Extortion Victims Suffered Threats of A Total Shutdown of Their Businesses Demonstrate the Stark Contrast With Hill's Conduct

In *United States v. Edwards*, this Court explained that a Hobbs Act case was substantiated when the Louisiana Governor's *aide de camp* threatened companies

applying for riverboat gaming licenses with total foreclosure by the gaming regulatory committee. 303 F.3d 606, 636 (5th Cir. 2002) ("as a result of Brown's threats, they believed that they would not even have ***an opportunity*** to obtain a license.") (emphasis added). Similarly, in *United States v. Collins*, the Sixth Circuit upheld a Hobbs Act conviction against the husband of the Kentucky Governor who solicited contributions for the Democratic Party as a precondition for the right to contend for state contracts when the bidders "paid out of a fear that unless they paid money to Defendant . . ., they would forfeit ***any*** potential business opportunity with the [state]."). 78 F.3d 1021, 1030 (6th Cir. 1996) (emphasis added).

Hill recognizes that under the authority of *Edwards* and *Collins*, he might have perpetrated a cognizable Hobbs Act violation had he threatened to 1) deny Fisher basic building permits for inchoate projects, 2) impede Fisher's ability to build anything new in Dallas by voting against projects in other Districts, 3) or to shut down existing properties by sending code enforcement personnel to investigate fake safety concerns. *Accord United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971) (former Alabama attorney general and two associates were convicted on evidence that the three had threatened certain loan and insurance companies that unless payoffs were made to them, the loan companies would be put out of

business and the insurance companies would be denied intrastate stock issue approval).

By contrast, the most glaring aspect of trial was a total lack of evidence that Hill walked a path even close to this parade of horribles. At most, the evidence established that Hill passed votes when asked to do so by stars in his political solar system because these bad actors wanted to enjoy a different business relationship with Fisher than they otherwise would have.

The legal significance is that this evidence falls far short of the Hobbs Act's *sine qua non* that a victim perceive a fear economic harm rather than a simple loss of an economic benefit.

2. Wrongful Use of Fear Includes Economic Harm But Not Loss of Potential Benefit

a. The Qualification Endures from *Tomblin* to *Edwards*

For over forty years, this court has held that the "gravamen of the [extortion] offense is loss to the victim." *United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971). In the past two decades, this Court has repeatedly enunciated the qualification that loss of a potential benefit does not qualify as fear of economic harm for purposes of the Hobbs Act. In *United States v. Tomblin*, the Court held, "[t]he fear, however, must be of a loss; fear of losing a potential benefit does not suffice." 46 F.3d 1369, 1384 (5th Cir. 1995). This Court most recently spoke on

the subject of Hobbs Act violations in the public corruption in *USA v. Edwards*, 303 F.3d 606 (5th Cir. 2002), a prosecution of the epoch Louisiana political figure, Edwin Edwards, after his last term in office. Citing *Tomblin*, the Court explained, "Extortion by wrongful use of fear includes fear of economic harm. **This harm must take the form of a particular economic loss, not merely the loss of a potential benefit**." *Id*. at 635 (emphasis added and citations to *Tomblin* omitted); *see also United States v. Rivera-Rangel*, 396 F.3d 476, 482 (1st Cir. 2005) (quoting both *Edwards* and *Garcia*).

b. *Tomblin* and *Edwards* Are Doctrinal Cases Built on the Second Circuit's Opinions in *Capo* and *Garcia*

Both *Tomblin* and *Edwards* cite to the Second Circuit's opinion in *United States v. Garcia*, 907 F.2d 380 (2d Cir. 1990). In turn, *Garcia* presents a straightforward application of that Court's en banc opinion three years earlier, *United States v. Capo*, 817 F.2d 947 (2d Cir. 1987).

c. The Hallmark Case is The Second Circuit's En Banc Opinion in *United States v. Capo*

In 1982, Kodak announced a new product line and needed approximately 2,300 new employees. Standard hiring procedures fell by the wayside in the scramble to fill these jobs. The defendants in Capo used their influence with a

Kodak employment counselor to ensure individuals who paid them would be hired as Kodak employees.

The Second Circuit Court of Appeals, sitting en banc, reversed the Hobbs Act convictions of the defendants. *United States v. Capo*, 817 F.2d 947 (2d Cir. 1987). The *Capo* court reasoned that fear of economic loss must be viewed from the victim's perspective and the victim must have reasonably believed "first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment."*Id*. at 951. While this language would seem to redound to the Government's benefit, the *Capo* court held the Kodak job-selling scheme was not extortion because the "victims" were "willing participants" in an attempt to obtain influence and improve their employment chances. *Id*. at 952. Elaborating, the *Capo* court described the payment by one witness of $500 for his wife's job as made "not out of fear that [co-defendant] would otherwise impair her prospects for employment at Kodak, but, rather, to achieve a result she had been unable to attain on her own" *Id*. at 953. The court concluded by reasoning "these 'victims' faced no increased risk if they did not pay, but, rather, stood only to improve their lots by paying defendants" and therefore while the case presented a "classic example of bribery[,]" the evidence was insufficient to support a conviction for extortion. *Id*. at 954.

d. *United States v. Garcia*

The viability of *Capo* was confirmed by the Second Circuit Court of Appeals a few years later in *United States v. Garcia*, 907 F.2d 380 (2d Cir. 1990). In *Garcia*, a New York Congressman, emphasizing the influence he wielded with various government agencies, suggested to a corporation interested in obtaining contracts with those agencies that it hire his wife as a public relations consultant. After considering the Government's argument that this request was an implicit threat given the corporation's dependence on continued political influence, the *Garcia* court concluded the Congressman could not be guilty of extortion. "The central fact is clear[,]" the court wrote: "even in the face of *Garcia*'s disgraceful request for money, Wedtech [the corporation] was not risking the loss of anything to which it is legally entitled. Wedtech would still be permitted to bid on government contracts." *Id*. at 383-84. *See also United States v. Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978) (vacating extortion conviction because architectural firm was a "willing collaborator who sought and paid for [state legislator]'s good words to influential people" in order to obtain state contracts and there was no evidence firm believed it could not obtain state contracts without legislator's intervention).

e. Application of *Capo* and *Garcia* to Facts Presented in Case *Sub Judice*

Like *Capo*, Fisher was a "willing participant" in his initial dealings with Reagan and his subsequent dealings with the subcontractors. The parallels between *Garcia* and Hill's efforts to secure Farrington a contract with Potashnik are obvious, but inapposite for analysis under the Hobbs Act. More relevant is the Second Circuit's holding that "Wedtech would still be permitted to bid on government contracts" and the reality that Fisher remained free to lobby the City Council with people other than Reagan just as he did with lawyers from such firms as Jackson Walker and Shackelford, Melton & McKinley.

