IN THE FIFTH CIRCUIT COURT OF APPEALS

FOR THE UNITED STATES

UNITED STATES OF AMERICA, Plaintiff – Appellee	)	
v.	)	No. 11-30908
MICHAEL ROUSSEL Defendant – Appellant	)	

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA,
Criminal Docket . No. 10-174, Sec. "J",
Judge Carl Barbier Presiding

INITIAL BRIEF FOR APPELLANT MICHAEL ROUSSEL

WILLIAM SOTHERN, La. Bar No. 27884
Law Office of William M. Sothern
JOHN WILSON REED, La. Bar No. 11126
Glass & Reed
530 Natchez Street, Suite 530
New Orleans, La. 70130
(504) 581-9083

Counsel for Michael Roussel

CERTIFICATE OF INTERESTED PARTIES

In compliance with Fifth Circuit Local Rule 28.2.1, undersigned counsel for appellant certifies that he knows of no persons, associations of persons, firms, partnerships, or corporations which have an interest in the outcome of this particular case other than the parties noted in the style of the case and their lawyers:

For Appellant: William M. Sothern, John Wilson Reed, Robert Glass (trial), William Clifton Stoutz (trial).

For the Appellee: U.S. Attorney for the Eastern District of Louisiana James B. Letten, Assistant U.S. Attorney Harry W. McSherry, Assistant U.S. Attorney Diane Hollenshead Copes, Assistant U.S. Attorney Carol Loupe Michel, Assistant U.S. Attorney Peter Mansfield, Michael Magner.

s/s William M. Sothern
William M. Sothern, La. Bar No. 27884

Counsel for Michael Roussel

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that oral argument will aid the Court in resolving this case because the appeal is factually and procedurally complex and involves difficult issues of constitutional importance and trial sentencing issues that are res nova in this Court. These issues include the validity of a Fifth Circuit pattern jury instruction in light of the United States Supreme Court's recent opinion in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011). Each of the issues presented require substantial engagement and comprehension of the factual details in the complicated record of this case. Counsel for Mr. Roussel respectfully suggest that their familiarity with the facts and issues in this case would assist the Court in deciding the case following oral argument.

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JURISDICTIONAL STATEMENT

This is an appeal of a final judgment in a criminal proceeding. Jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Eastern District of Louisiana and under Section 3742, Title 18, United States Code, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

ISSUES PRESENTED

Issue One: Whether the district court's willful blindness instruction ran afoul of the United States Supreme Court's recent Global-Tech decision.

Issue Two: Whether the district court's 404(B) instruction improperly allowed the jury to consider a vastly dissimilar and unproven prior act to infer intent and provided a basis for the Government's improper propensity argument.

Issue Three: Whether the district court's limitation on a critical witness and cooperating co-defendant's cross examination about his promised 5K1.1 deal and the magnitude of the benefit of his cooperation undermined Mr. Roussel's right to confront his accusers.

Issue Four: Whether Mr. Roussel is a public official or a high public official for the purposes of 2C1.1's sentencing enhancements.

Issue Five: Whether the bribery scheme involved more than one bribe for the purpose of 2C1.1's sentencing enhancement.

Issue Six: Whether the district court's expected benefit calculation under 2C1.1 is needlessly speculative and excessive.

Issue Seven: Whether *Apprendi v. New Jersey* was violated when an element of a crime that increased Mr. Roussel's maximum sentence was not submitted to the jury or proven beyond a reasonable doubt.

BRIEF ON APPEAL

STATEMENT OF THE CASE

Michael Roussel was initially charged with wire fraud in violation of 18 U.S.C. § 1343 and 2 for his alleged role as a principal in a bribery and fraud scheme on June 21, 2010. USCA5 15, 21. Along with co-defendant Joseph Branch, he was indicted under the same statutes in a one count indictment that urged that the intended victim of the fraud, Entergy, was reimbursed by the Federal Government through the Federal Emergency Management Agency (FEMA) for a security guard contract that was the alleged object of the fraud. USCA5 29-33. The men were charged under a six count superseding indictment on January 20, 2011, which added one conspiracy count under 18 U.S.C. § 371, which included five separate wire fraud counts, and specifically alleged that the fraud involved an organization that receives more than $10,000 in federal funds through FEMA in violation of 18 U.S.C. 666(a)(2). USCA5 92-98.

Branch pled guilty only to the conspiracy count in a plea agreement that required him to testify as necessary against Roussel for which the Government agreed to provide the court notice of his cooperation. *See* EDLA Document 57. Roussel was alone charged in a final superseding indictment on the same six counts but including language urging that the fraud involved federal funds through

FEMA *and the Department of Housing and Urban Development* (HUD) on March 24, 2011. USCA5 173-180.

Roussel pled not guilty to the indictment on March 28, 2011, as he had with the previous indictments. USCA5 189. His trial commenced with voir dire the same day. USCA5 190. Following four days of testimony and evidence, the jury returned a partial verdict on the fifth day, finding Mr. Roussel guilty of the conspiracy count (count 1) and two wire fraud counts (counts 5 and 6), not guilty of one of the wire fraud counts (count 2), and hanging on the remaining two wire fraud counts. (Counts 3 and 4.) USCA5 229.

At the September 8, 2011 sentencing, following numerous defense objections, the court sentenced Roussel to 136 months in prison, a downward variance from the offense level of 38, which carried a 235 to 293 month sentence under Roussel's criminal history category of I. USCA5 1819-22. Branch was subsequently sentenced to 5 years in prison, the maximum sentence for the conspiracy change to which he pled guilty. Significantly, the offense level found by the court in his case was 25, substantially lower than Roussel's by virtue of the fact that he pled guilty (accounting for three points) and was not found to have obstructed justice by testifying in his own defense (accounting for another two points) but primarily because the court did not apply two sentencing enhancements applied to Roussel based on purported multiple bribes and the fact the bribe

scheme involved a high public official. *See* Transcript of October 20, 2011 Sentencing of Joseph Branch (Branch Sentencing) at 3.[1]

A timely Notice of Appeal was filed on September 20, 2011. USCA5 480-81. A Motion for Bond Pending Appeal was subsequently filed on November 8, 2011 and was denied on November 15, 2011. USCA5 486-97; 514-23. This appeal follows.

STATEMENT OF THE FACTS

In 1997, a relatively new patrolman in the New Orleans Police Department (NOPD), Michael Roussel, was accused by a seasoned Lieutentant, Louis Dabdoub, of being a dirty cop. USCA5 750-59, 1447-51. Lieutenant Dabdoub believed that Officer Roussel had tipped off a drug dealer to a coming police raid. USCA5 757, 1451. Dabdoub confronted Roussel with the accusation and he denied any role in providing information about the raid. USCA5 756, 1451. Dabdoub claimed that, during the course of his questioning of Roussel, that Roussel had stated that he was not in the Sixth District Police Station that day, a fact that Roussel denied denying. USCA5 756, 1451. Based on Dabdoub's accusation and investigation, NOPD's Public Integrity Bureau (PIB) investigated whether Roussel had (1) obstructed justice and (2) been untruthful in denying to Dabdoub that he was present in the stationhouse on the day in question. Dabdoub's accusation that

[1] The record on appeal was supplemented with this transcript pursuant to this Court's April 4, 2012 order.

Roussel had obstructed justice by tipping off the drug dealer was not sustained by PIB. USCA5 757-58. However, based on Dabdoub's seniority and despite Roussel's insistence on his innocence, the Commission sustained the untruthfulness accusation and Roussel was suspended without pay for three days. USCA5 1452. In his 16 years of police service, the sustained finding of untruthfulness, which he persists in unrefuting, was the only blemish on Roussel's record prior to the present charges. USCA5 1426, 1452.

Thirteen years later, Roussel was a NOPD Captain and Dabdoub was the head of security for the Entergy Corporation. The men had only passing contact over the intervening years. USCA5 1455. In addition to his regular NOPD work, Roussel, like most NOPD officers, supplemented his police income by working and coordinating paid details, essentially private security provided by off duty, uniformed NOPD officers. One of the private entities that Roussel coordinated details for was Gladius Security, a Texas based private security company run by Joey Branch, a fast talking, big spending former Texas cop. USCA5 1436-42. Roussel had resolved issues for Branch and Gladius on several occasions including resolving a dispute between Gladius and the NOPD regarding the company's ability to provide security to Home Depot in New Orleans East in 2008 following Hurricane Gustav and provided contacts to Gladius to identify law enforcement officers in Louisiana for other details. USCA5 1437-38. On one occasion, Roussel

worked paid details for Gladius himself. USCA5 1135. In June 9, 2008, Branch contacted Roussel to get his assistance in coordinating a security detail in Plaquemines Parish involving executives from AT&T, Gladius' principal client. USCA5 1443. In that context, Branch and Roussel met at the Gordon Biersch restaurant in New Orleans' Central Business District on June 10, 2010. USCA5 1138, 1443. Their relationship to that point had involved Gladius business, a handful of phone calls, and two in person meetings over two years. Branch's girlfriend, Tamara Shelley, a stranger to Roussel, was present for the lunch meeting. USCA5 1145. Sergeant Hickman, who Roussel had coordinated to provide the AT&T detail, was also present during portions of the lunch meeting. USCA5 1444. After introducing Sergeant Hickman to Branch and resolving the AT&T business, Branch asked Roussel if he knew any local business people that might help him obtain security contracts. USCA5 1138, 1454. Branch told Roussel that he paid "finder's fees" to assist Gladius in obtaining contracts and that he had done so with a former Secret Service officer who assisted him in obtaining his contract with Home Depot. USCA5 1189.

Roussel told Branch that he knew Louis Dabdoub, the director of security at Entergy. USCA5 1139, 1454. Branch testified at trial that Roussel told him, in front of Branch's girlfriend in a public restaurant where a police sergeant had just been sitting, that Dabdoub would "want a piece of" the contract. Roussel denied

making that statement in his testimony. USCA5 1139-40, 1456-57. Regardless, Branch asked Roussel to call Dabdoub, then and there, to try to get a meeting for Branch to "pitch" Gladius to Entergy. USCA5 1454. Roussel, who did not even have Dabdoub's phone number, called the Commander of the NOPD Reserve Unit, where Dabdoub had a commission, to get his phone number. USCA5 1455. After Roussel got Dabdoub's number, he called him and, when he did not get through, left a message on his voicemail. USCA5 1456. About a half an hour later, Dabdoub returned Roussel's call and they had a two minute conversation, one of their first since the 1997 conversation that led to Dabdoub's accusation of obstruction of justice. USCA5 747, 1457, Government's Exhibit 16. Dabdoub testified that during the brief call that Roussel said that they would both make money if Dabdoub gave Branch a contract. USCA5 747. Roussel testified that he only told him about Branch's desire to pitch his company to Entergy and recounted that *Branch said to him*, "We can make some money." USCA5 1457. Roussel specifically denied offering any kind of kickback. USCA5 1457.

Later that day, Roussel sent Branch an email, providing Dabdoub's phone number so that Branch could set up his own meeting, along with the number of a Baton Rouge law enforcement officer for an AT&T detail in Baton Rouge:

> joe,
> as you requested,

1) East Baton Rouge Constable Lt. Vernon Scott – tele: [redacted] email: [redacted]
2) Director of Security for ENTERGY, Louis Dabdoub tele: [redacted] (call me if you have a problem making contact).

later

Government Exhibit (G.E.) 22.[2] [3]

Upon receiving the email, Branch testified that he called Roussel and told him, "Hey, he's your guy, you know, let you deal with him." USCA5 1142. Over the next several days, Roussel and Dabdoub exchanged text messages wherein it was determined that Dabdoub would meet with Branch on Monday, June 14 at his Entergy office and that Branch would fly in for the meeting. G.E. 16. But while Roussel was trying to set up the meeting and assisting Branch with his AT&T detail, Dabdoub went to the NOPD and then the FBI with his belief that Roussel was propositioning him with a bribe. USCA5 760-64. By June 14, when Roussel and Dabdoub next spoke, Dabdoub had gone undercover, intent on finally catching Mr. Roussel in wrongdoing.[4] USCA5 771-774. The phone call was recorded and presented at trial by the Government. G.E. 3. On the tape, Dabdoub brings up the possibility of kickbacks in veiled terms and Roussel appears to not understand him. G.E. 3-T at 3 ("Wait, what do you mean?").

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[2] This email was the basis of first of the five wire fraud counts, Count 2 of the Indictment. USCA5 179.

[3] The telephone numbers and email address appear in the exhibit but have been blacked out in this Brief.

[4] Despite the passage of time and the fact that the PIB did not sustain Dabdoub's obstruction of justice accusation, he remained convinced that he was right. USCA5 1016. Dabdoud informed the FBI of his beliefs about Roussel early on in this investigation. USCA5 1024.

Dabdoub, Branch, and Roussel met in person later that day at Dabdoub's Entergy office. Roussel, just after he got off work, drove to the Lakefront Airport where Branch and two associates arrived in Gladius' private plane. USCA5 1466. Roussel had not yet changed out of his uniform and drove an NOPD car. USCA5 1467. When the group arrived at Dabdoub's office, Branch and his associates sat opposite Dabdoub at his desk while Mr. Roussel sat back by the door. G.E. 8. The videotape of the meeting, which was surreptitiously recorded by Dabdoub and agents from the FBI, shows a disengaged Mr. Roussel amidst the flurry of words, contract talk, and scheming between Dabdoub and Branch. G.E. 8. At one point during the meeting, he got up and went the bathroom and, in his absence, the talk continued unabated. G.E. 8. At another point he was on his phone texting. G.E. 8. Roussel testified at trial that he was "bored" during the meeting, that the talk was "above" him, and that it "didn't register" that the men were scheming to defraud Entergy. USCA5 1471-74. He explained that he believed that Branch was a legitimate businessman and that Dabdoub was an incorruptible "straight arrow." USCA5 1473-74. He testified that he did not believe that these two men could be confecting something corrupt or illegal. USCA5 1474. Meanwhile, Dabdoub and Branch had agreed to overbill Entergy by 14.50 a man-hour on the security contract – a figure that Dabdoub suggested – and to split the proceeds of the

inflated contract three ways, between Dabdoub, Branch, and Roussel, another term proposed by Dabdoub. G.E. 8.

When Branch, his associates, and Roussel left Entergy that evening, they had dinner at a French Quarter restaurant. Branch testified that there was excited talk about all of the money to be made on the Entergy contract at dinner. USCA5 1156-58. He testified that Roussel was talking about retiring to Mississippi while Branch excitedly calculated figures. USCA5 1157. Roussel testified that he ate his shrimp salad and while Branch was talking about money, he was more interested in talking about fishing and hunting near his house in Mississippi, a 1500 square foot double wide trailer. USCA5 1482-84.

Two days later, Dabdoub, still in his undercover role, called Roussel and expressed concerns to him about whether Branch would follow through on the discussions from the meeting. G.E. 9. In the conversation, Roussel talked up the legitimate aspects of Branch's business, his current licensing, his corporate assets, and his past detail coordination for Gladius. G.E. 9. Dabdoub asked specifically whether he should have asked Branch for "up front" money and Roussel said no and talked up Branch's honesty and the solid nature of his business. G.E. 9. Dabdoub persisted in the inquiry about the money and urged Roussel to ask Branch to bring money to show good faith. G.E. 9. Roussel said that he would call Branch that day to ask but records show that no call was ever made. G.E. 9. He testified

that he did not make the call because he thought it was "cheeky" and "immoral" and "not how you do business." USCA5 1485-86.

While phone records show that Roussel never made that call, G.E. 16, there were many calls, texts, and emails between Branch and Dabdoub. The emails included (1) a contract that had been prepared by Entergy based on the bogus terms agreed to in the June 14 meeting which Gladius' attorney had "notated" and which was returned to Dabdoub as an emailed attachment and (2) an email from Branch confirming a June 20 meeting at Dabdoub's office where the contract was to be signed.[5] G.E.s 25 & 26. Dabdoub called Branch at his home on June 18 and they had a 25 minute phone conversation, recorded by Dabdoub and the FBI, about the details of how the security contract would work and what Entergy's requirements would be.[6] G.E. 11. Two days later, June 20, the day that Branch was to come to New Orleans to sign the contract, he called Roussel. G.E. 16. This call was not recorded. Roussel testified that he told Branch in the call that Dabdoub had asked him to inquire about upfront money "to reassure him that he was going to do a good job" but that Branch was insulted. USCA5 1488-89. Roussel testified that he advised Branch to instead take Dabdoub out to dinner "if y'all work out the contract." USCA5 1490. Branch testified that Roussel had told him about

[5] These two emails were the basis of the second and third wire fraud counts, Counts 3 and 4 of the Indictment. USCA5 179.

[6] This call is the basis of the fourth wire fraud count, Count 5 of the Indictment. USCA5 179

Dabdoub's request for the good faith money but said that it was clear that Dabdoub was concerned that Branch might "screw[] him out of his money." USCA5 1167. Branch testified that he was angry about the request but that he offered to bring $10,000 for Dabdoub, an amount he claimed that Roussel said was too much. USCA5 1168. Branch testified that he told Roussel that he would bring $1,000 for Dabdoub instead.[7] USCA5 1168.

Two days later, Branch and his entourage arrived again at Lakefront Airport. USCA5 1171. Roussel met them there, again in uniform in an NOPD car, and drove Branch to the Entergy office while his associates drove in a rented car. USCA5 1171. Branch gave him $500 on the ride over. USCA5 1173, 1552. Roussel testified that the money was owed to him for coordinating the AT&T detail in Baton Rouge. USCA5 1552. Branch testified that he gave it to Roussel as a sign of good faith and trust "to do this deal" and because, he told him, he did not want to give $1,000 to Dabdoub and not give Roussel anything. USCA5 1173.

Upon arriving at Entergy, the group met in a large conference room before Dabdoub asked Roussel and Branch to join him in his office. At the beginning of the meeting, Dabdoub provided Branch paperwork so that his wife could be established as a Gladius employee, the previously discussed means through which Dabdoub was to receive his portion of the inflated contract. G.E. 14. Branch gave

[7] This call is the basis of the fifth wire fraud count, Count 6 of the Indictment. USCA5 179.