3. Housing Tax Credits Encapsulate An Unalloyed Economic Benefit And No Concept of "Economic Loss" Inheres in their Removal

a. Low-Income Housing Was Developed Long Before Congress Became Involved in the Year 1986

There was no evidence that homelessness pervades the city of Dallas or even its impoverished Southern Sector. The crude reality is that low income housing may not have always been an edifying spectacle, but investors have always been willing to build housing at a price that clears the market. This point was made clarion by Mayor Miller, who testified that "in the '70s sometime, the early '80s, there were a lot of apartment complexes built in one area." Vol.20.94. It is

striking that the "early '80s" predates Congressional enactment of the Low-Income Housing Tax Credit Program in 1986. Indictment; ¶1.

b. These Two Developers Did More Than $1 Billion in Business And Were Branching Out into Retail

The government presented substantial evidence that Potashnik and Fisher were genuinely interested in building housing projects with services that helped uplift their downtrodden tenants. But this benevolence was intertwined with a palpable desire to make a lot of money. For example, Potashnik testified that in the preceding decade he had done $800 million in business, of which $300 million was in the Southern Sector. Vol.16.9. No witness established the dollar-volume of Fisher's company, but since he was a major competitor it is a fair assumption that these two developers together were behind $1 billion of development.

Highlighting the lucrative nature of his business, "Fisher came up with a concept that he would bring retail to communities where he was also bringing affordable housing." Vol.15.12.

The point to take away is that even when all evidence is viewed in the light most favorable to the government, it is absurd to think that no low-income rental units would have been developed in the city of Dallas since the year 1986 without government largesse. To the contrary, the premium developers had moved past residential into retail.

c. Even A Financial Loss Would Still Be Very Much An Economic Profit Opportunity in This Industry

Nor did the tax credits transform loss-projects into money-makers. To the contrary, Potashnik testified that "we would only be using the ***very best*** architects, engineers, materials." Vol.13.41 (emphasis added). The ineluctable conclusion is that without the government subsidy, housing units would have been built with materials somewhere below the standard of the "very best" but still above the regulatory minimum under the health and safety codes. In other words, the profit margins would be preserved by cutting back on extras.

A correlate to this proposition suggests the difference between financial profits and economic profits. No witness testified what the internal rate of return on capital was for firms such as Odyssey Residential or Southwest Housing, but by all accounts both Potashnik and Fisher had become millionaires in a relatively short period of time. Without the subsidy, these housing developments might have become *financial* losses when the expected profits were discounted at these companies' high IRR or hurdle rates, but no evidence established that the projects would have become *economic* losses since cash flows would still exceed operating expenses.

II. EVIDENCE WAS INSUFFICIENT TO ESTABLISH CONSPIRACY TO COMMIT MONEY LAUNDERING (COUNT 19)

A. Funds Do Not Become "Proceeds" Until After A Criminal Transaction Has Been Finalized

1. Count 19 Is Predicated on Potashnik's Contracts with Farrington and Associates and Farrington's Contracts With Bright III

Section 1956(h) provides: "Any person who conspires to commit any offense defined in [§ 1956] or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." Although 1956(h) does not contain an overt act requirement, *Whitfield v. United States*, 543 U.S. 209 (2005), the Indictment identified the source of the "proceeds" for each underlying substantive violation: "which involved the proceeds of a specified unlawful activity concerning a local government receiving federal benefits, that is, 18 U.S.C. §666, the substance of which is set forth in Counts Eleven through Fourteen of this indictment…". (RE.3.202; 203) (reiterating cross-reference for respective violations of §§1956(a)(1)(A)(i), (B)(i), and (B)(ii), respectively). In turn, Counts 11-14 are predicated on the 2 annual contracts awarded by Potashnik to Farrington and Associates and Farrington's contracts with Bright III.

2. Each of the Listed Underlying §1956 Offenses Contains an Embedded Proceeds Requirement

"To sustain a conviction under 1956(a)(1), the government must prove beyond a reasonable doubt that (1) the financial transaction in question involves the proceeds of unlawful activity, (2) the defendant had knowledge that the property involved in the financial transaction represented proceeds of an unlawful activity, and (3) the financial transaction was conducted with the intent to promote the carrying on of a specified unlawful activity." *United States v. Valuck*, 286 F.3d 221, 225 (5th Cir. 2002) (quoting *United States v. Wilson*, 249 F.3d 366, 377 (5th Cir. 2001)). The difference between subsections (A) and (B) trains on the mere "knowing" scienter requirement implicit in the latter. *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999) (subsection A "is not satisfied by mere evidence of promotion, or even *knowing* promotion, but requires evidence of *intentional* promotion.").

3. The Money Paid By Potashnik Never Became "Proceeds"

a. No Cash Ever Went to Hill

Agent Garcia testified that he could never place any money from the alleged conspiracy into Hill's hands. Vol.34.139.

b. Money Laundering Cases in the Public CorruptionContext

i. *United States v. LaBrunerie*

The defendant in *United States v. LaBrunerie* was charged with two counts of conspiracy to commit §666 bribery and §1956 (a)(1)(B)(i) money laundering when he allegedly paid a City Councilman $20,000 to drop a proposed ordinance and another $50,000 for the Councilman's assistance in persuading the city to buy property he wished to sell at a favorable price. 914 F. Supp. 340, 342 (E.D. Mo. 1995) (Larsen, MJ). A passel of underlying bribery and money laundering counts were appended to the conspiracy charges. *Id*. at 342-344.

LaBrunerie moved to dismiss the money laundering counts; the government resisted with the argument that "briberies were completed acts at the time the financial transactions occurred, and therefore the checks represent proceeds of the briberies." *Id*. at 344. The government further argued that since any financial transactions with these funds necessarily occurred after the acts were completed, "the indictment sufficiently alleges that the monetary transactions involved proceeds of specified unlawful activity, i.e., bribery." *Id*. at 345.

The District Court rejected both of the government's arguments, explaining:

> There is nothing in the legislative history or in the case law suggesting that Congress intended to criminalize monetary transactions occurring ***before that money was paid to the person committing the underlying unlawful act***.

Id. at 347 (emphasis added).

In the case at bar, the 'underlying unlawful act' (at least for the §666 counts upon which Count 19 is predicated) was alleged to be Hill's passing and/or changing of votes in exchange for favors bestowed on others. Even when viewed in the light most favorable to the government's theory of the case, the totally separate legal principle of money laundering "proceeds" is unsatisfied since none of the money paid to others ever reached him.

ii. *United States v. Collins*

United States v. Collins involved a §666 and §1951 (a)(1)(B)(i) prosecution of 1) the CEO of a company which manufactured a synthetic meat product and 2) the former executive director of the Texas Department of Criminal Justice who allegedly received two $10,000 wire transfers for supporting a contract to supply TDCJ's meat requirements with this ersatz beef. 2005 U.S. Dist. LEXIS 46763 (S.D. Tex. 2005) (rev'd on other grounds by *United States v. Collins*, 243 Fed. Appx. 56 (5th Cir. 2007)). Following a guilty verdict, the District Court granted each defendant's Rule 29 motions (and in the alternative their Rule 33 motions) on all counts. Writing on the subject of money laundering, the Court explained:

> Even if the evidence established that the men engaged in bribery, it cannot establish that they laundered money. Money laundering is separate from the specified unlawful activity. It occurs only after the crime from which the funds were obtained is complete. Under the government's theory, the

> transfers are the proceeds of the bribes and were designed to conceal those same bribes. ***This is impossible: the transfers are the bribery; they cannot be the laundered funds, too. Since there was no completed offense before the transfers were made, there were no proceeds to clean.***

Id. at *66 (emphasis added) (Hughes, J).