Dabdoub an envelope in return, which was later found to contain $1,000. G.E. 14, USCA5 1105. Dabdoub and Branch again discussed their nascent deal and the profits – legitimate and illegitimate – to be made. G.E. 14. Again, Roussel was inessential to the conversation. G.E. 14.

After the men met, they went to a large conference room where Branch's associate and an Entergy employee were gathered. G.E. 12. While everyone else sat at the large conference table discussing the details of the contract – lawyers, insurance, liability, and logistics - Roussel sat on the sidelines. G.E. 12. At the close of the meeting after all the details had been resolved, an agent for Entergy signed the contract and Branch signed the contract for Gladius. G.E. 12. Dabdoub then invited Branch to meet his "boss" and he walked out of the room and was arrested. G.E. 12. Roussel was also arrested and taken into custody. USCA5 1096.

SUMMARY OF THE ARGUMENT

The case against Michael Roussel was the result of a bizarre game of Telephone wherein Roussel spoke and heard words filtered through others that were interpreted in the very worst light due to the fact the on one end of the line was Louis Dabdoub, who had always believed the worst of Roussel, and on another line was Joey Branch, who talked far more than he listened and who appeared to have the singlemindedness of an addict to obtain Dabdoub and Entergy's business at any moral, legal, or financial cost.

Notwithstanding the fact that Roussel was convicted of conspiracy and wire fraud relating to the June 18 call between Dabdoub and Branch and the June 20 call between Branch and Roussel, the Government's case had substantial weaknesses. Primary among them is the fact that the theory of the prosecution asked the jury to believe that Roussel committed acts that no person with the barest impulse toward self-preservation would have attempted if they had believed they were criminal.

Is it possible to believe that Roussel would have blurted out to Branch in a restaurant during the busy central business district lunch hour that the Entergy director of security would give him a contract in exchange for kickbacks? How much less likely is that to have occurred with a complete stranger – Branch's girlfriend – at the table, and when an NOPD sergeant had just left the table?

Next, would anyone in Roussel's position cold call Louis Dabdoub - a man whose primary role in his life had been as chief accuser and persecutor - and offer him a bribe? How much less likely is that to have occurred if the accuser has a reputation for such sterling honesty? Having talked to him briefly, is it possible that anyone would simply give Dabdoub's phone number to an acquaintance like Branch and tell him, "He'll give you the contract for a piece of the action. Just give him a ring."

Would a veteran police officer then knowingly sit in a meeting where his former accuser and his quick talking acquaintance engaged him in fraud in an office where he did not even have a seat at the table while two complete strangers – Branch's associates - sat and watch the crooked deal foment?

To be sure, the jury answered these questions in the affirmative in convicting Roussel. But the difficulty of the questions was overcome by errors made by the court that tipped the scales against Roussel.

The first two trial errors emerge from the district court's instruction. First, the court gave an instruction on deliberate ignorance that this Court has warned could potentially punish "innocent conduct" and which was recently criticized by the Supreme Court as potentially degrading the mens rea standard from "knowing" to "reckless". *See* Issue I(A); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011); *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996).

Second, the court confusingly instructed the jury to consider acts "allegedly committed on other occasions to determine whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment." USCA5 1633. This instruction was harnessed by the Government to argue that Roussel should be convicted on propensity grounds, and would have encouraged jurors to find Roussel guilty because of Dabdoub's allegations that he was in cahoots with drug dealers thirteen years earlier. *See* Issue I(B). These instructions would have

been prejudicial in any case but in a case where state of mind is the only real question, they unfairly undermined Roussel's defense.

While allowing the jury to make improper inferences about Roussel's state of mind, the court simultaneously barred him from effectively impeaching his co-defendant, Branch, who offered damning testimony against him. *See* Issue II. In particular, Branch was the Government's only witness to testify that (1) Roussel proposed the Dabdoub bribe scheme and therefore was aware of its venality and that (2) he facilitated and encouraged the $1,000 bribe to Dabdoub. His testimony also helped the Government overcome whatever difficulty the jury might have had in believing that Dabdoub was credible in his assessment of Roussel's role in the scheme given Dabdoub's seeming decade long vendetta against Roussel. Notwithstanding the centrality and significance of Branch's testimony to the Government's case, Roussel was unable to effectively confront Branch about either the sentencing benefit that he had already received or that that he hoped to see in the future.

The district court's lack of balance and parity at trial was even more evident at sentencing where the court applied sentencing enhancements against Roussel until he had an offense level of 38, the base offense level for second degree murder. USSG §2A1.2. Part of what is disturbing about this outcome is that Branch, who the court found to be the more culpable of the two men, avoided

enhancements where there is no possible justification for disparate treatment, and had a resulting offense level of 25.[8] In particular, Roussel received a four-point enhancement because the offense *involved* a public official and a two-point enhancement because there were multiple bribes in the offense. *See* Issues III(A)&(B). The court applied neither of these enhancement to Branch in calculating his offense level. *See* Branch Sentencing at 3. Roussel does not complain on appeal that he should not get the enhancements simply because Branch did not. Instead, the court's determination, with the Government's acquiescence, that they ought not be applied to Branch ratifies Roussel's argument that the enhancements are inapplicable to both men. These and other sentencing errors exaggerated the Guideline's arithmetic of culpability such that it placed him amongst the very worst offenders notwithstanding the court's determination that he was less culpable than his co-defendant who only received a five-year sentence.

ARGUMENT

Trial Issues

I. The District Court's Instructions Degraded the Requisite Mental State that the Jury Was Required to Find and Invited the Jury to Consider Highly Prejudical Propensity Evidence.

[8] At Branch's sentencing, the court stated that Branch used money to corrupt Roussel and stated, "There is no doubt in my mind that Branch was the prime mover in this. He certainly recruited Mr. Roussel . . .." Branch Sentencing at 7.

A. The District Court's Willful Blindness Instruction Ran Afoul of the United States Supreme Court's Recent *Global-Tech* Decision.

In this case, where the jury's principal task was to determine whether Mr. Roussel *knew* that Joseph Branch and Louis Dabdoub were concocting an illegal plan to defraud Entergy and to give Dabdoub kickbacks, the court instructed the jury in a manner that suggested that the Government need only prove that Roussel closed his eyes to this reality in a manner *reckless* to the truth. The court failed to require that the jury find that Roussel subjectively believed that this criminal plan existed. The court's misleading instruction lowered the bar far below the specific intent required to convict in this case. The court's instructional error is reviewed to determine whether, as a whole, the instructions are a correct statement of the law and are applicable to the factual issues in the case. *United States v. Peterson*, 244 F.3d 385, 395 (5th Cir. 2001).

The court offered a "deliberate ignorance" instruction in this case at the Government's urging. USCA5 1302. In response to a defense objection that the instruction was inapplicable, the court responded that the theory of the defense required the instruction,

> Throughout this whole thing, . . . your defense is he was there but he wasn't there, as I appreciate it. He was kind of in the background, he was texting, he was getting up to go to the bathroom. He really wasn't involved, you know. So I don't know how you can have it both ways. . . . I think the government is entitled to a deliberate ignorance charge in that. All it says is he can't deliberately close his eyes to what would

> otherwise have been obvious to him. It's a standard Fifth Circuit charge on that.

USCA5 1303.

Consistent with its response, the court instructed the jury on deliberate ignorance in a verbatim reading of this Court's applicable pattern jury instruction:

> You may find that a defendant had knowledge of a fact if you find the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

USCA5 1640.[9]

This instruction should not have been given to the jury. As an initial matter, no deliberate ignorance instruction should have been offered *at all*. The instruction is inapplicable to this case given that there is no particular fact, other than the existence of the crime itself, that Mr. Roussel claimed to be unaware. While the defense clearly challenged the knowingness of Mr. Roussel's conduct, "the proof at trial [did not] support[] an inference of deliberate indifference." *United States v. Threadgill*, 172 F.3d 357, 368 (5th Cir. 1999). Particularly given this Court's admonition that the instruction "should rarely be given," the court ought not to have given it in this case. *Id*. Assuming arguendo that a deliberate ignorance instruction was properly given, however, the instruction offered does not reflect or

[9] *See* Fifth Circuit Pattern Jury Instructions (2001), §1.37.

include necessary language required both by this Court and, more recently, the Supreme Court. *Global-Tech*, 131 S. Ct. 2060; *United States v. Freeman*, 434 F.3d 369, 378 (5th Cir. 2005).

The Supreme Court's recent opinion in *Global-Tech* engaged the knowledge requirements for civil liability, addressing what is required for "willful blindness" (or "deliberate ignorance") to establish knowledge as an element. *Global-Tech*, 131 S.Ct. at 2069. The Court observed that each of the Courts of Appeal, including this one, had the following two basic requirement to prove knowledge by deliberate ignorance: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of the fact." *Id*. at 2070.