This logic applies with equal valence to Hill's situation: even if the transfers from Potashnik to Farrington and Associates' bank account were bribes "they cannot be the laundered funds to." Moreover, the government's theory of the case was inconsistent with concealment once the funds were expended by Southwest Housing: Farrington gave money to Lee, paid her overhead expenses, and even bought a car in her company's name which she allowed Hill to use. The conspicuous consumption is completely opposite from concealment. *United States v. Marshall*, 248 F.3d 525 (6th Cir. 2001) (jury could not infer intent to conceal under subsection (B)(1) when defendant used money stolen from an ATM to buy a Rolex watch, a diamond tennis bracelet, and wine).

c. Doctrinal Principles From Drug Cases Apply Straightforwardly to the Case *Sub Judice*

Money laundering is most commonly litigated in the context of drug transactions where large sums of cash follow drug purchases. *See, e.g., Regalado-Cuellar v. United State*s, 553 U.S. 550, 555 n.1 (2008) (explaining Circuit splits which have arisen in § 1956(a)(2)(B)(i) doctrine and reversing conviction on the

facts presented). The points of sale are often separated by a great amount of time and geography from the payment of purchase price. However, this Court and others have made clear that even under the lower scienter requirements of subsection (B), transactions for the payment of drugs, even if efforts are made to conceal those payments, are not sufficient to establish a violation of 18 U.S.C. § 1956(a)(1)(B)(1) because "a transaction to pay for illegal drugs is not money laundering." *United States v. Harris*, 666 F.3d 905, 908 (5th Cir. 2012) (quoting cases and reversing convictions under (B)(1)). The doctrinal principles from this line of cases compels the conclusion that 'a transaction to pay for illegal political/governmental influence is not money laundering.'

Harris is this Court's most recent example of the legal parameter that money laundering must follow in time for the underlying criminal offense and, where the underlying drug transaction had not been completed, monetary transactions related to that drug transaction do not constitute money laundering. The *Harris* court cited approvingly, 666 F.3d at 908, to the Tenth Circuit's opinion in *United States v. Dimeck*, which overviewed the common division of labor in a drug trafficking organization:

> A drug transaction, from a business perspective, consists of the distributor (or kingpin) getting the drugs to his middlemen who in turn either sell the drugs directly or have others conduct the actual street sales. The middlemen then collect the money from either their sellers or the consumer (depending upon whether they conduct the sales themselves) and the

> middlemen then pay the distributor for the drugs that had been advanced to them. It is not unusual for a middleman to use a courier to deliver the money to, and pick up the drugs from, the distributor. During those transactions, it is not necessary for those involved to conceal or disguise the attributes of the money as it passes from one set of hands to another because the people expected to handle the money know it is illegal drug money.

24 F.3d 1239, 1240 (10th Cir. 1994).

As applied to the case *sub judice*, Hill is the kingpin, Lee was the middleman, and Farrington was the mere distributor. However, nothing about the existence of this division of labor in an extortion conspiracy (as opposed to a drug conspiracy) shifts the money laundering paradigm. In *Regalado-Cuellar*, the Supreme Court quoted approvingly Judge Smith's dissent in the en banc opinion being appealed from this Court:

> He emphasized the distinction between 'concealing something to transport it, and transporting something to conceal it,' and explained that whether petitioner was doing the latter depended on whether his ultimate plan upon reaching his destination was to conceal the nature, location, source, ownership, or control of the money.

553 U.S., at 556.

Even under the government's theory of this case, if Farrington regarded Hill as her "ultimate destination" her plan was not to conceal the source of the funds (Potashnik) but rather to make fully known its origin so that Hill would be at his most appreciative upon receipt. Any other theory would undermine the government's core contention that Hill intended to reciprocally benefit the giver.

III. EVIDENCE WAS INSUFFICIENT TO ESTABLISH HILL'S INTENT TO ENGAGE IN BRIBERY (COUNTS 11 AND 12)

A. Baseline Legal Principles

Section 666 "prohibits theft or bribery concerning programs receiving federal funds." *United States v. Westmoreland*, 841 F.2d 572, 574 (5th Cir. 1988). "The Supreme Court has described the coverage of § 666 as 'expansive, both as to the [conduct] forbidden and the entities covered.'" *United States v. Hildenbrand*, 527 F.3d 466, 477-78 (5th Cir. 2008) (quoting *Fischer v. United State*s, 529 U.S. 667, 678 (2000)). The legislative history indicates that § 666 was designed "to protect the integrity of federal funds by punishing theft and bribery involving Federal programs for which there is a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." *United States v. Marmolejo*, 89 F.3d 1185, 1190 (5th Cir. 1996) (quotation omitted).

B. Even if Hill Was Aware that Potashnik Gave A Contract to Farrington And Another to Spencer/Slovacek, The Evidence Was Insufficient to Establish That Hill Intended to "Make Good on the Bargain"

Even though there was substantial evidence at trial that Hill knew Farrington had received a consulting contract, and that Spencer/Slovacek had received a construction contract, this evidence only established that Hill was aware of

Potashnik's intent. Contrariwise, there was no evidence that Hill intended to "make good on the bargain" by changing his official conduct.

In *United States v. Ford*, the Second Circuit held that "intending to be influenced" means "there must be a *quid pro quo*" to establish the intent of the person demanding the thing of value. 435 F.3d 204, 213 (2d Cir. 2006) (a jury should be clearly instructed that it is the recipient' intent to make good on the bargain, not simply her awareness of the donor's intent that is essential to establishing guilt under Section 666"). (reversing and vacating conviction).

IV. EVIDENCE WAS INSUFFICIENT TO ESTABLISH CONSPIRACY TO COMMIT BRIBERY (COUNT TEN)

Despite the undeniable "flurry of activity" presented by the facts of this case, *United States v. Galvan*, 693 F.2d 417, 420 (5th Cir. 1982), and the certainty that a conspiracy existed, no jury could have reasonably found Hill guilty beyond a reasonable doubt. To the contrary, even though this evidence raises suspicions of guilt, a reasonable trier of fact would see virtually equal circumstantial evidence of incrimination and exoneration, and consequently would entertain a reasonable doubt whether Hill knew of Lee's agreement with others to violate Section 666 and/or voluntarily participated in that agreement. *United States v. Reyna*, 148 F.3d 540, 547 (5th Cir. 1998). "When," as here, "that is the case, [this Court] has no choice but to reverse the conviction." *Id*.

Even when viewed in the light most favorable to the government, the evidence was clear that Farrington thought she was performing useful labor for Potashnik and that Hill genuinely believed that he was bringing needed business to minority contractors in general without favoring any one contractor in specific.

The bottom line is that the evidence is insufficient to tether Hill to Lee's machinations. "When the evidence is in equipoise, as a matter of law it cannot serve as the basis of a funding of knowledge." *United States v. Reveles*, 190 F.3d 678, 686 (5th Cir. 1999) (reversing conviction for conspiracy).

V. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT A NEW TRIAL

Even if the Court finds the evidence barely sufficient to sustain the convictions, this Court should, pursuant to the broad remedial powers vested in it by 28 U.S.C. 2106, grant Hill a new trial on the ground that the verdict is against the weight of the evidence.[4] Under FED. R. CRIM. P. 33, a district court is authorized to grant a new trial on this ground even where the evidence is sufficient. See, e.g., *United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997) (upholding a district court's grant of a new trial on this ground). Moreover, "[i]f the complete record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong as to require a judgment of acquittal,

[4] Hill did not raise this argument at the trial court. While Hill did file a Motion to join Farrington's Motion for New Trial at the same time he filed his Rule 29 Motion (Doc. Nos. 1046; 1041, respectively) this Rule 33 motion was based on juror misconduct.

the district judge may be obliged to grant a new trial." *United States v. Morales*, 910 F.2d 467, 468 (7th Cir. 1990), amending opinion originally reported at 902 F.2d 604 (7th Cir. 1990).

VI. CLOSING ARGUMENT WAS CONTAMINATED WITH PROSECUTORIAL MISCONDUCT

In the seminal case of *Berger v. United States*, Justice Sutherland explained:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prose cution is not that it shall win a case, but that justice shall be done.

295 U.S. 78, 88 (1935); *accord United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986) (improper for prosecutor to tell jury it had any obligation other than weighing evidence).

During closing argument, the Prosecutor reminded the jury "I represent the United States." Vol. 47; 121. "If there is something about this Brian Potashnik plea agreement that you don't like, you think that I gave him too sweet of a deal, then take it out on me." *Id.*

Unfortunately, the Prosecutors' closing statements went far beyond reminding the jury that they were "the representative not of an ordinary party to a controversy" but were in fact contaminated with prosecutorial misconduct running

the gamut from aspersions about the defendants' sex lives to unalloyed vouching for prosecution witnesses by dint of their jobs in government.[5]

A. Prosecutors May Not Ask Juries to Send Larger Social Messages Rather At the Expense of a Dispassionate Analysis of the Facts Adduced at Trial

In *United States v. McRae*, this Court was "appalled at the Assistant United States Attorney's indulging himself in such an outburst" when he stated during closing argument:

> You don't have to believe part of it if you don't want to. Or if you want to, you can believe all of it and turn him loose, and we'll send him down in the elevator with you with his gun. He'll go out the front door with you.

593 F.2d 700, 706 (5th Cir. 1979); *accord United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993) (prosecutor attempts to instill in jurors fear of defendants).

Like the prosecutor in *McRae*, the Prosecutor asked rhetorically, "if developers are hit up for a tax and are forced or recommended or required to hire unqualified subcontractors to build, will South Dallas continue to be blighted?" Vol. 47; 176. *McRae* is distinguishable insofar as it involved a crime of violence whereas the prosecution of Hill involved alleged extortion. However, the Prosecutor's statement parallels that which require reversal in *McRae* because in both cases the jurors were asked to consider hypothetical *ex post* consequences of an acquittal at the expense of their propose focus on factual determinations.

[5] The only instance of prosecutorial misconduct which was objected to concerned the plea negotiations with Cheryl Potashnik. *See* Part D.1, *infra*. The other instances of prosecutorial misconduct, viewed either singularly or in the aggregate, easily establish plain error.

B. Appeal for the Jury to Strike A Blow Against Government Corruption Rather than Dispassionate Focus on Evidence

1. Prosecutor's Statement

> This is legitimate business.
>
> This is business as usual.
>
> This is politics as usual.
>
> If it is, we're in a lot of trouble, because ultimately it is for you to decide what form of government you want.
>
> Do you want for it to be transparent and open and honest?
>
> Or do you want what has been shown to you these last three months?
>
> **If you are satisfied or comfortable with what has been shown to you by these defendants and their co-conspirators these last three months, *then you find them not guilty.***
>
> But if their conduct is offensive to you, if all the money that flowed to them, all because they wielded the power, they had the big stick, they could make it happen, ***if that's offensive to you, then find these defendants guilty as charged.***
>
> You won't be telling them anything they don't already know.

Vol. 47; 172-173 (emphasis added).

Hill recognizes that "prosecutorial appeals for the jury to act as 'the conscience of the community' are not impermissible when they are not intended to inflame. *United States v. Smith*, 918 F.2d 1551, 1563 (11th Cir. 1990) (quoting *United States v. Kopituk*, 690 F.2d 1289, 1342-43 (11th Cir. 1982). However,

these statements by the Prosecutor were clearly 'intended to inflame' since the jury was asked not to serve as a mere 'community conscience' but rather "to decide what form of government you want." In other words, the Prosecutor invited the jury to abandon its discreet role as fact-finder in order to morph into a quasi-Constitutional Convention.

Moreover, the Prosecutor's exhortation to the jury that its decision should be determined by what was "satisfied or comfortable" with because the defendants "already know" their wrongdoing was an unalloyed appeal to 'moral law' rather than the law as stated in the jury charge. *People v. Fields*, 277 N.Y.S. 21, 22 (2d Dep't 1967) (reversing where "the prosecutor…told the jurors in effect that their deliberations should be controlled by the moral law…").

C. Personal Vouching for Government Witness: IRS Agent

1. Prosecutor's Statement

> You saw Mr. Garcia's analysis where the money comes out in cash. Mr. Garcia told you clearly that is a red flag as to activity within a company not being legitimate, because there is no way to trace where the cash goes.
>
> So you were actually- I think one of the questions to Mr. Garcia was what if an IRS former agent comes in here and testifies about some of the transactions that you have testified about, Mr. Garcia, ***wouldn't it be better to listen to the IRS agent about these finances?***

Vol. 45; 112 (emphasis added).

2. This Court Has Reversed Less Egregious Bolstering

In *United States v. Brown*, this Court reversed when a prosecutor maintained in his closing that a government agent/witness "did a real good job." 451 F.2d 1231, 1235-36 (5th Cir. 1971). Similarly, in *United States v. Garza*, this Court reversed when a Prosecutor stated about the testifying case agents:

> I'll tell you they don't have to fabricate to do it because there is enough wrong going on and there is enough corruption going on out there that if you just go out and walk around the streets and know what you are looking at and looking for you just bump right into it.

608 F.2d 659 (5th Cir. 1979); *see also United States v. Guerra*, 113 F.3d 809 (8th Cir. 1997) (vouching for witness' "excellent testimony").

3. Analysis

The Prosecutor's statements about Agent Garcia were more egregious that those found to require reversal in *Brown*; beyond saying that Garcia 'did a good job' in the analysis he presented to the jury, the Prosecutor repeatedly exclaimed that Garcia was "a former IRS agent." Moreover, the Prosecutor's statement fits conformably within the rule enunciated in *Garza*. By asking the rhetorical question, "wouldn't it be ***better*** to listen to the IRS agent on these finances?" the Prosecutor created an impossible polemical argument to refute since there was no countervailing witness the agent was supposedly better than.