On this proposition, *Global-Tech* cited to this Court's opinion in *United States v. Freeman*, wherein this Court provided two nearly identical required facts to support a deliberate indifference instruction. 434 F.3d 369, 378 (5th Cir. 2005). Significantly, the Supreme Court explained that these conditions are necessary to have a mens rea requirement equivalent to knowledge. *Global-Tech*, 131 S.Ct. at 2070 ("We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence.") Unfortunately, these requirements appear nowhere in the instructions offered in this case. USCA5 1640. Consequently, the instruction fails to require the jury to find either that (1) the

defendant has a "subjective belief" in a "high probability" of the existence of the illegal conduct or that (2) he made "deliberate" efforts to "avoid learning" of the illegal conduct. While the absence of those requirements renders the instruction inadequate to mandate a finding of knowledge, the final sentence of the instruction offered in this case – requiring that the defendant's actions demonstrate more than negligence, carelessness or foolishness – compounds that error by suggesting that something beyond negligence, for instance, recklessness, would be adequate to convict, even though that measure is short of knowledge. USCA5 1640. Additionally, the instruction's reference to the defendant "blind[ing] himself," without the other requisite language, further suggests that no actions are required to show constructive knowledge. Consequently, the instructions read to the jury in this case create a substantial likelihood that jurors convicted Roussel finding that a *mens rea* closer to recklessness than knowledge was adequate to convict him.

The court should not have read the deliberate indifference instruction in this case but, if it did, Roussel was entitled to an instruction that did not undercut the mens rea requirement that the jury needed to find to convict. For these reasons, he is entitled to a new trial.

B. The District Court's Improperly Given 404(B) Instruction Allowed the Jury to Consider a Vastly Dissimilar and Unproven Prior Act to Infer Intent and Provided a Basis for the Government's Improper Propensity Argument.

The district court improperly instructed the jury that they were permitted to employ evidence of a fourteen year old, entirely unrelated accusation that Mr. Roussel was involved in tipping off a drug dealer about an impending raid to determine whether Roussel had the specific intent to commit acts of fraud in this case. The prior accusation was entirely extrinsic and completely dissimilar and therefore the jury should have been discouraged from giving this evidence any weight at all in determining Roussel's guilt in the present case. The district court's error in instructing the jury to consider this evidence pursuant to Fed. R. Evid. 404(B) is reviewed under a heightened abuse of discretion standard. *United States v. Richards*, 204 F.3d 177 (5th Cir. 2000).

The evidence of the prior accusation was initially referenced and introduced *by the defense*. The prior accusation, leveled against Roussel by the Government's principal witness in this case, Louis Dabdoub, was that, in 1997, Roussel overheard information in his police station regarding a forthcoming police raid of a location and that he informed the target of the imminent raid. USCA5 714, 1447-51. Though Roussel was acquitted of this obstruction of justice charge by the NOPD's Public Integrity Bureau based on a complaint brought by Dabdoub, the charge of "untruthfulness" based on Dabdoub's representation that Roussel had

lied to him about his whereabouts on the day of the raid was sustained. USCA5 714, 1452. The defense marshaled this evidence in support of its theory that Roussel would not have knowingly approached Dabdoub, his dogged prior accuser, with a solicitation for illegal activity. USCA5 714-15. The evidence was admitted for this purpose and the court subsequently permitted the Government to employ this evidence in its questioning of witnesses. USCA5 724 ("In light of the defendant's opening statement, I'll allow the government to bring that up. . . . That issue from the 404(b) evidence with Dabdoub.")

Based on the admission of this evidence, the court instructed the jury as follows:

> Now, during the trial you also heard evidence of certain acts of the defendant which are not charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for a very limited purpose. If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then *you may consider evidence of other acts allegedly committed on other occasions to determine whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment*. This is the limited purpose for which any evidence of other acts may be considered.

USCA5 1633 (emphasis supplied).

At an earlier bench conference, trial counsel specifically urged a limiting instruction that would not permit the jury to consider the prior act evidence in assessing Roussel's guilt:

> . . . the bad acts . . . were introduced not for the sake of proving whether they did or did not occur . . . but to show his state of mind with regard to the defendant in relationship to how it may have affected his behavior or the defendant's behavior. So I don't think we're talking about a 404(b) evidence, but I do think we should get a cautionary instruction . . ..

USCA5 1311.

The court appeared to agree with trial counsel, recalling, "[T]he government originally offered it as a 404(B) evidence, and . . . I was inclined to keep it out of this case completely until the defense injected it into the case for other reasons . . .." USCA5 1309-10. At that point, the Court suggested that "the similar acts stock language . . . doesn't exactly fit this case." USCA5 1309. When the instruction was finalized and included the permissible use of the evidence to show intent, trial counsel took issue with it and its variance from his proposed instruction[10] but the court maintained the instruction as written, stating, "You're right, it's not exactly the words that you submitted, but I think this is a proper charge considering the context in this case." *See* USCA5 1564-1567.

[10] This proposed instruction is not included in the record on appeal but the record suggests that it is consistent with the first two sentences of the court's instruction but does not include language relating to any limited purpose for considering the other crimes evidence in assessing Roussel's guilt.

The court was correct in its earlier determination that the prior acts do not qualify for admission under 404(B), which states, "Crimes, wrongs, or other acts . . . may be admissible for another purpose [other than proving bad character], such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." The rule providing for the admission of other crimes evidence to prove intent is predicated on the notion that a person's prior offense engaging in very similar behavior shows that the defendant knew what he was doing when engaging in the acts that gave rise to the current charged offense. *See*, *e.g.*, *United States v. Robichaux*, 995 F.2d 565, 568 (5th Cir. 1993)(Prior offense admissible in "trial for enhancing with fraudulent securities the assets of an insurance company" where defendant had previously knowingly used fraudulent securities to increase the assets of another insurance company and defendant claimed not to know "what was going on" in present offense.)

While in this case it is unclear what the prior act was – the court did not make clear to the jury whether they were permitted to consider Roussel's previous sustained finding of untruthfulness or the unsustained accusation that he had tipped off a drug dealer and obstructed justice – it is insignificant to the determination of their admissibility as 404(B) evidence because neither the prior accusation or the sustained finding bear any resemblance to Roussel's present charges such that they might be relevant to understanding his intent (or lack of intent) to defraud Entergy.

The lack of similarity rendered the prior act inadmissible.[11] *See United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) ("Where the evidence sought to be introduced is an extrinsic offense, its relevance is a function of its similarity to the offense charged. In this regard, however, similarity means more than that the extrinsic and charged offense have a common characteristic. For the purposes of determining relevancy, 'a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand.'") Additionally, the fact that the prior acts were fourteen years old at the time of trial further undermined their relevance and admissibility. *Id*. at 917 ("temporal remoteness" weighs against admissibility of other crimes evidence). Notwithstanding the highly prejudicial nature of this evidence and the difficulty that jurors have in grasping its admissibility for a purpose other than showing propensity or bad character, the court improperly offered an instruction that invited the jury to incorporate the evidence into their assessment of Roussel's guilt.

This error was compounded by the fact that it empowered the Government to argue at length that Roussel was a dishonest and dirty cop with a bad character and a propensity toward crime and corruption, as follows:

[11] Assuming, *arguendo*, the validity of Dabdoub's full, unsustained accusation against Roussel, it would show only that Roussel had tipped off the target of the investigation and not that he was receiving bribes or other consideration that would make that obstruction of justice accusation in any way similar to the charged offense in this case. Consequently, this purported (but disputed and unproven) act would have no bearing on Roussel's intent or lack of mistake in his dealings allegedly offering bribes to Dabdoub or entering into a fraudulent commercial contract.

> And it's worked. It's worked for him in the past. And, you know, it may work for him again, because when you're a thoroughly corrupt cop and you've seen how it goes, and you've seen how it's gone in New Orleans for the 20-odd years that you've worked here, and the way this city has degenerated, you know, you probably can get away with almost anything. So why not? You're smart, you're streetwise, you know who the best lawyers are. You just go for it. Go for it.

USCA5 1581.

See also USCA5 1585 ("That's the kind of man that you have here today. . . . But this guy goes from untruthful street cop to being a captain of police, so he's gotten away with lying before. And so what he does, was he cold calls Dabdoub."); 1620 ("What does 1997 tell you about why a greedy cop would take a chance to make millions of dollars? What it tells you is that in 1997, when this guy got caught, he lied. . . . So what do you think this guy, as he's protecting drug dealers, what do you think he's thinking as Louis Dabdoub has gone out in the world, in the commercial world and he's sitting there and he says, so Joey -- I'll make a call to the guy.") The Government's arguments were improper and essentially urged the jury, counter to 404(B), that Roussel should be convicted because the prior accusation. *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (propensity evidence inadmissible). However, these arguments were only made viable by the district court's improper instruction.

II. The District Court's Limitation on a Critical Witness and Cooperating Co-Defendant's Cross Examination About His Promised 5K1.1 Deal and the Magnitude of the Benefit of his Cooperation Undermined Mr. Roussel's Right to Confront his Accusers.

The district court's rulings limiting Mr. Roussel's cross-examination of Joseph Branch, the Government's star witness against him, undermined Roussel's right to confrontation. Like all constitutional questions, review of whether the limitations abridged the Confrontation Clause is de novo. Beyond that, limitation of cross-examination is reviewed for abuse of discretion. *United States v. Davis*, 393 F.3d 540, 548 (5th Cir. 2004); *United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993).