D. Bolstering Credibility: Prosecutor Made Himself An Unsworn Witness

1. Prosecutor Testified As to the Plea Negotiations With Cheryl Potashnik

> Brian Potashnik's wife has pled guilty. She didn't plead guilty to count 10. ***I gave her the option.*** She pled guilty to a count involving Gladys Hodge.
>
> MR. VITAL: Your Honor, I object to what he gave her, the option. There is no evidence of that.
>
> THE COURT: Overruled.
>
> Ladies and gentlemen, again, you're bound to the evidence that you have heard, and you will recall what it was.
>
> MR. BUSCH: She pled guilty to bribery. They want to suggest that it's a sweetheart deal. Goes to club fed, plays some tennis, shoots some hoop. I think that's how Mr. Vital characterized it. Three squares a day. Gets out, still has his millions.

Vol. 47; 118-119.

2. *State v. Payne*

In *State v. Payne*, the Connecticut Supreme Court reversed when a prosecutor made himself an unsworn witness by personalizing the decision to bring charges against the defendant:

> There are a lot of other cases here. They are not calling the shot in this case. I filed the information. My name is on the information. I brought the charges here.

797 A.2d 1088 (Conn. 2002).

The Court expounded on the manifold errors inherent in this line of argument:

> [T]he prosecutor personalized the decision to bring charges based on his witnesses' testimony, suggesting that he would not have done so unless he believed McFarlane and Marrero and that he believed the defendant was guilty. This statement vouched for the credibility of the prosecutor's witnesses. It also emphasized the credibility of the prosecutor and his office and conveyed to the jury the prosecutor's personal belief that the defendant was guilty. Thus, the prosecutor took advantage of his role as an administrator of justice and urged the jury to convict on the basis of his belief that the defendant was guilty instead of on the basis of the jury's evaluation of the evidence.

Id.

In *Payne*, the prosecutor brought attention to the act that the charging instrument (the information) contained his imprimatur. *Payne*'s logic inveighs more strongly in Hill's case because the Prosecutor gave unsworn testimony about the plea negotiation process with Cheryl Potashnik ("I gave her the option") and personalized the terms of plea agreement ultimately entered into, thereby cloaking Brian Potashnik's testimony with an aura of validity and personal vindication for the government's agent.

E. Appeals to Wealth and Class Biases

The law has long held that closing argument must be germane to the charges at issue and that a prosecutor errs by veering into tangential issue of wealth and class. "The defendant was charged with murder, and not with being wealthy, and no reference should have been made to his station in life." *Goff v. Commonwealth*,

44 S.W.2d 306, 308 (Ky. 1931). Similarly, Hill and his co-defendants were charged with public corruption rather than exhibiting some form of generalized greed. Unfortunately, the Prosecutor repeatedly focused the jury on the defendants' perceived desire to grow rich rather than on any actual quid pro quo.

1. Reference to Farrington's "Sweet Deal"

> "91 percent of the funds from this account came Southwest Housing, and that ***sweet deal*** that Ms. Farrington got in October 2004."

Vol. 46; 21.

> That's the ***shameless greed*** that we're talking about in this case. It's unbelievable.

Vol. 47; 135 (emphasis added).

2. Repeated References to Lee's "Million Dollar Club"

> This, you will recall, is Mr. Lee's even more flagrant attempt to make the ***million-dollar club***.

Vol. 46; 4 (emphasis added).

> [V]ery clearly it's not Mr. Lee working on his own out there trying to get this Lancaster-Kiest project going, ***and his first million***, Mr. Hill is right there.

Vol. 46; 12 (emphasis added).

> So clearly acknowledging the source of the money, knowing that it's coming from—for his efforts in connection with all that he's done in terms of acting as a city council person to try to lay the groundwork for the scheme by Mr. Lee where he's trying to make his ***first million***.

Vol. 46; 26 (emphasis added).

> Mr. Lee, the planning commissioner who wanted to join the ***million-dollar club***…

Vol. 46; 36 (emphasis added).

> Businesses don't deal in cash.

Vol. 46; 22.

3. Analysis

a. Appeals to Wealth and Class Are Inherently Inflammatory Remarks

Numerous courts have upbraided prosecutors for appealing to the wealth and class biases of jurors. *See, e.g.*, *Brown v. United States*, 766 A.2d 530 (D.C. Cir. 2001) (reference to defendants as wealth physicians who had no respect for the law). The difference between appeals that are merely "undignified and intemperate", *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940), and those requiring reversal trains on the frequency of the prosecutor's statements during closing argument. *United States v. Stahl*, 616 F.2d 30 (2d Cir. 1980) (reversing a conviction because the prosecutor engaged in "calculated and persistent efforts to arouse such prejudice."). As shown in the immediately preceding section, the prosecutor did not simply refer to Potashnik's deal with Lee and Farrington with an anodyne description such as "profitable deals" or even "great deals." To the contrary, the prosecutor used the undignified term "sweet

deal" and used the phrases "first million" or "million dollar club" at least four times.

b. Caselaw

This Court has long held that reversible error is established when a prosecutor uses invective to refer to a defendant's profitable business operations. In *Benham v. United States*, the Court reversed when the prosecutor referred to a businessman on trial for tax fraud a "loan shark" and elaborated:

> He is the kind of a man who, in the course of his operations, buys notes at fifty per cent, sells them to an unsuspecting investor in second lien notes at a hundred per cent. He is not satisfied with a hundred per cent profit on his investment.

215 F.2d 472, 475 (5th Cir. 1954).

United States v. Stahl involved the prosecution of a businessman for bribery of an IRS official from whom he sought a lower valuation of real estate to minimize the associated inheritance tax. *Id* at 31. The prosecutor portrayed the case as one "about money, tremendous amounts of money" and repeatedly spoke of the defendant's "Park Avenue Offices" and sought to prejudice the less affluent jurors by emphasizing the defendant's wealth and property and alleging that his only desire in life was "to make money in real estate, money, money, money." *Id*. at 32. The Second Circuit was "compelled to reverse" because "such appeals are improper and have no place in a court room." *Id*. at 32.

Sizemore v. Fletcher came to the Sixth Circuit via §2254 habeas petition challenging certain aspects of Sizemore's underlying criminal prosecution for murder. 921 F.2d 667 (6th Cir. 1990). The court granted remand for issuance of a conditional writ, reasoning that:

> The prosecutor's references to the defendant's 'money', his "multitude of attorneys', and the statement that Sizemore 'would rather kill two men than to give them a raise' were all calculated to generate a class bias in the jurors' minds against the defendant. **Such appeals to class prejudice must not be tolerated in the courtroom.**

Id. at 671 (emphasis added).

c. Conclusion

Hill recognizes that had there been evidence of an actual "club" that Lee aspired to join (such as the Dallas Country Club) the prosecutor could have fairly referred to it during closing argument. To the contrary, there was no evidence of any such elite or restrictive club. In necessarily follows that the Prosecutor's repeated reference to the "million dollar club" was an unalloyed pejorative deliberately intended to arouse the jury's passions.