During cross-examination of this witness, trial counsel attempted to ask a series of questions that focused on the deal and potential benefits for his cooperation that Branch received or expected in exchange for his testimony against Roussel. USCA5 1241-53. Trial counsel elicited testimony that Branch had originally faced charges (for five counts of wire fraud) that carried a statutory maximum of thirty years in prison and that, pursuant to this deal with the Government, that he faced only five years maximum (for his plea to conspiracy to commit wire fraud). But the Court granted the Government's objections about the Guidelines and barred trial counsel from inquiring about Branch's actual exposure under the guidelines or expected further benefit for his cooperation. USCA5 1241-42.

At a bench conference immediately following the court's ruling, the court explained he would not permit "a debate or argument over the sentencing guidelines" and cautioned trial counsel, "You've pretty much gotten what you can get out of this. He told you what he -- what the maximum was." UCSA5 1242.

The court made clear that its ruling was based on a prior case where similar issues were raised and marked out the limits of what could be asked of the witness: "I just went through this in another case, went to the circuit. I know I'm right on this. It gets too far to go into guidelines and all of this because there are too many uncertainties." USCA5 1243. Following the court's statement, several additional questions from defense counsel – "And before that deal . . ." and "You have substantially lowered . . ." – that were cut off by Government objections that the court sustained. USCA5 1245-46.

Later in his testimony, defense counsel sought to cross-examine Branch about his expectations of the benefit – in addition to his plea to a reduced charge - that he might realize by virtue of his cooperation and testimony. USCA5 1248-49. Notwithstanding the fact that Branch's signed plea agreement references the possibility (but not requirement) of the Government advising the court of Branch's cooperation in the form of a letter or motion supporting a sentencing departure under USSG 5K1.1, defense counsel was shut down and not permitted to ask what further sentencing reduction he thought he might obtain. USCA5 1249 ("We've

beat this horse to death, Mr. Reed. We really have. We're not going into sentencing guidelines. I told you already, okay.")

The court's rulings effectively limited Roussel's right to cross-examine and confront Branch about the actual benefit that he received as a result of his plea bargain and testimony, something that was critical to the jury's understanding of his motivations in cooperating with the Government and testifying against Roussel. Whether or not they understood or were told about Branch's exposure under the Guidelines, the jury surely would have assumed, as is true, that Branch's actual exposure for fraud was far less than 30 years. But a significant problem arises from the fact that they would not have known how much less Branch's exposure was and therefore had no way of discerning his actual benefit in reducing his exposure to five years under the plea. Additionally, the jury was in the dark about Branch's subjective understanding of his wished-for 5K1.1 motion.

To eliminate any lack of certainty about Branch's subjective understanding about the benefit that he was receiving or expecting for testifying against Roussel, he could have been asked what he believed his exposure under the Guidelines was based on his discussions with his lawyers and what his lawyer had advised about potential future reductions. Clearly, Branch would have been in a position to respond to this question because he had pled guilty seven months earlier on March 10, 2010, where he affirmed to the court, as all defendants who plead guilty do,

that he had discussed the Guidelines with his lawyers and had been offered an estimate of his exposure. *See Bench Book for U.S. District Court Judges*, Fifth Edition (September 2007), Federal Judicial Center ("Have you and your attorney talked about how these advisory Sentencing Guidelines might apply to your case?"). Significantly, the Federal Rules of Criminal Procedure *require* an inquiry into a defendant's understanding of "the court's obligation to apply calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines . . .." Fed. R. Crim. P. 11(b)(1)(m).

Branch would have surely discussed his pre- and post-plea exposure under the Guidelines with his attorneys. The difference between the amount of exposure under each would have been the basis of Branch's attorneys guidance about his guilty plea and cooperation[12]. Consequently, no confusion would have resulted from defense counsel's inquiry into his understanding of the benefit of his plea agreement.

These limitations on Roussel's cross examination of Branch violated the Confrontation Clause. *Davis v. Alaska*, 415 U.S. 308 (1974) (recognizing that "[t]he partiality of a witness," including "a witness's motivation in testifying," is a core concern of the Confrontation Clause, and therefore a constitutionally

[12] Upon court's denial of the 5K1.1 motion filed by Government, Branch's lawyer took issue with the ruling and invoked the fact that he had only had a similar denial "twice in 20 years in this district." Branch Sentencing at 11. This reaction strongly suggests that Branch was advised that he was nearly certain to receive an additional sentencing benefit for his cooperation. *Id*.

protected area of cross-examination.); *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Other courts of appeal have applied the Confrontation Clause to bar the same kind of limitations on cross-examination regarding the magnitude of the benefit that the witness expected. *See United States v. Chandler*, 326 F.3d 210, 224 (3rd Cir. 2003) (defendant has a right to cross-examine a Government witness on the difference between the guideline sentence that resulted from his plea and cooperation and what he would have been exposed to if he had not testified against the defendant); *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc) (limitations on cross examination violated the Confrontation Clause where a defendant was prohibited from asking government witnesses about the sentence that they would have received in the absence of their cooperation with the Government). This Court has only addressed this issue in unpublished opinions, one of which was relied upon by the court in granting the Government's objection. USCA5 1243 (court apparently referencing, though not in name, *United States v. Wilson*, 408 Fed. Appx. 798, 2010 U.S. App. LEXIS 23638 (5th Cir. 2010)).

The cross-examination permitted to Roussel did not reach either what Branch had really achieved with his plea or what he hoped he might get for his

testimony and therefore Roussel's Confrontation Right was undermined with regard to an essential Government witness.[13]

Sentencing Issues

III. The District Court Improperly Applied the Specific Offense Characteristics of Guidelines Section 2C1.1.

A. Mr. Roussel Is neither a Public Official nor a High Public Official for the Purposes of 2C1.1's Sentencing Enhancements

The district court erred in finding Mr. Roussel to be a public official and a "high level" public official for the purposes of USSG §2C1.1(a)(1) and (b)(2), respectively. This misapprehension of the guidelines increased Roussel's offense level by six points, or approximately 10 years. The district court's error in determining that Mr. Roussel was a public official was a matter of pure guidelines interpretation, and therefore, this Court reviews it de novo. *See United States v. Morris*, 131 F.3d 1136, 1138 (5th Cir. 1997).

Roussel, though a NOPD captain of the traffic unit at the time of this offense, was not acting in any official capacity during the course of this offense. His position provided him with no special access to Dabdoub, who was an acquaintance from high school and no longer employed by the NOPD, or to Entergy. The only relationship between Roussel's status as an NOPD officer and

[13] At Branch's sentencing, the court characterized Branch's deal for cooperation in exchange for testimony as a "tremendous break." Branch Sentencing at 10.

his offense was that, like hundreds of other officers, he went about his personal business after work with his uniform on and in his take home police vehicle. In short, he chauffeured Branch in a city owned car and sat in the back of the meeting between Branch and Dabdoub in his work clothes, facts that are entirely irrelevant to the fraud perpretrated in this case. And yet, over defense objections, he received a six-point enhancement based on his unrelated public position. USCA5 1792, 1795.

The initial two-point increase to a Base Offense Level of 14, rather than 12, was based on the fact that the "defendant was a public official." USSG §2C1.1(a)(1). The Commentary defines "public official" "broadly" but requires that the defendant be engaged in that role during the offense. Indeed, the provision most applicable to Roussel is the following:

> An officer or employee or person *acting* for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any function, under or by authority of such department, agency, or branch of government, or a juror in a state or local trial.

USSG §2C1.1, comment (n.1) (emphasis supplied).

The inclusion of the verb "acting" in the definition makes clear that what is required is not merely a government employee but, instead, one acting in that role. Precisely this objection was leveled below:

> This definition is plainly not one of pure status intended to enhance punishment on those who hold some public commission, but one that

> is directed to function and confines itself to those situations in which the individual is "acting... in any official function." Although Michael Roussel was indeed an "employee of local government," he was not "acting" in that capacity, or "in any official function," in relation to the events that form the offense.

Defendant Roussel's Sentencing Memorandum Regarding Guideline Issues And Motions For Downward Departure And Downward Variance, p. 14.

This objection and reading is supported by the Sentencing Commission's explanation for including the two additional points in its 2004 amendment of the USSG §2C1.1:

> Sections 2C1.1 and 2C1.2 each are amended to include alternative base offense levels, with an increase of two levels for public official defendants *who violate their offices or responsibilities by accepting bribes, gratuities, or anything else of value*. The higher alternative base offense levels for public officials reflect the Commission's view that offenders *who abuse their positions of public trust* are inherently more culpable than those who seek to corrupt them, and their offenses present a somewhat greater threat to the integrity of governmental processes.

USSG App. C, amend. 666, reason (emphasis supplied).

This language, which makes clear that increased offense level is intended to apply to public officials who corrupt their offices by accepting bribes and thereby abuse their positions of public trust, further highlights the inapplicability of the 14-point base offense level. Roussel accepted no bribes or remuneration in this offense related to his public position. Consequently, because Roussel was not "acting" as a public official in this offense and was not a defendant in this case alleged to have

violated his office by accepting improper remuneration, the 12-point, rather than 14-point, base offense level should have been applied.