F. Focus on Municipal Layoffs

1. Prosecutor's Statement in Rebuttal

> Number one, Don Hill testified when he was asked by Mr. Jackson whether that was significant.

> He said no, the City of Dallas has a budget of $2 billion. So losing 4 and a half to 7 million, or whatever the City's portion of that would be, because that's total county taxes and hospital district, wasn't material.
>
> Well, ***tell that to all the City of Dallas employees who have been laid off this year*** because of the budget shortfalls.
>
> Tell that to them, it's insignificant.

Vol. 47; 104 (emphasis added).

2. *United States v. Payne* Is The Hallmark Case on Inappropriate Reference to Layoffs During Closing Arguments

In *United States v. Payne*, a postal worker from Jackson, Michigan was convicted of conditioning receipt of mail on the payment of money by the recipients. 2 F.3d 706 (6th Cir. 1993). During closing argument, the prosecutor mentioned a then-recent announcement by General Motors of a 75,000-person layoff. *Id*. at 711. Reversing, the Sixth Circuit explained:

> [W]e find that the comments had the ability to mislead the jury as well as ignite strong sympathetic passions for the victims and against Payne. Occurrences like Christmas and major employee layoffs, because they affect or potentially affect such a broad scale of people, are going to invoke emotions which may cloud the jury's determination of Payne's guilt.
>
> In particular, the comment about GM probably would have tremendous emotional impact on a jury sitting in Michigan because GM employs so many Michigan residents.

Id. at 712.

At one level of analysis, *Payne* is distinguishable insofar as the Prosecutor did not specify how many Dallas municipal employees had been laid off, but rather spoke about this group in general. However, the Prosecutor went further than did the prosecutor in Payne because GM had actually announced layoffs; by contrast, there was no evidence at trial about any municipal layoffs. *Payne's* holding applies with greater valence to the statements made by the Prosecutor, since he did not merely mention the layoffs, but invited the jury to "tell that to them."

G. Closing Argument About The Sex Lives of Hill and Farrington

1. Prosecutor Argued That Affair Itself Was "One of the" Crimes At Issue

The prosecutor spoke at great length about the affair between Hill and Farrington:

> [Hill] had his foot in two households essentially that were having financial problems. Those are largely undisputed facts.
>
> A difficult situation, I'm sure, for him, because, as he told you, he was trying to keep this relationship with Ms. Farrington-Hill from being discovered by other people. From his colleagues on the city Council, from his constituents, from other people in the City, and that all together probably created a very difficult situation for him.
>
> I say this because I want to bring your attention to all of these facts that were present that actually allowed these crimes to be committed by these five defendants. ***That's one of them.***

Vol. 45; 86 (emphasis added).

2. Prosecutor Disingenuously Disclaimed "Moral Judgment"

> There is nobody here trying to pass moral judgment on Ms. Farrington-Hill. That is not certainly undisputedly within the jurisdiction of the United States.
>
> No disrespect. The facts are what they are. The relationship was what it was for the relevant time period, and that is why we used that term. It did not come within our thinking, as Mr. Hill suggested, that ***the government should refer to her as his fiancé when he had his own household and his own wife at the time.***

Vol. 45; 87 (emphasis added).

3. Analysis

Every court to consider the issue has held that "placing [defendant's] marital fidelity into issue was highly improper." *United States v. Hall*, 989 F.2d 711 (4th Cir. 1993) (reversing where prosecutor stated in closing argument that the only reason the government did not have evidence of drug buys from the defendant was because no female officers were willing to go to bed with him); *see also Cook v. Bordenkircher*, 602 F.2d 117, 120 (6th Cir. 1979) ("prosecutor's misconduct in this case is severe" due to his "ad hominem attack on the petitioner's character").

In *Hall*, the prosecutor made one stray comment about the defendant's willingness to sleep with a woman other than his wife. By contrast, the Prosecutor demonstrated an almost prurient interest in this subject, orating about Hill and Farrington's affair for nearly two typed pages of transcript. More salient than the

sheer amount of words devoted was the insidious nature of the presentation. Immediately after speaking about "these crimes", the Prosecutor stated, "that's one of them." Even more alarmingly, the ersatz nature of the Prosecutor's statement that she would not "pass moral judgment" is made plain by her immediately following statement that Hill "his own household and his own wife at the time."

H. Expression of Personal Opinion and Belief

Prosecutors have a duty not to express personal opinions and beliefs. ABA Code of Professional Conduct DR7-106(4) (1976) (duty of attorney not to "assert his personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused."); *United States v. Young*, 470 U.S. 1 (1985) (expressing personal opinions concerning defendant's guilt pose twin dangers that jury will impact special trust in the prosecutor's judgment).

1. Aspersions on "Classic Politicians"

In contravention of these principles, the Prosecutor repeatedly attacked Hill as a "faithful public official" and a "classic politician":

> Don Hill said on the stand that I wanted Sheila to stay in University Park. It was important to me. The schools are better.
>
> That's coming from a city council member for the City of Dallas.
>
> How arrogant is that?
>
> He cooks up this deal with the Dallas Housing Authority, doesn't tell anybody at city council, the mayor, that this is in the works. Tells Ann Lott

> not to show up. Deprives the City, the county, the hospital district of millions of dollars because his girlfriend needs to live in University Park because DISD is not good enough.
>
> ***That's your faithful public official in this case. Always thinking of you.***

Vol. 47; 105 (emphasis added).

> Always trying to find a way out. ***The perfect politician.***

Vol. 47; 113 (emphasis added).

> It's a grotesque sham if you have ever seen one.

Vol. 47; 135.

2. Aspersions for Opposing Portions of Mayor Laura Miller's Political Agenda

Alarmingly, the prosecutor argued that the simple fact of Hill' decision to oppose parts of Mayor Laura Miller's agenda was evidence of wrongdoing:

> You know, when you elect somebody to serve they take an oath, and you expect them to abide by that oath.
>
> You expect them to live up to that, to follow the law.
>
> ***Not argue against increased ethics, disclosure requirements that Laura Miller was pushing for***, because it would put a burden on people.

Vol. 47; 111 (emphasis added).

Legislators choose to support (or oppose) a political agenda advanced by the Executive for any number of legitimate political reasons. Indeed, debate is the sinew of our democracy. In addition to bolstering the testimony of Mayor Miller,

it is truly alarming that the Prosecutor argued that the fact of Hill's having been opposed to some part of her agenda was evidence of bribery or extortion.

Moreover, this argument is counterfactual, as Mayor Miller testified that she and Hill were often aligned politically and that they "admired" one another:

> We had disagreements about policy and sometimes they were small differences, sometimes they were big differences and -- but we admired each other. When we both came to the council horseshoe on a big issue we were both pretty well prepared. When we were together, we were awesome. When we differed on an issue, it was challenging for both of us, I think.

Vol. 20.59.