For similar reasons, the four-point enhancement applied to Roussel for his being a high public official was also misapplied, notwithstanding objections prior to and at sentencing. *Defendant Roussel's Sentencing Memorandum Regarding Guideline Issues And Motions For Downward Departure And Downward Variance*, p. 14-16; USCA5 1780-83. That provision, USSG §2C1.1(B)(3), provides, "If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels." The Commentary to this provision makes crystal clear that the enhancement only applies "if the payment was for the purpose of influencing an official act by certain officials." USSG §2C1.1, comment (backg'd).[14] This Court has employed this Commentary to explicate the object of the enhancement: "The commentary explains that the four-level enhancement should be applied if the payment was for the purpose of influencing an official act by certain officials." *United States v. Barraza*, 655 F.3d 375, 384 (5th Cir. 2011). Consistent with this Commentary, each of the cases from this Court identified by undersigned counsel discussing the application of this enhancement under §2C1.1(b)(2), the offense has involved a

[14] This same language, applying the enhancement for bribes or payments *to* high level officials, has been included in the Commentary to this section since the first Guideline Manual was issued in 1987. USSG §2C1.1, comment (1987) (". . . *if the bribe is for the purpose of influencing an official act by certain officials, the offense level is increased by 8* . . .").

public official accepting bribes to influence his conduct in his official capacity. *See Id.* (enhancement applies where judge used "his position as a state judge to obtain money and sexual favors in exchange for assisting a criminal defendant"); *United States v. McCowan*, 2010 U.S. App. LEXIS 25406 (5th Cir. Tex. Dec. 13, 2010)(enhancement applies where offense involved bribes of prison guards to deliver drugs to an inmate); *United States v. Castillo Chairez*, 423 Fed. Appx. 361 (5th Cir. Tex. 2011)(enhancement applies where prison guard was convicted of accepting bribes); *United States v. Guzman*, 383 Fed. Appx. 493 (5th Cir. Tex. 2010)(enhancement applies where prison guard was convicted of accepting bribes to smuggle contraband to inmates). The other courts have similarly required that the high public official be the subject of the bribe or payment. *See, e.g.*, *United States v. Ring*, 811 F. Supp. 2d 359, 381 (D.D.C. 2011)(enhancement "explicitly applies where the 'payment' is 'for the purpose of influencing' an elected official."); *United States v. Delano*, 1995 U.S. App. LEXIS 39931 (2d Cir. Dec. 22, 1995)(applying enhancement based on finding that defendant "accepted a bribe knowing that it was provided in order to influence him in making decisions in his official capacity.").

The district court's findings offered in denying Roussel's objection to the enhancements are entirely inadequate to establish the he was involved in a scheme to make a bribe or payment for the purpose of influencing an official act by a

public official. Instead, while acknowledging that Roussel was not "officially on duty," the court focused on the fact that Roussel was a "high-ranking captain and commander of the New Orleans Police Department at the time these events occurred" and noted that he "used the so-called trappings of his office" – his police vehicle and his uniform – during the offense.[15] USCA5 1792. However, this Court has required that a defendant participate in a bribe of a public official during the offense so it is not enough that Mr. Roussel was a public official outside of this offense or that he had the trappings of public office while committing the offense because he was not the subject of the bribe and his official role was not compromised.[16] *Barraza*, 655 F.3d at 384.

Given the language in the Guidelines and in the Commentary, the enhancement applies without regard to whether the defendant was the high level official receiving the bribe or the private citizen offering the bribe. See *United States v. Villafranca*, 260 F.3d 374, 382 (5th Cir. 2001) (enhancement applies to both the person offering and the person receiving the bribe). Because Mr. Roussel

[15] In finding these enhancements, the court focused on the fact that this offense involved "more than just a couple of private businessmen cooking up some kind of plot or bribe." USCA5 1793. However, the reality that this offense involved potential fraud involving public funds was already reflected in the designated USSG §2C1.1 guideline, which carries substantially higher sentences than the USSG §2B1.1, the guideline for commercial fraud.

[16] Confirming the district court's erroneous view that the enhancement was applied to Roussel because he was a public official, even if not acting in that capacity during this offense, the court stated at Branch's sentencing, "There is one way to look at it, that [Roussel's] conduct was more egregious because he was a police officer, public official, and which jacked up his guidelines . . .." Branch Sentencing at 10.

and Branch were convicted of engaging in the same bribery scheme which involved them offering a bribe to Dabdoub, it is clear that any applicable enhancement under 2C1.1(b)(3) would apply equally to both of them.[17] However, the court did *not* apply the four-point enhancement in calculating Branch's Guidelines. In calculating Branch's guideline offense level, it appears that the court assigned a 12-point base offense level (for a defendant not acting as a public official), a 16-point enhancement based on a projected gains from the fraud (the same as Roussel), less three points for acceptance of responsibility, for a total offense level of 25.[18] Branch Sentencing at 3. There is no principled reason why

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[17] In applying this enhancement, the court was only considering the bribery scheme involving Dabdoub as it had specifically determined that any other purported bribes from Branch to Roussel two years earlier in 2008 were not "relevant conduct" because the conduct lacked a "close temporal relationship" with the present offense and therefore was not considered in calculating Roussel's guidelines. USCA5 1784. Significantly, Probation only recommended the application of the high public official enhancement based on the excluded relevant conduct and offered an alternative calculation, eschewed by the court, in the event the court did not consider that conduct:

Base Offense Level: USSG §2C1.1(a)(1)	14
Specific Offense Characteristics: USSG §2C1.1(b)(2), benefit to be received is more than $1,000,000 but less than $2,500,000	+16
Adjustment for Obstruction of Justice:	+2
Total Offense Level:	32

See Addendum to the Presentence Report, p.7.

As discussed in Issue III(B), this calculation also excluded the Multiple Bribes enhancement based on the assumption that it was only supportable with the excluded relevant conduct.

[18] While the specific guideline applications are not explicitly in the sentencing transcript, they are clear given the context of the case and application of the guidelines in Roussel's case. This

the court would apply the enhancement against Roussel and not against Branch and its absence, with the Government's apparent acquiescence, suggests that it was misapplied to Roussel and undermines the rationality and uniformity that Guidelines were created to encourage.

The district court's misapplication of the public official enhancements resulted in a six offense level increase from the otherwise applicable offense level of 32, a level with a minimum sentence 114 months less than the offense level assigned by the court in this case.[19] This vast discrepancy surely impacted Roussel's sentence and consequently he is entitled to have his sentence vacated and a remand for resentencing where he can be sentenced based on an accurate guideline calculation. *See United States v. Ibarra-Luna*, 628 F.3d 712, 717 (5th Cir. 2010).

B. The Bribery Scheme Did Not Involve More than One Bribe for the Purpose of 2C1.1's Sentencing Enhancement.

The district court erred in finding that Mr. Roussel's offense "involved" more than one bribe, a determination that resulted in a two-point enhancement of his offense level. The district court's error in determining that Roussel was a public

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suggested calculation also mirrors the calculation offered by probation in Roussel's case in the event that the court excluded the 2008 purportedly relevant conduct.

[19] As discussed below, the court made further guidelines errors in this case resulting in at least a offense level inflated by at least another six points due to errors regarding the multiple bribes (+2) and amount of loss enhancement (+4). If this court corrected these errors as well, the resulting offense level will be 26, which carries a sentencing range of 63 to 78 months.

official was a matter of pure guidelines interpretation, and therefore, this Court reviews it de novo. *See Morris*, 131 F.3d at1138.

Roussel was convicted of conspiring with Branch to obtain an inflated contract with Entergy in exchange for a kickback to Dabdoub, who was working undercover for the FBI. The scheme, which never could have gone anywhere given Dabdoub's fictitious role, ended before it began with only one transfer of money from Branch to Dabdoub, earnest money requested, in role, by Dabdoub against future-never-to-be realized fraudulent earnings. In assessing that offense, Probation did not find multiple bribes and, instead, in its Pre-Sentence Report, recommended the multiple bribes enhancement based on a purported bribe from Branch to Mr. Roussel in 2008. Pre-Sentence Report at 10. The Addendum, however, makes clear that the enhancement would not apply if the 2008 acts were not considered "relevant conduct." Addendum to Pre-Sentence Report at 7. The court did not consider the 2008 acts as "relevant conduct," USCA5 at 1790, but applied the enhancement under a different theory. USCA5 at 1793-94. Over a defense objection, the court found that the defendants "intended . . . a series of actions" that "was to continue for some period of time in the future." USCA5 at 1793; *see* Objections to Pre-Sentence Report, p. 5. Further, because the money to Dabdoub would have been directed to him based on different presidentially declared

disasters, the court found that "another bribe [was] to be paid every time there was another event that occurred." USCA5 1793-94.

The court's application of the enhancement is erroneous because the guidelines regard payments made in exchange for a *single* action as a *single* bribe even if it is paid in multiple installments. The Guidelines makes clear,

> Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (e.g., a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.

USSG §2C1.1, comment (n.2).

Other Courts of Appeal have employed a three-part test to determine whether an offense involved more than one bribe under this definition. *United States v. Arshad*, 239 F.3d 276 (2d Cir. 2001); United States v. Weaver, 175 Fed. Appx. 506 (3d Cir. 2006); *United States v. Ford*, 344 Fed. Appx. 167, 170 (6th Cir. 2009). That test includes the following factors: 1) whether the payments were made to influence a "single action," *Arshad*, 239 F.3d at 280; 2) whether the pattern and amount of payments bear the hallmarks of installment payments rather than a series of varied bribes, *Id*. at 281-82; and 3) whether the method for making each payment remains the same. *Id*. at 282.

The bribery scheme in this case was hypothetical and never really going to happen. Consequently, it is difficult to pin down exactly how it would have worked

with precision. However, the elements of what the men intended are clear enough to determine that the intended bribe was a single bribe under this definition. First, the promise of a $4.83 share of each $89.50 man-hour worked by Gladius was intended to get Dabdoub to approve and execute and facilitate a contract between Gladius and Entergy to provide security during disasters at a rate inflated by $14.50 per man-hour. While numerous smaller tasks were no doubt subsumed within this hypothetical action, this is the one thing that the promised $4.83 share was intended to accomplish.[20] Second, the payments to Dabdoub were to be for a fixed and specific portion of the proceeds of the hypothetical contract between Gladius and Entergy. Consequently, while the dollar amount would have varied, the payments would have been exactly 5.400372% ($4.83 of every $89.50) of the Gladius's gross from this contract, a figure precisely the same as the amount intended for Roussel and for Branch. This specific amount of payment was discussed, agreed to, and regarded as a fixed and permanent arrangement for the term of the contract. Third, and finally, the hypothetical payments were to be directed to Dabdoub's wife for sham employment as a secretary through Gladius's otherwise legitimate payroll. Each of these factors suggests that this was not more

[20] To the extent that this Court looks instead to the $1,000 paid to Dabdoub as the bribe in question, it is clearly both (1) similarly intended to obtain his complicity in this fraudulent contract and (2) was merely to show good faith on Branch's ability to deliver on the balance of the bribe.

than one bribe. Consequently, the district court's application of the enhancement was unmoored from the Guidelines and was error.

Second, assuming arguendo that this Court accepted the district court's application of the enhancement to the bribery scheme, as planned, there is no support in the Guidelines or the related caselaw for the application of the enhancement based on intended but uncompleted and hypothetical bribes. The plain language of the enhancement, "If the offense *involved* more than one bribe . . .," rings clear with the simple past tense form of the it verb, to involve. USSG §2C1.1(B)(1) (emphasis supplied). Consistent with the plain meaning of the enhancement, a review of this Court's cases discussing the application of this enhancement fails to reveal a single case where the bribes involved were not already completed. *See e.g., Barraza*, 655 F.3d at 384 (two bribes made to a judge by a former client); *United States v. Bohuchot*, 625 F.3d 892 (5th Cir. 2010) (multiple bribes where defendant received cash, vacation trips, employment for family members, sporting event tickets, and use of two yachts in exchange for pieces of insider information); *United States v. Carr*, 303 Fed. Appx. 166 (5th Cir. 2008) (two bribes where police officer received bribes to protect drug dealer); *United States v. Mann*, 493 F.3d 484 (5th Cir. 2007) (multiple acts of extortion of non-interstate travellers). In this case, the only real, non-hypothetical payment to

Dabdoub was the $1000 earnest money payment made to him prior to the signing of the contract.

Reflecting the accuracy of Roussel's position regarding this enhancement, Probation did not recommend, the Government did not seek, and the court did not apply this enhancement in the sentencing of Roussel's co-defendant, Joseph Branch. *See* Branch Sentencing at 3. There is no principled reason why the court would apply the enhancement against Roussel and not against Branch and its absence suggests that it was misapplied to Roussel and undermines the rationality and uniformity that Guidelines were created to encourage. Just as it did not apply against Branch, the multiple bribes enhancement should not have been applied in this case. This increased guideline sentence and offense level surely impacted Roussel's sentence and consequently he is entitled to have his sentence vacated and a remand for resentencing where he can be sentenced based on an accurate guideline calculation. *See Ibarra-Luna*, 628 F.3d at 717.

C. The District Court's Expected Benefit Calculation Is Needlessly Speculative and Excessive.

The district court's estimate of the value of the benefit to be received in relation to this offense, which led to a 16-point enhancement to Mr. Roussel's offense level, was unreasonably based on a four year old storm season that included Hurricane Ike, the second costliest hurricane in United States history and Hurricane Gustav, a terrifying hurricane that led to one of the biggest evacuations

in United States history, rather than more recent and typical storm seasons that would have reduced the enhancement considerably. The district court's error in methodology – choosing one of the worst possible hurricane years to fix the prospective loss rather than the inactive season that actually occurred during the relevant period – for fixing the loss is reviewed de novo. *United States v. Harris*, 597 F.3d 242, 250-51 (5th Cir. 2010).

Given the fact that no actually money was lost due to the fraud in this case, Probation projected potential losses based on past events, but using the $14.50 per man hour (by which the contract was inflated) to fix the possible loss in the event that Gladius had performed the work on these prior events.[21] The possible loss figure ultimately applied by the court was based on Probation's representation concerning Hurricanes Gustav and Ike in 2008:

> According to government information, Entergy pays for security services to protect their corporate assets and the corporate assets of their subsidiaries during natural disasters and other emergencies in Louisiana, Texas, and Arkansas. In 2008, Entergy paid for security services for Hurricanes Ike and Gustav; however, the two events were treated as one because of the close timing of landfall of the storms. During this event, Entergy utilized two security companies to provide the armed security services. Both companies utilized current and/or

[21] The $14.50 inflated amount was included in the contract at the recommendation of Dabdoub in his capacity as an undercover agent who provided the figure as an inflation that would be beneath Entergy's radar. Consequently, losses projected based on this amount are not only speculative but are likely farcical, given the likelihood that the Fortune 500 company would recognize that its multi-million dollar security contract was inflated by at least 20 percent. Consequently, a projected loss based on this amount overstates the seriousness of the offense. *See* Defendant's Sentencing Memorandum Regarding Guideline Issues at 34, n. 8.

> retired military and law enforcement personnel, similar to Gladius. One of the companies billed Entergy for 121,188 man hours during the event. At the rate of $89.50 per hour negotiated between Gladius and Entergy, Gladius would have been paid $10,846,326, which would have resulted in $1,817,820 to be spilt equally between Dabdoub, Branch, and Roussel. The other company billed Entergy for 74,683 man hours for this event. At the rate of $89.50 per hour negotiated between Gladius and Entergy, Gladius would have been paid $6,684,128.50, which would have resulted in $1,120,245 to be split equally between Dabdoub, Branch, and Roussel.

Presentence Report at 8.

At the time of the Report in November 2011, these then three year old storms were the last hurricanes to have affected Entergy. Addendum to the Presentence Report at 2 ("The last hurricane event that affected Entergy was Hurricanes Ike and Gustav.") The Report discussed Entergy security needs related to the 2011 Mississippi flooding, noting:

> Entergy deployed armed security services to protect assets during the Mississippi River flooding event. Entergy was billed a total of 15,438 hours for armed security services during the flood, which would have resulted in $1,381,701 to be paid to Gladius at the negotiated rate of $89.50 per man hour. This would have resulted in $231,570 being split equally by Dabdoub, Branch, and Roussel. As of this writing, security services are on-going for this event.

Presentence Report at 8-9.

Apparently, based on the 2008 storms, Probation proposed a $1,000,000 to 2,500,000 potential benefit from the fraud, a projection accepted by the court over

defense objection that resulted in a 16-point enhancement of Roussel's sentence. USCA5 1794.

In objecting to this calculation, trial counsel urged that that only non-speculative, "fact-based" methold for calculating the prospective benefit under the fraudulent one year contract was "to calculat[e] the loss based on Entergy's actual needs during the planned term of the contract." The only event identified by the Report that occurred during the term of the contract was the Mississippi River flooding and, consequently, trial counsel urged a probable benefit of $231,570, which would have resulted in a 12-point enhancement. USSG §2B1.1; *see also*, Defendant's Sentencing Memorandum Regarding Guideline Issues at 38.

The relevant specific offense characteristic in the Guidelines is as follows:

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

USSG § 2C1.1(B)(2).

In this case, the applicable applicable provision was "the benefit received or *to be* received in return for the payment." This Court has made clear that the benefit can include "expected benefits" as well as "actual benefits." *United States v. Griffin*, 324 F.3d 330, 366 (5th Cir. 2003). While this Court has also made clear that

district courts may estimate the actual or expected benefits, it has also urged that the method for determining the amount must yield a figure that has a "reasonable relationship" with the anticipated harm of the offense. *United States v. John*, 597 F.3d 263, 279 (5th Cir. 2010). This Court has rejected benefit calculations that are unmoored from the actual offense. *See Griffin*, 324 F.3d at 365.