I. Prosecutor Misled The Jury By Misstating the Law Concerning the Distinction Between Factual and Legal Determinations

1. Prosecutor's Misstatement

> The federal laws which the Court has already instructed you on, and what we will be dealing more with as I present my argument this afternoon, are intended to ensure that our public officials conduct themselves in this manner. It's not a -- ***quite frankly, the highest standard of behavior, but there is a minimum standard of behavior that is expected*** and that is protected by the laws of the United States which are ***going to be before you this afternoon.***

Vol. 45; 83 (emphasis added).

2. Disparagement of the Reasonable Doubt Standard

"A prosecutor may not mislead the jury about the State's burden of proof, nor can the State knowingly disparage the reasonable doubt standard that governs the jury's determination of guilt." *Boatswain v. State*, 872 A.2d 959, *4 (Del.

2005) (citing cases). The Prosecutor confused 1) her own subjective concept of "a minimum standard of behavior that is expected" with 2) the government's burden of proof. Whatever line is drawn underneath this ethical "minimum" is irrelevant to the guilt/innocence determination. Indeed, a public official might well fall beneath the Prosecutor's concept of ethics in government while not implicating any of the legal issues in a public corruption such as "corrupt intent" or "thing of value."

Moreover, there can be no doubt that the Prosecutor intended to put lend her personal imprimatur on the dueling "standards" because the sentenced was prefaced with the term "quite frankly."

3. Misstatement of the Jury's Fact-Finding Role

"A misstatement of law that affirmatively negated a constitutional right or principle is often, in our view, a more serious infringement than the mere omission of a requested instruction." *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990) (holding, on pre-AEDPA habeas review, that prosecutorial misstatement about jury's fact-finding role was harmful error requiring reversal).

The Prosecutor's statement, "the laws of the United States which are going to be before you this afternoon" invited the jurors to conflate the legal instructions (given by the judge in the jury charge) and the factual determinations (excusive

province of the jury). This point is demonstrated by temporal phrase "which are ***going*** to be before you this afternoon…". By the time of closing arguments, the jury had already had the charge read to them. The only prospective determinations "going" to be made were purely factual.

J. Prosecutor Burdened Defendants' Exercise of Right of Their Trial Right By Stating that Defendants Wasted "Jurors' Time"

1. Prosecutor's First Misstatement

The Prosecutor stated the defendants had 'wasted "jurors' time":

> [Plea agreements] saves the government time, it certainly saves jurors' time if there are -- if somebody who's guilty actually pleads guilty ahead of time, and does not require the government to be put to trial.

Vol. 45; 96.

2. A Second, And Even More Egregious Misstatement, During Rebuttal

In rebuttal, the Prosecutor invited the jury to infer guilt on the part of the defendants who went to trial from the fact that other co-defendants resolved their cases by plea agreement:

> That this man who has this business would go to prison because he was afraid to go to trial.
>
> I guess Allen McGill was afraid to go to trial.
>
> I guess Andrea Spencer was afraid to go to trial.

> Cheryl Potashnik, Kevin Dean, John Lewis. I guess they were all afraid to go to trial.
>
> I guess they all pled to some sham offense that wasn't really legitimate. They didn't really mean it. It has no meaning. It has no value in this case.

Vol. 47; 120.

3. Prosecutors May Not Cast Aspersions on the Right to Trial

Numerous courts have reversed when a prosecutor has cast negative aspersions of a defendant for proceeding to trial. In *Cunningham v. Zant*, the Eleventh Circuit found harmful error when a "prosecutor's comments improperly implied that Cunningham had abused our legal system in some way by exercising his Sixth Amendment right to a jury trial." 928 F.2d 1006, 1019 (11th Cir. 1991) (pre-AEDPA habeas case). More recently, the Kansas Supreme Court found error when "the prosecutor's comments in this case also injected a matter outside the evidence, inferring that Snow should have acceded to the State's evidence and waived his right to a fair trial because of the strength of the State's evidence against him." *State v. Snow*, 282 Kan. 323, 338 (Kan. 2006).

Even more alarming is the prosecutor's argument that the defendants' guilt could be inferred from the reality of their co-defendants' plea agreements. *United States v. Smith*, 934 F.2d 270, 275 (11th Cir. 1991) (error when "the prosecutor stated during his closing argument to the jury that Smith 'has not taken

responsibility for his actions' because he refused to plead guilty, whereas his co-defendants entered guilty pleas.").

VII. The District Court Reversibly Erred When it Sealed The Courtroom for *Voir Dire*

A. Pretrial Conference

On June 12, 2009, the District Court held a pretrial conference with the parties. During the pretrial conference, the District Court advised Mr. Trahan (a local news reporter) and the parties that "the jury selection will be in here, but I'm not going to have room for anybody but the parties and the lawyers for jury selection." Addressing Mr. Trahan further, the Court stated: "So Mr. Trahan, I will very happily through my office, if you like to call, I will let you know where we are, and when we're going to start with the scheduling, but I'm not going to have room for anybody else. To get the jurors in here is going to be difficult." (June 21 Transcript, p. 21).

B. June 22 Order

On June 22, 2009, the District Court issued a three-page order regarding trial proceedings. In the order, it made the following statement concerning *voir dire*: "[v]oir dire will be conducted in Courtroom 1516, and due to the anticipated space limitations, no seats will be reserved except for trial counsel, the parties, jury consultants, and close friends and family members of the defendants. R.913.

C. Jury Selection

The morning of the first day of jury selection, the District Court stated: "It will take quite a while to get everybody seated in here. I'm not anticipating that there is going to be room for anyone other than court personnel, counsel, defendants, government, government agents and the potential jurors. So those of you who are not in that category, once I'm am [sic] advised that jurors are up here, we will ask you to leave." Vol.1.3. Once the potential jurors arrived, the Court then stated: "The Court intends to seal the *voir dire* proceedings to protect the confidentiality of the jurors. I'm going to clear the courtroom, please, so I don't have to have my courtroom deputy step around you all. If there's room for you we will consider it, but it's not likely. Everybody out." Vol.1.7.

D. Baseline Legal Principles

"Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Co. v. Superior Court of California, Riverside* . . . , 464 U.S. 501, 509, 104 S.Ct. 819, 823, 78 L.Ed.2d 629 (1984). "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness." *Press-Enterprise Co.,* 464 U.S. 501, 508.

None of the parties requested that the courtroom be closed to the public during *voir dire*. No attorney for the defendants or the government objected to the District Court closing the courtroom for *voir dire*.

E. Post-Trial Briefing on *Presley v. Georgia*

On February 15, 2010, Hill filed a motion to join Farrington's Rule 33 motion on the (then) recently decided case of *Presley v. Georgia*. RE.8 and 9.[6] On February 25, the District Court denied motion for leave to file, on the grounds that it was both 1) untimely and 2) forfeited since no contemporaneous objection had been made. RE.10.

F. No Waiver

As the Supreme Court recently inculcated in *Presley v. Georgia*, it is clear that the District Court erred in closing the courtroom to the public during *voir dire*. 130 S.Ct. 721 (2010). The issue is whether the error was forfeited since there was no contemporaneous objection. *Presley* indicates that closing the courtroom from public access, whether a party has asserted that right or not, is error. *Id*. at 724 ("The public has a right to be present whether or not any party has asserted the right."). For instance, in *Press-Enterprise Co.,* neither the defendant nor the

[6] Insofar as Farrington raises a somewhat different argument on this point, Hill incorporates these arguments through FED. R. APP. P. 28(i).

prosecution requested an open courtroom during *voir dire* proceedings. *Id*., at 464 U.S. 503-504. The Court, nonetheless, found it was error to close the courtroom. *Id*., at 513, 104 S.Ct. 819.

In *United States v. Hitt*, this Court held that a defendant forfeited his right to complain of the trial court's closure of the courtroom during both a suppression hearing and during a minor's trial testimony. *Hitt*, 473 F.3d 146 (5th Cir. 2006), cert. denied, 549 U.S. 1360 (2007). The Court noted that "[a]t no time during the suppression hearing, after the government filed its motion to close the trial during [minor's] testimony, during the time between the suppression hearing and trial, at trial, or even in post-trial motions, did [the defendants] object to the courtroom closure." *Id*. at 155. It concluded, "[t]he defendants therefore waived their Sixth Amendment right to a public trial." Id. This ruling is called into question by *Presley*. *Id*., at 130 S.Ct. 721, 724-725.

In stark contrast to *Hitt*, the Seventh Circuit in *Walton v. Briley*, 361 F.3d 431 (7th Cir. 2004), held that a defendant cannot waive his or her right to the denial of a public trial resulting from the closure of the courtroom by simply failing to object to the closure. In *Walton*, the first two sessions of trial, which encompassed the prosecutor's entire case, were held during the evening hours after the courthouse had been closed and locked. *Id*. 433. Walton's fiancée had attempted on two occasions to enter the courtroom, but could not because the

courthouse was locked. Likewise, a confidential informant involved in the case tried to access the trial, but was unable since the courthouse was locked. *Id*. Walton's counsel failed to object to the late trial or to its effect of barring the public from attending the trial. *Id*. at 433. The district court found that Walton had waived this error by his counsel failing to object. The Seventh Circuit disagreed and reversed the case. *Id*. at 434.

In reaching its decision, the Seventh Circuit noted the Supreme Court's comment in *Schneckloth v. Bustamonte*, 412 U.S. 218, 241-42, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) that "[t]he Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial. Accordingly, "every reasonable presumption should be indulged against" waiver of a fundamental right. *Walton*, 361 F.3d at 433, *quoting Hodges v. Easton*, 106 U.S. 408, 412, 1 S.Ct. 307, 27 L.Ed 169 (1882).

The *Walton* court noted that this "heightened standard of waiver has been applied to plea agreements, the right against self-incrimination, the right to a trial, the right to a trial by jury, the right to an attorney, and the right to confront witnesses." *Id*. at 433, *See e.g*. *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Moltke v. Gillies*, 332 U.S. 708, 723-26, 68

S.Ct. 316, 92 L.Ed. 309 (1948). The common element of these cited cased is the fact that the rights which they deal with all concern the fairness of trial. Id. The right to public trial also concerns the right to a fair trial. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)("The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned . . ."). As such, the Seventh Circuit held, "like other fundamental rights, a right to a public trial may be relinquished only upon a showing that the defendant knowingly and voluntarily waived such a right . . . and cannot be waived by failing to object at trial." *Walton*, 361 F.3d. at 434.

The District Court failed to show that the privacy interests of potential jurors warranted closure of the courtroom. Moreover, the District Court failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. *See Press-Enterprise Co.*, 464 U.S. 501, 512. It does not appear that the case being tried would lend itself to questions that would give rise to a legitimate privacy interest of potential jurors. The District Court sought to keep the identity of the jurors secret without specifying any reason or need to keep their identities secret. This does not appear to be a legitimate basis for closing the courtroom from public access in the instant case.

G. Any Waiver Was Plain

Even if a waiver analysis is applied despite the Supreme Court's rejection of such an analysis in *Presley*, the issue would still be reviewed for plain error. *See United States v. Olano*, 507 U.S. 725, 733-34 (1993). Plain error requires that (1) there is an error; (2) the error is clear and obvious; and (3) the error affects a defendant's substantial rights. *See, e.g.*, *United States v. Ferguson*, 211 F.3d 878, 886 (5th Cir. 2000). The first two prongs are easily met in this case. As noted above, the Supreme Court in *Presley* believed that closing the courtroom during jury selection was an error so clear and obvious that it could decide that case in a summary disposition. Thus, the only question is whether the District Court's error in this case affected "substantial rights."

The Supreme Court explained in *Presley* that "'the process of juror selection is . . . a matter of importance, not simply to the adversaries but to the criminal justice system.'" *Presley*, at 724 (citations omitted). Indeed, this is why the law mandates a public *voir dire*. An openly held *voir dire* instills confidence in the public and protects the rights of the accused, ensuring "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their function." *Waller v. Georgia*, 467 U.S. 39, 467 (1984)(internal quotation marks omitted). However, the District Court's June 22nd

order closing the entire jury selection process to most of the public and the press resulted in a jury selection process shrouded in secrecy.

In describing the right to a public trial, one Court of Appeals wrote, "No right is more sacred in our constitutional firmament than that of the accused to a fair trial. Our national experience instructs us that except in rare circumstances openness preserves, indeed, is essential to, the realization of that right and to public confidence in the administration of justice." *ABC v. Stewart*, 360 F.3d 90, 105-06 (2d Cir. 2004). If no right is more "sacred," then there are very few trials where the right was more important than the instant case. A trial of this import, involving the prosecution of key African-American political figures and charges that they were selectively prosecuted based on their race, demanded a completely open trial in order to preserve "public confidence in the administration of justice." The fact that *voir dire* was closed to the public without good cause shown clearly shows that the defendants' substantial right, a sacred right, was affected.

For the reasons stated above, Hill's convictions should be reversed and a new trial ordered.

CONCLUSION

Hill's convictions must be reversed and remanded.

Respectfully submitted,

/s/ Seth Kretzer

Seth Kretzer
LAW OFFICES OF SETH KRETZER
The Lyric Center
440 Louisiana Street
Houston, TX 77002

[Tel.] (713) 775-3050
[Fax] (713) 224-2815

COURT APPOINTED ATTORNEY FOR
APPELLANT DON HILL

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 18,034 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a

proportionally spaced typeface using Microsoft® Office Word 2003 in 14-Point Times New Roman font.

/s/ Seth Kretzer

Date: March 27, 2012 Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that seven (7) copies of the Brief of Appellant were filed with the Court by U.S. Mail, and in electronic format via the ECF system, on the 27th day of March, 2012. I further certify that an electronic copy of the brief was served on all counsel of record by filing on the ECF System on the same date.

/s/ Seth Kretzer

Seth Kretzer

CERTIFICATE OF SERVICE

I certify that one copy of the Brief of Appellant was served on Donald Hill, Register Number 37106-177, on the 27th day of March, 2012.

FCI ASHLAND
SATELLITE CAMP
P.O. BOX 6000
ASHLAND, KY 41105

/s/ Seth Kretzer

Seth Kretzer