In this case, it is clear that there is no "reasonable relationship" between the harm that would have been done from the fraudulent contract because the subsequent year in which the fraud would have occurred can now be seen clearly. As Probation made clear, there were no hurricanes which required Entergy to hire armed security and the only reported security expense during the relevant period was the $1,381,701 paid for armed security as a result of the flooding.[22] According to Probation, this would have yielded a benefit of $231,570 under the Gladius contract. This would have put the benefit in the $200,000 to 400,000 range under USSG §2B1.1(B)(1), which provides a 12-point enhancement. Instead, Probation proposed and the court employed the much larger benefit based on Hurricanes Gustav and Ike, which put the expected benefit in the $1,000,000 to 2,500,000 range that provides a 16-point enhancement. Using this range is unreasonable in light of the fact that the court had been provided with concrete facts that showed

[22] The contract's term was from June 16, 2010 to June 15, 2011. G.E. 51. The flood incident occurred in the spring of 2011. John Pope, "As Mississippi River recedes, flood warning lifted for New Orleans," Times Picayune, May 27, 2011.

that there were no hurricanes during the relevant year of the contract and that the only security that Gladius could have provided was for the Mississippi River flooding which would have yielded much less money. *See Griffin*, 324 F.3d at 366 (diminishing expected benefit based on lack of evidence and speculative nature of whether necessary conditions would have occurred to yield the amount found by the district court). [23]

Assuming arguendo that the court properly considered hurricanes that it knew did not occur during the relevant period of the contract, it was still unreasonable for the court to use the exceptionally costly 2008 hurricane season to fix the amount of the probable benefit. Hurricane Ike was the second costliest storm in United States history pounding Texas and inundating Galveston Island. *See* Insurance Information Institute, Hurricane Facts, at http://www.iii.org/media/facts/statsbyissue/hurricanes/ (last visited April 12, 2012). Hurricane Gustav was also an historic event that led to the largest evacuation in the history of the state. Emily Bazar and Jury Keen, "La. See Most See Most Evacuees in State History, Avoids Past Mistakes," USA Today, September 2, 2008. The 2008 storm season was not vaguely representative of typical storm season. Given that the profits from the fraud in this case increased

[23] In its Sentencing Recommendation to the district court, Probation recognized that the "speculative nature of the potential gain" and the fact that "there was no actual loss in the instant offense" should result in a variance. Sentencing Recommendation at 1-2. Implicit in this recommendation is a view that this 16-point enhancement exaggerated Mr. Roussel's culpability.

with hurricane activity, a hurricane season like 2008 would be a best case scenario for the beneficiaries of the fraud. Fortunately, however, for the people of the Gulf, these years are exceptions and it is not reasonable to treat them as at all exemplary. Basing the prospective benefit off of such a storm season is unreasonable and only serves to accomplish a yet more severe sanction for an already harshly punished defendant. *See Griffin*, 324 F.3d at 366.

The court erred both in employing a hurricane season like the one that occurred in 2008 and not instead using the relevant 2010-2011 contract period that included no significant hurricane and the Mississippi flooding. Roussel received an additional four points on his offense level, thus increasing his relevant minimum guideline sentence by 59 months. This increased guideline sentence and offense level surely impacted Mr. Roussel's sentence and consequently he is entitled to have his sentence vacated and a remand for resentencing where he can be sentenced based on an accurate guideline calculation. *See Ibarra-Luna*, 628 F.3d at 717.

IV. Elements of a Crime that Increased Mr. Roussel's Maximum Sentence Were Neither Submitted to the Jury nor Proven Beyond a Reasonable Doubt in Violation of *Apprendi v. New Jersey*.

The district court sentenced Mr. Roussel based on the assumption that his maximum sentence was 30 years in prison when the facts giving rise to this

sentence were neither submitted to the jury nor proven beyond a reasonable doubt, contrary to the requirements of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The determination whether this violated Roussel's constitutional rights is conducted de novo while the determination of whether he is entitled to relief is conducted under a harmless error standard. *United States v. Matthews*, 312 F.3d 652, 661 (5th Cir. 2002).

Roussel was charged and sentenced under, inter alia, 18 U.S.C. § 1343, which provides a 20 year maximum sentence for wire fraud but increases the maximum sentence to 30 years where the "violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with[] a presidentially declared major disaster or emergency . . .."

The superseding indictment charging Roussel under this statute noted that Entergy, the company that he was charged with defrauding, "was reimbursed by the Federal Government, through the Federal Emergency Management Agency and the Department of Housing and Urban Development, for a portion of the expenses incurred in connection with a presidentially declared major disaster or emergency . . .." USCA5 174 (omitting internal parentheticals). However, notwithstanding the statute and the indictment, at no point during Roussel's trial did the Government present evidence that the scheme to defraud Entergy involved any benefits

"authorized, transported, transmitted, transferred, disbursed, or paid" by the government in relation to a presidentially declared disaster. Furthermore, the jury was not charged with finding the fact that the scheme involved benefits pursuant to a presidentially authorized federal disaster. USCA5 213.

It appears from the indictment that the Government's theory as to this element of the offense was that FEMA, HUD, or both routinely reimbursed Entergy for security costs in disaster situations so that the Gladius contract in 2010 involved those funds. However, no evidence was adduced at trial in support of this and, in fact, evidence to the contrary was presented to the court and the jury. First, trial counsel produced uncontradicted evidence that FEMA does not fund for-profit corporations like Entergy. Motion for Leave to File a New Objection to the Pre-Sentence Report at 4. Second, the funds from which HUD reimbursed Entergy for security needs previously were a consequence of a specific Congressional authorization for to costs related to Hurricane Katrina and not a routine matter or even one that his subsequently recurred. *Id*. at 3; G.E. 55, 56.

The evidence supporting the sui generis nature of Entergy's Katrina reimbursement was introduced by the Government. The Louisiana State Action Plan related to disaster funds for Entergy makes clear that the only "eligible restoration and rebuilding costs," which include "security" costs, "must be directly related to damages caused by Hurricane Katrina . . .." G.E. 56. A Securities and

Exchange Commission report on Entergy explains that in 2007, the New Orleans City Counsel resolved that Entergy could receive federal funds for *Hurricane Katrina-related costs* obtained from Congress's 2005 Katrina Relief Bill and notes two specific disbursements in 2007 and 2010. G.E. 55. A Government witness from HUD also testified that the disbursements his agency has overseen to Entergy were related only to Hurricane Katrina. USCA5 1123. In short, the Government's evidence suggests that Entergy's federal reimbursement for security costs was limited to Hurricane Katrina and was, like so many things relating to that storm, sui generis.

The law is clear that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *United States v. Garcia*, 242 F.3d 593, 599 (5th Cir. 2001). The court found that the applicable statutory maximum in this case was 30 rather than 20 years notwithstanding the fact that the above discussed requisites for that maximum sentence under 18 U.S.C. § 1343 were neither submitted to the jury nor proven beyond a reasonable doubt. As urged and objected to by trial counsel, the lack of evidence to show that the Gladius contract would involve any benefits authorized or paid pursuant to a presidentially declared disaster undermined Government's the Government's theory in support of the 30 year maximum sentence. Motion for

Leave to File a New Objection to the Pre-Sentence Report; Defendant Roussel's Reply to Government's Email Memorandum re New Objection; USCA5 1800-1803. Trial counsel further objected to the fact that the court did not instruct the jury on this element. USCA5 1803-05.

The practical difficulties of applying this provision to the prospective and uncompleted fraud of a non-governmental, for-profit corporation that might or might not receive federal funding in the event of disasters that might or might not be presidentially declared that might or might not lead to a specific Congressional authorization to provide reimbursement for Entergy's security costs suggests a simpler reading of the provision. A plain reading of the provision, which requires no mental gymnastics, would require that the fraud involve a disaster or emergency that has already been presidentially declared for which federal funds have been consequently "authorized, transported, transmitted, transferred, disbursed, or paid." Under this reading, the provision would not apply to instances, like the present one, where the fraud involved only a bogus contract, a rain dance, and a lot of wishful thinking.

In any event, the jury was not charged on the element, the element was not proven, and, because Roussel was sentenced based on the assumption that he faced a maximum sentence of 30 years, the error is not harmless and compounded Guideline errors in this case that also exaggerated Roussel's possible sentence. *See*

Issue III. Consequently, Mr. Roussel's sentence should be vacated and the case should be remanded for re-sentencing. *United States v. Williams*, 602 F.3d 313, 318-320 (5th Cir. 2010); *see also*, *Jackson v. Virginia*, 443 U.S. 307 (1979)(a review of trial record must demonstrate proof beyond a reasonable doubt under all elements of an offense).

CONCLUSION

For the reasons stated above and for any other reasons that appear to this Court, Mr. Roussel's conviction and sentence should be vacated.

Respectfully Submitted,

/s/ William M. Sothern
WILLIAM SOTHERN, La. Bar No. 27884

The Law Office of William M. Sothern
530 Natchez Street, Suite 350
New Orleans, La. 70130
(504) 524-7922

billys@thejusticecenter.org

/s/ John Wilson Reed
JOHN WILSON REED, La. Bar No. 11126

Glass & Reed
530 Natchez Street, Suite 350
New Orleans, La. 70130
(504) 581-9083

jwreed@bellsouth.net

Counsel for Mr. Roussel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court on April 16, 2012, by using the CM/ECF system which will send a notice of electronic filing to all counsel of record, including:

Assistant U.S. Attorney Harry W. McSherry,
Assistant U.S. Attorney Diane Hollenshead Copes,
Assistant U.S. Attorney Carol Loupe Michel,
Michael Magner

s/s William M. Sothern
WILLIAM M. SOTHERN (La Bar No. 27884)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 13,732 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in Size 14 Times New Roman font.

s/s William M. Sothern
William M. Sothern

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